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FILE: WAC 07 130 53648 Office: CALIFORNIA SERVICE CENTER Date: JUN 06 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 an information technology consulting business 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 is in compliance with the terms and conditions of employment.

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) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. 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.

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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

In an April 1, letter submitted in support of the petition, the petitioner described the proposed responsibilities of the proffered programmer analyst position as follows:

Assist in the planning, development, testing and documenting of computer programs; evaluate user requests for new or modified programs; consult with senior programmer analysts and with users to identify current operating procedures and to clarify program objectives; analyze, review and alter programs to increase operating efficiency or to adapt to new requirements utilizing SAP, PeopleSoft, Oracle, SQL, SQR and Crystal Reports on WindowsNT/Unix. *The beneficiary will exercise limited independent judgment in daily responsibilities.* (Emphasis added.)

The record also includes three labor condition applications (LCAs) submitted at the time of filing listing the beneficiary's work locations in: Columbus, Ohio; Indianapolis, Indiana; Princeton, New Jersey; King of Prussia, Pennsylvania; Atlanta, Georgia; and Miami, Florida, 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, the petitioner stated that it maintains full-time control over the day-to-day tasks of its employees, withholds federal income, social security and Medicare taxes, and pays unemployment taxes. The petitioner also stated that, until the beneficiary becomes familiarized with "ERP Analysts standard procedures," he would work at the petitioner's home office in Dublin, Ohio, and would be assigned to join one of the development groups working on the in-house project "Ed-Smart." As supporting documentation, the petitioner submitted: copies of previously submitted LCAs; a chart identifying the petitioner's employees who have used the LCAs or for which a petition is pending; the beneficiary's Form I-20 A-B and employment authorization card; a chart listing all the petitioner's H-1B employees; copies of recently submitted withdrawal letters for separated employees; a pay stub for the beneficiary; information pertaining to the beneficiary's project "Ed-Smart"; a letter of appreciation from a client; the petitioner's certificate of incorporation and related business documents; the petitioner's lease and purchase agreement; photos; the petitioner's job postings; the petitioner's 2005 and 2006 federal income tax returns; quarterly federal tax returns; bank statements; healthcare benefit payments; an employee handbook; and website information. The petitioner also submitted contract agreements with the following: CherryRoad Technologies Inc., signed on February 13, 2007; Unicon International, Inc. (UNICON), signed in 2006; a subcontractor agreement, effective on November 10, 2004, between UNICON and the State Teachers Retirement System of Ohio; Veredus Corporation, signed on March 5, 2007, and a related work order naming another employee as consultant; System Efficiency, dated March 13, 2007; and Spherion Atlantic Enterprises LLC, dated February 24, 2005.

The director denied the petition on the basis that, although the petitioner had submitted various contracts, it had not provided valid contracts and purchase orders between itself, the beneficiary, the software consulting company, and the end-client business where the beneficiary would perform the actual work duties. The director found that without such contracts, the petitioner had not demonstrated that it qualifies as an employer or agent or that the proffered position qualifies as a specialty occupation. The director also found that the petitioner's claimed gross annual income of \$6 million on the petition that was signed by the petitioner's president on March 30, 2007, is inconsistent with the amounts reflected on its 2005 and 2006 federal income tax returns.

On appeal, counsel states, in part, that the petitioner's claimed gross annual income of \$6 million is a true statement in terms of the petitioner's projected income for 2007. Counsel also states that an employer-employee relationship exists between the petitioner and the beneficiary because the petitioner may hire, pay, fire, supervise or otherwise control the beneficiary's work. Counsel also asserts that the petitioner has assigned the beneficiary to work primarily on in-house assignments, such as the Ed-Smart project, and thus an itinerary, work contracts, and purchase orders are not necessary. As supporting documentation,

counsel submits accounting statements estimating the petitioner's gross revenue for 2007 as at least \$8.5 million, a website overview and specifications for the petitioner's Ed-Smart project.

Preliminarily, the AAO finds that the evidence of record is sufficient to overcome the director's objection concerning the petitioner's claimed gross annual income. The AAO also 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 July 17, 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 Columbus, Ohio and at its clients' sites in: Indianapolis, Indiana; King of Prussia, Pennsylvania; Princeton, New Jersey; Atlanta, Georgia; and Miami, Florida. 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 at various locations as indicated by the submitted LCAs, 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, 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 does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Although counsel asserts on appeal that the beneficiary would work on the development of the petitioner's Ed-Smart project at the petitioner's Dublin (suburb of Columbus), Ohio home office and therefore an itinerary, work contracts, and purchase orders are not necessary, the petitioner's April 1, 2007 letter submitted at the time of filing indicated that the beneficiary would also work on occasion at various client sites in: Indianapolis, Indiana; King of Prussia, Pennsylvania; Princeton, New Jersey; Atlanta, Georgia;

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).

and Miami, Florida. As discussed above, the petitioner submitted certified LCAs for these locations at the time of filing. Furthermore, the proposed duties pertaining to the Ed-Smart project, as described in the petitioner's July 17, 2007 letter, include integrating the new system with the client's existing system, providing initial user training and customer support to the end-users, and installing various software components on the client server and mainframe applications. Thus, although counsel asserts on appeal that an itinerary, work contracts, and purchase orders are not necessary, the evidence of record does not support his assertion, as the petitioner describes the beneficiary as working both on-site and off-site. The record contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, although counsel submits an overview and the functional specifications for the Ed-Smart project, which reflect, in part, that the beneficiary has been assigned as one of the developers for this project, the record does not contain substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. Specifically, the petitioner's president states in his April 1, 2007 letter that the beneficiary would consult with senior programmer analysts and would exercise only limited independent judgment in daily responsibilities. Thus, the exact nature of the beneficiary's duties and the complexity of the proffered position remain unclear. It is noted that the petitioner and its clients or client's clients utilizing the beneficiary's services must detail the expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and its clients or client's clients and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS, however, must rely on a detailed, comprehensive description demonstrating what the petitioner and the ultimate end-user expect from the beneficiary in relation to its business and to third party projects, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. Due to the broad array of vocational and educational tracks as well as simple experience leading to employment in the computer field, the petitioner must demonstrate that the beneficiary's work includes the theoretical and practical application of specialized knowledge attained only through study at the bachelor's level in a specific discipline. In this matter, the petitioner has failed to provide such evidence. 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

² The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are

In that the exact nature of the proffered position remains unclear, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description detailing the specific duties, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

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.

The AAO acknowledges that the beneficiary was admitted to the United States on an F-1 visa to pursue a master's degree in mathematics, but the record does not contain evidence that the beneficiary completed the master's program for which he was admitted. 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).

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 record 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 specific discipline.

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.