

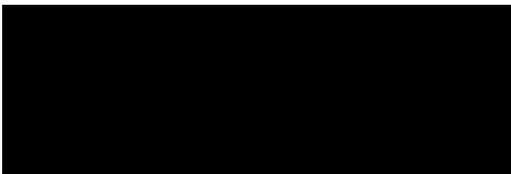
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U.S. Citizenship
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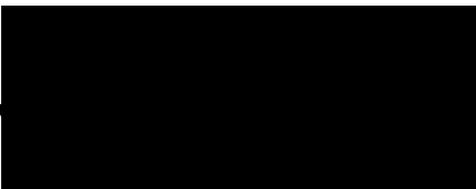


FILE: WAC 04 045 51192 Office: CALIFORNIA SERVICE CENTER Date: **JAN 18 2006**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 software engineer/programmer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the petitioner had not demonstrated that an employer-employee relationship exists. The director further found that, although the petitioner has filed in excess of 75 petitions, the majority of which have been approved, information on the petition reflects only 15 employees. The director also found that the petitioner had not complied with the terms of the labor condition applications filed on behalf of its previously approved H-1B beneficiaries, namely that the beneficiaries had not been compensated in accordance with the information reflected on their labor condition applications. On appeal, counsel submits a brief, copies of previously submitted documentation, and additional evidence including: an "Independent Service Contract"; a letter from the petitioner's general manager; four letters of revocation from the director in response to the petitioner's written withdrawals; and four letters from the petitioner terminating its H-1B sponsorship.

On appeal, the petitioner provides a sample of an independent services contract indicating that the petitioner provides worker's compensation and employer's liability insurance for its workers while performing services for its clients. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. In the director's February 5, 2004 Request for Evidence, he specifically requested additional evidence including "copies of contractual agreements between the petitioner and the companies for which the beneficiary will be providing consulting services." The petitioner failed to submit this portion of 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 appeal will be adjudicated based on the record of proceeding before the director and the remainder of the additional evidence listed above.

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

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.

The director denied the petition because the petitioner had not demonstrated that an employer-employee relationship exists.

On appeal, counsel states, in part, that the petitioner has demonstrated that it qualifies as a U.S. employer pursuant to 8 C.F.R. § 214.2(h)(4)(ii), based on its temporary employment offer to the beneficiary and its certified labor condition application. Counsel states further that the petitioner also submitted a list of its clients and that the petitioner maintains responsibility over the workers who are assigned to client projects.

Counsel's assertion that the petitioner controls the work of the employees who are assigned to client projects is noted. The record, however, does not contain any evidence in support of his assertion, such as detailed service contracts describing the nature of the petitioner's control over its employees. The AAO will not consider the sample contract submitted on appeal, as stated above. *See Matter of Soriano*. 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). For this reason, the petitioner has not established that it is the U.S. employer of the beneficiary.

The director also found that the petitioner had not complied with the terms of the labor condition applications filed on behalf of its previously approved H-1B beneficiaries, as the beneficiaries had not been compensated in accordance with the information reflected on their labor condition applications. The director found further that, although the petitioner has filed in excess of 75 petitions, the majority of which have been approved, information on the petition reflects only 15 employees.

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. . . .

On appeal, counsel states that the petitioner "had no control over factors that lowered the alien beneficiaries' compensation, as follows: voluntarily working for less hours; illnesses; vacation; and bench time" and, therefore, the petitioner had not committed fraud or misrepresentation. Counsel also states that, despite the director's assertion that the petitioner had filed approximately 75 H-1B petitions, there are valid reasons why the petitioner has only 15 employees on its payroll, namely that many alien beneficiaries were unable to complete H-1B processing abroad due to unreasonable documentary requirements and prolonged screening processes, and others simply failed to report for work. Counsel submits eight "sample copies" of letters to support his assertion that the petitioner has requested the cancellation of several alien beneficiaries.

