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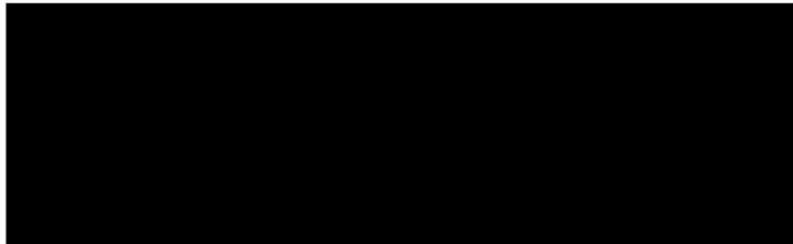
FILE: WAC 07 103 50626 Office: CALIFORNIA SERVICE CENTER Date: **MAR 17 2008**

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 IT consulting, software development and support 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 that it had submitted a certified labor condition application (LCA) for the requested period of employment, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B).

On appeal, counsel states, in part, that the director disregarded the evidence. Counsel also states that the beneficiary will be a salaried employee of the petitioner and will be under the petitioner's exclusive control, even while working for the petitioner's clients. Counsel states further that at the time of the filing of the petition on February 22, 2007, the beneficiary was working at the petitioner's location in Harrisburg, Pennsylvania, and that in response to the RFE, the petitioner correctly submitted a new LCA and a corrected I-129 Data Collection Form. As supporting documentation, counsel submits a Secondary Supplier Agreement, dated February 23, 2007, between the petitioner and Codeworks, Inc. and a Purchase Order, dated February 23, 2007, issued to the petitioner from Codeworks, Inc., naming the beneficiary to perform consulting services for its client, APS Healthcare.

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 director's request; (4) the director's denial letter; and (5) the Form I-290B, with new 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 February 22, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

1. Analyze user requirements, procedures, and problems to automate processing and to improve existing computer system in Open system, software development, System Analyst, Database Design, and develop software applications using Visual Basic, Microsoft.Net, SQL, C++,

HTML, XML, relational database, Oracle PL/SQL, Unix Windows, DB technology using SQL & Relational database as backend on the Windows and Unix servers;

2. Confer with personnel of organizational units involved to analyze current operational procedures, identify problems, and specify input and output requirements, such as forms of data input, how the data is to be summarized and format for reports;
3. Write detailed description of user needs, program function and steps required to develop or modify computer programs;
4. Review computer system capabilities, work flow and scheduling limitations to determine if requested program or program change is possible within existing system;
5. Analyze business procedures and problems to redefine data and convert it to programmable form for EDP;
6. Study existing information processing systems to evaluate effectiveness and develop new systems to improve production or work flow as required;
7. Conduct studies pertaining to development of new information systems to meet current and projected needs;
8. Plan and prepare technical reports, memoranda and instructional manuals as documentation of program development; and
9. Upgrade systems and correct errors to maintain system after implementation.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Harrisburg, Pennsylvania as a programmer/analyst.

In an RFE to the petitioner, the director requested additional evidence, including an explanation for filing an unusually high number of petitions in proportion to the low number of employees reflected on the petition, and 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, or service agreements for the beneficiary.

In response to the RFE, the petitioner stated, in part, that it had filed from 50 to 55 H-1B petitions since 2000, and that it currently needed the beneficiary to work for its client and partner, Code Works Inc., at the end-client APS Healthcare, Inc., located at Brookfield, Wisconsin. As supporting documentation, the petitioner submitted a current list of employees and approval notices, an organizational chart, federal income tax returns, quarterly wage reports, W-2 forms, corporation and lease documents, photos, and letters from the end-client, APS Healthcare, Inc.

The director denied the petition determining that the petitioner had not established that it qualifies as a U.S. employer, as the petitioner had not provided any contracts pertaining to the beneficiary's employment, as described in the RFE. The director also found that the petitioner had not submitted a certified labor condition application (LCA) for the requested period of employment, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B).

On appeal, counsel states, in part, that the beneficiary will be a salaried employee of the petitioner and will be under the petitioner's exclusive control, even while working for the petitioner's clients. Counsel states further that at the time of the filing of the petition on February 22, 2007, the beneficiary was working at the petitioner's location in Harrisburg, Pennsylvania, and that in response to the RFE, the petitioner correctly submitted a new LCA and a corrected I-129 Data Collection Form. In addition to submitting previously submitted documentation, counsel submits a Secondary Supplier Agreement, dated February 23, 2007, between the petitioner and Codeworks, Inc. and a Purchase Order, dated February 23, 2007, issued to the petitioner from Codeworks, Inc., naming the beneficiary to perform consulting services for its client, APS Healthcare.

The Secondary Supplier Agreement, dated February 23, 2007, between the petitioner and Codeworks, Inc. and the Purchase Order, dated February 23, 2007, issued to the petitioner from Codeworks, Inc., naming the beneficiary to perform consulting services for its client, APS Healthcare, are noted. The petitioner, however, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As discussed above, the director specifically requested in her RFE 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, or service agreements for the beneficiary. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO, however, will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO will not consider this evidence on appeal.

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, dated February 19, 2007, between the beneficiary and the petitioner.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 nature of the petitioner's business is computer consulting. 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 petitioner 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 the entity ultimately employing the alien or using the alien's services. *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 provided a general description of the proposed programmer/analyst duties and a letter, dated April 5, 2007, from a representative of APS Healthcare Inc., who stated that the beneficiary had been working with APS Healthcare Inc. since February 26, 2007, in the capacity of programmer analyst. The representative also submitted a general description of the proposed duties. The petitioner, however, must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the petitioner must also provide details of the third party's expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party 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 must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

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

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).

(5th Cir. 2000). The petitioner did not submit the requested evidence in its response to 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)). 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).²

In that the record does not contain a sufficient description of duties from the end user of the beneficiary's services, 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 contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, 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 evidence of programmer/analyst duties the beneficiary would perform under contract with the third party, 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 director also found that the petitioner had not demonstrated its compliance with the terms and conditions of employment on the LCA that was submitted at the time of filing, which identifies the beneficiary's work location as Harrisburg, Pennsylvania.

On appeal, counsel asserts, in part:

Please be aware that at all times [the petitioner] has submitted appropriate and correctly filed . . . LCA Forms. At the time of filing on February 22, 2007, [the beneficiary] was working at

² The AAO observes that the *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 Harrisburg location. After the receipt of the request for evidence, a new LCA was presented because at that time she was working at the Brookfield, Wisconsin location. Therefore, this cannot be a basis for denial.

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. . . .

Counsel's assertion is noted. The evidence of record, however, indicates that the petition was not properly filed until March 6, 2007. According to the April 5, 2007 letter from the representative of APS Healthcare, Inc., the beneficiary had been working for APS Healthcare, Inc. located in Brookfield, Wisconsin, since February 26, 2007. The LCA identifying the beneficiary's work location as Brookfield, Wisconsin, was certified on May 21, 2007, a date subsequent to March 6, 2007, the filing date of the visa petition. Regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provide that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. (*Emphasis added.*) Since this has not occurred, for this additional reason the petition may not be approved.

In view of the foregoing, the petitioner has not overcome the director's objections.

In short, the record provides no basis for disturbing the director's decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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