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U.S. Citizenship  
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Services

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FILE: WAC 07 047 51896 Office: CALIFORNIA SERVICE CENTER Date: JUN 23 2008

IN RE: Petitioner:  
Beneficiary:



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 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, that the proffered position is a specialty occupation, or that it had complied with the terms and conditions of the labor condition applications.

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 director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. 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 November 29, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Write SQL loader scripts and Unix Shell scripts; develop physical database designs and supporting production database environments; develop Oracle applications by using Oracle Database 8i/9i/10g; write stored procedures and functions; and design, develop, and test programs.

The record also includes a certified labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Farmington Hills, Michigan as a programmer analyst. The petitioner subsequently submitted a new LCA changing the beneficiary's job location from Farmington Hills, Michigan to San Diego, California.

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 submitted various contracts and related documents, including

the following:

- A subcontracting agreement, signed on December 19, 2006, between the petitioner and Spherian Pacific Enterprises LLC (Spherian), and Exhibit A, Scope of Work, signed by the petitioner and Spherian on December 19, 2006, naming the beneficiary to perform as a PL-SQL developer for LPL Financial Services in La Jolla, California;
- A services agreement, dated May 31, 2006, between the petitioner and SyG Americas Corporation, and Purchase Order naming the beneficiary as a software consultant at the SyG Americas Corporation location in Salinas, California; and
- A corporate consulting agreement, effective on May 1, 2006, between the petitioner and Delegata Corporation, located in Sacramento, California, and Exhibit A, naming the beneficiary to perform the services of a “Data Design Lead.”

The director denied the petition finding that the petitioner failed to provide a contract with its end-client, LPL Financial Services. The director concluded that, without such a contract detailing the beneficiary’s duties, the petitioner had not established that the proffered position is a specialty occupation or that it qualifies as a U.S. employer.

On appeal, counsel for the petitioner states that the requested contracts were submitted in response to the director’s RFE. Counsel also states that such contracts explicitly state that the beneficiary is the petitioner’s employee. As supporting documentation, counsel resubmits copies of the subcontracting agreement, signed on December 19, 2006, between the petitioner and Spherian, and Exhibit A, Scope of Work, signed by the petitioner and Spherian on December 19, 2006, naming the beneficiary to perform as a PL-SQL developer for LPL Financial Services in La Jolla, California.

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 job offer letter, signed by the petitioner's president and the beneficiary on November 9, 2006 and November 11, 2006, respectively.<sup>1</sup> 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 multiple locations. 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.

Thus, 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. 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. The June 28, 2007 letter submitted on appeal from the managing director of Spherion, describing its business relationship with the petitioner, is noted. However, only a detailed job description from the end-user that requires the alien's services, in this case, LPL Financial Services, will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). 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. 1972)). The record contains no information regarding the proposed duties from LPL Financial Services, the end-user company that will actually utilize the beneficiary's services. Thus, as the nature of the proposed duties are unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).<sup>2</sup>

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<sup>1</sup> 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).

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

In that the record does not demonstrate that the beneficiary would perform the duties of a programmer analyst, 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 entailing programmer analyst 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The director also found that, although the petitioner initially submitted a certified LCA listing a work location of Farmington Hills, Michigan, the petitioner did not submit any contracts for that location. In addition, the director found that, although the record contains a purchase order with SyG Americas Corporation indicating that the beneficiary had been assigned to work in Salinas, California, the record contains no certified LCA for that location. The director found further that, without a contract from the ultimate end-client for whom the beneficiary will provide his services, in this case, LPL Financial Services, the certified LCA listing the work location of San Diego, California cannot be considered to be in compliance with 8 C.F.R. § 214.2(h)(4)(iii)(B).

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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.

On appeal, counsel states that the petitioner has always complied fully with the terms and conditions of the certified LCAs. Counsel also states that the beneficiary has not been employed in Salinas, California, and that the Salinas contract was submitted only to provide information regarding the petitioner's current contracts. Counsel does not address the director's finding that the petitioner did not submit any contracts for the Farmington Hills, Michigan location that is listed on the original LCA.

As discussed above, 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 the entity for whom the beneficiary would ultimately be performing services, in this case, LPL Financial Services. 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. 1972)). Thus, as the nature of the proposed duties is unclear, the AAO is precluded from determining whether the petitioner has complied with the terms and conditions of the LCA. As the beneficiary's ultimate worksite is unclear, it has not been shown that the work would be covered by the locations on the LCA. Moreover, as discussed above, counsel does not address the director's finding that the petitioner did not submit any contracts for the Farmington Hills, Michigan location that is listed on the original LCA submitted at the time of filing. In addition, although counsel asserts that the beneficiary has not been employed in Salinas, California, and that the Salinas contract was submitted only to provide information regarding the petitioner's current contracts, counsel does not provide an explanation for the purchase order naming the beneficiary as a software consultant at the SyG Americas Corporation location in Salinas, California. 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 Obaighena*, 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). For this additional reason, the petition may not be approved.

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.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). 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). For this additional reason, the petition will not be approved.

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.