Counsel's assertion that the petitioner had no control over factors that lowered the alien beneficiaries' compensation, such as voluntarily working for less hours, illnesses, vacation, and bench time is noted. The practice of "benching" employees while a petitioner does not have work is expressly prohibited by Section

413(a) of the American Competitiveness and Workforce Improvement Act (ACWIA), INA § 212(n)(2)(C)(vii)(I), 8 U.S.C. 1182(n)(2)(C)(vii)(I), prohibits an employer of a full-time H-1B nonimmigrant worker from failing to pay the full-time wages of the worker while in nonproductive status due to such factors as lack of work. Thus, when the petitioner's H-1B workers were not working because they were "benched" as stated by the petitioner, the full-time wages should have been continued. Further, the record does not contain any evidence in support of counsel's assertion, such as time and attendance records for the petitioner's employees. Furthermore, to demonstrate that it properly submitted letters of withdrawal for "several" of its employees, the petitioner would need to document all of the employees for whom it had submitted withdrawals, not just eight "sample copies." Again, without documentary evidence, the petitioner will not meet its burden or proof in these proceedings. 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). The petitioner has not overcome this portion of the director's objections.

Beyond the decision of the director, it is noted that the petitioner failed to submit an itinerary of definite employment as requested by the director. The director's Request for Evidence requested an "[I]tinerary of definite employment, listing the location and organization where the beneficiary will be providing services. The itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary." 8 C.F.R. § 214.2(h)(2)(i)(B) indicates that when a beneficiary will be providing service or training in more than one location, an itinerary with the dates and locations of the services or training must be filed with CIS. A CIS memo indicates that officers should use discretion to determine whether the requirement of an itinerary has been met, and that the petitioner's past hiring practices should be considered in determining whether the itinerary requirement has been met. "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", Office of Adjudications (December 29, 1995). Considering the petitioner's employment history of H-1B workers, the director properly requested an itinerary of definite employment, which the petitioner failed to provide. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(8). As the petitioner failed to provide the requested itinerary, the petitioner has not established that it will employ the beneficiary temporarily in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the petition is a specialty occupation.

Section 214(i)(1) of 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)(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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner is seeking the beneficiary’s services as a software engineer/programmer. Evidence of the beneficiary’s duties includes: the I-129 petition; the petitioner’s October 25, 2003 letter in support of the petition; and the petitioner’s response to the director’s request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing Relational Database Management Systems in addition to designing and implementing Client/Server under Unix platforms, as well as the SQL & Oracle environments; developing and integrating operational information system using a database system; developing and maintaining RDBMS tables, indexes, and clusters to optimize database performance; troubleshooting the software products, testing for problem areas, and suggesting remedies; installing and maintaining software; and serving as a software technical consultant. The petitioner indicated that a qualified candidate for the job would possess a related bachelor’s degree.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the position of a software engineer/programmer is so specialized and complex that it clearly qualifies as a specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although a review of the *Handbook*, 2004-2005 edition, finds that a software engineer/programmer may qualify as a specialty occupation, the AAO does not concur with counsel that the proffered position is a specialty occupation. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. In this case, the record does not contain any service agreements between the petitioner and its clients, where the beneficiary will work, or a comprehensive description of the beneficiary's proposed duties from an authorized representative of such clients. Without such evidence, the petitioner has not demonstrated that the work that the beneficiary will perform at the petitioner's clients will qualify as a specialty occupation. Without documentary evidence, the petitioner has not met its burden of proof in these proceedings. 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). Based on insufficient information from the work locations where the beneficiary will work, the petitioner has failed to establish that it will employ the beneficiary as a software engineer/programmer, and that the beneficiary will be coming to perform services in a specialty occupation, in accordance with Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b).

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record contains insufficient evidence of the petitioner's past hiring practices such as employment records and educational qualifications of employees previously in the petition. Therefore, the petitioner has not met its burden of proof in this regard. 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)).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. For this additional reason, the petition will be denied.

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.