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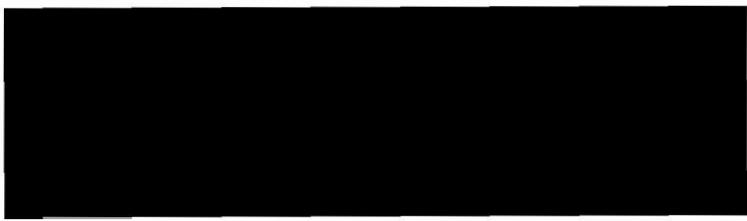
FILE: WAC 07 130 53802 Office: CALIFORNIA SERVICE CENTER Date: **MAY 02 2008**

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 F. 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 consulting and development 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 the proffered position is a specialty occupation.

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 letter and additional 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 22, 2007 letter submitted in support of the petition, the petitioner described the proposed responsibilities and time allocations of the proffered programmer analyst position as follows:

- **Systems Analysis (20%):** Design software systems; Consult with client's professional staff to study, evaluate and analyze client's current business/technical systems; Analyze current business and software systems including hardware, software, and operating systems; Analyze the client's data processing requirements and compute hardware to determine the software which will best serve the client's needs; Translate client's needs into software requirement specifications; Determine feasibility, cost, time requirements and compatibility of new functions or enhancements with current systems and computing capabilities; Provide client with specific recommendations in order to address business and software systems needs;
- **Design/Development (20%):** Design and develop computer systems which will best serve the client's business and software needs; Design, develop and integrate hardware and software which will process the client's data in an efficient and timely manner; Outline the steps necessary to develop new or modified programs/applications;
- **Development of System Model (20%):** Complete detailed systems specifications; Design, develop and build database; Code the front-end by creating forms, queries, menus and functions; Design and develop reports, queries and filters; Create on-line help text;

- **Testing/Debugging (20%):** Set up test environment; perform tests on systems performance and related issues; Build test beds and create test data for various test cases; Validate and test final design; Perform matrix analysis and create test plans to ensure that requirements are met and measures are being followed; Perform preliminary validation of software; and
- **Testing/Implementation (20%):** Develop installation procedures, methodology and installation tools; Fine tune the system model by incorporating results from user testing; Obtain user approval; Prepare technical and operational documentation; Prepare operations training courses and materials; Provide training to users.

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

In an RFE, the director requested additional information from the petitioner, including contracts from authorized officials of the ultimate client companies, statements of work, work orders, and service agreements for the beneficiary.

In response to the RFE, counsel for the petitioner stated, in part, that the petitioner was the beneficiary's actual employer, and the beneficiary was working in-house at the petitioner's location. Counsel submitted additional supporting documentation, including the petitioner's business and tax documents.

The director denied the petition on the basis that the petitioner had not submitted any client contracts and related documentation in support of its claim that the beneficiary would be working in-house on its client's software. The director concluded that, without such contracts, the petitioner had not demonstrated the nature and scope of the proffered position and duties.

On appeal, counsel states, in part, that the record contains substantial evidence that the petitioner is the actual employer and there is H-1B level work available at the petitioner's work site. As supporting documentation, counsel submits the petitioner's description of the projects to be developed in-house by the beneficiary, in accordance with the petitioner's contracts with Bright Star Engineering and Delphi Europe.

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 22, 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 in its March 22, 2007 letter that the beneficiary would be working at the petitioner's site in Troy, Michigan and at client sites. Specifically, the proposed duties listed above describe the proposed duties, in part, as: "consult[ing] with client's professional staff to study, evaluate and analyze client's current business/technical systems"; "analyz[ing] the client's data processing requirements and comput[ing] hardware to determine the software which will best serve the client's needs"; and "provid[ing] training to users." 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, 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. In "Appendix A" submitted on appeal, the petitioner's vice president of SAP Operations lists the beneficiary's proposed activities, including "Project 1 – SAP Regression and Automation (Location – Troy, MI)." The description of the duties comprising Project 1 is limited to generalized functions, such as "[H]elping this project by using her expertise in SAP and Software development/testing skills" and "[Serving as] the prime resource for deployment of this project." The petitioner has not identified methodologies or applications of specialized knowledge that actual performance of the position's functions would involve or provided details of concrete matters upon which the beneficiary would work. Nor has the petitioner explained or provided documentary evidence to establish how the beneficiary's actual substantive work would require at least a bachelor's degree level of knowledge in a specific specialty. The same pattern follows with all the duty descriptions in the record. They consist of generalized functions that do not establish the level of knowledge that would be required when actually

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).

performed upon this particular petitioner's business matters, matters about which the record here contains negligible substantive information. In addition, it is unclear whether Project 1 is to be performed in-house. Moreover, as the petitioner's vice president for SAP operations indicates that the beneficiary would be working on projects related to the petitioner's contracts with Bright Star Engineering (Project 2) and Delphi Europe, only a detailed job description from the entities that require 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). 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 does not contain a detailed description of the work to be performed by the beneficiary for the end users of the beneficiary's services. Thus, as the nature of the proposed duties is 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 proposed in-house duties are described only generically and the record does not provide a sufficient job description from the end users 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 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

² 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 record is insufficient to determine whether the duties of the proffered position would be performed by an individual with a two-year degree or certificate or would only be performed by an individual with a four-year degree in a specific discipline.

petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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 petitioner has not demonstrated compliance with the terms and conditions of the labor condition application, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(B). 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 its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements listing the location of the end-client business. 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. at 165. As the beneficiary's ultimate worksite remains unclear, it has not been shown that the work would be covered by the location on the LCA.

Of further note, although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the two evaluators of the beneficiary's educational background and employment experience reached conflicting conclusions. One concluded that the beneficiary holds the U.S. equivalent of a Bachelor of Arts degree with a dual major in management information systems and economics, while the other concluded that the beneficiary holds the U.S. equivalent of a master's degree in management information systems. The record contains no explanation for this inconsistency. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For these additional reasons, 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).

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.