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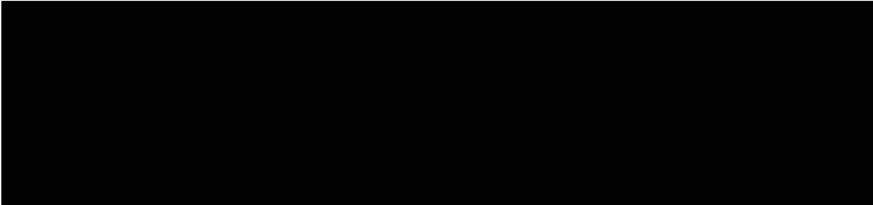


FILE: WAC 07 131 52395 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and consulting services provider that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition determining that the petitioner had not established that it qualifies as a U.S. employer or agent, that the proffered position is a specialty occupation, or that it will comply with the terms and conditions of the petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and documentation. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number

In a March 24, 2007 letter submitted in support of the petition, the petitioner stated that the beneficiary would be assigned to its client, Flight Options LLC, located in Cleveland, Ohio. The petitioner described the proposed responsibilities and time allocations of the proffered programmer analyst position as follows:

- Analysis of system requirements, (25%);
- Evaluation of interface feasibility between hardware and software, (10%);
- Software system design (using scientific analysis and mathematical models to predict and measure design consequences and outcome, (35%);
- Unit and integration testing, (20%);
- System installation, (5%); and
- Systems maintenance, (5%).

The record also includes a labor condition application (LCA) submitted at the time of filing listing the

beneficiary's work locations in Northville, Michigan and Cleveland, Ohio as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel for the petitioner stated that a specialty occupation exists for the beneficiary, as shown by the letter from Flight Options, LLC, and that the beneficiary's work would be under the control of the petitioner. As supporting documentation, the petitioner submitted a June 25, 2007 letter from Flight Options, LLC, a copy of the LCA that was submitted at the time of filing reflecting the Cleveland, Ohio client location, website information for the petitioner, a list of the petitioner's nonimmigrant employees, and the petitioner's business licenses, federal income tax returns, and quarterly wage reports.

The director denied the petition on the basis that, although the petitioner had submitted a letter from Flight Options, LLC, it had not submitted consulting contracts and/or agreements, statements of work, or purchase orders, as requested in the RFE. The director concluded that, without such contracts and work orders, the petitioner had not demonstrated that it qualifies as a U.S. employer or agent, or that the proffered position qualifies as a specialty occupation. The director also found that the evidence of record contained the following deficiencies: the petitioner's unsigned federal and state tax returns; the lack of salary or wage deductions on the petitioner's federal tax returns; the petitioner's unsubstantiated claim of six employees; and the claim of only six employees even though the petitioner has filed 15 petitions.

On appeal, counsel states, in part, that the petitioner's letter submitted at the time of filing indicates that the petitioner has ultimate control of the beneficiary's employment, and the letter from Flight Options, LLC, which was submitted in response to the RFE, also indicates that the petitioner is the actual employer, as it controls all the beneficiary's activities, including compensation payment, managerial supervision, hiring, firing, and performance evaluations. Counsel submits a letter on the petitioner's letterhead, dated August 13, 2007, signed by the petitioner and the president of Info Services LLC, indicating that Info Services, LLC has contracted with the petitioner to provide programming, networking, consulting and engineering related services to Info Services LLC's client, Flight Options, LLC, located in Cleveland, Ohio, and that Flight Options, LLC has selected the beneficiary to work on a project at their facility as a programmer analyst. Counsel also submits a letter from Flight Options, LLC, dated August 13, 2007, signed by the project manager of Flight Options, LLC and the president of Info Services, LLC, describing the proposed duties.

The AAO observes that the documentation submitted on appeal does not comply with the requirement that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this matter, the letters submitted by counsel on appeal from the petitioner and from Flight Options, LLC, are both dated August 13, 2007, after the April 2, 2007 filing date of the petition. As stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the petitioner's March 24, 2007 letter.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The Aytes memorandum cited at footnote 1, indicates that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the petitioner indicated that the beneficiary would be working at the petitioner's site in Northville, Michigan and at its client's site in Cleveland, Ohio. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). From this evidence, and the corresponding consulting contracts and/or agreements, statements of work, and/or purchase orders, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements for the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm.

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

1972)). The record does not contain a master contract between the petitioner and either Info Services LLC or Info Services LLC and Flight Options, LLC or any other agreement, statement of work, or work purchase order dated prior to filing the petition in April of 2007. Thus, the record does not contain evidence that a specialty occupation position existed when the petition was filed. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).²

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

As discussed above, the director also found that the evidence of record contains discrepancies pertaining to the petitioner's federal and state tax returns and the petitioner's number of employees. As the petition will be denied because the position is not a specialty occupation, these issues will not be addressed.

In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the beneficiary does not appear to be qualified to perform the duties of a specialty occupation. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

² Moreover, the AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education. The general overview of the beneficiary's duties described in the August 13, 2007 letter between Info Services LLC and Flight Options, LLC is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.