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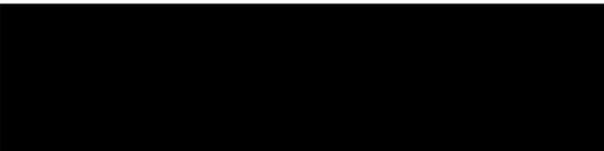
DZ

FILE: WAC 07 147 50838 Office: CALIFORNIA SERVICE CENTER Date: AUG 18 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 solutions provider 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, and that the petitioner had failed to demonstrate the existence of a specialty occupation. The director also determined that the petitioner's other employees had not been employed on a continual basis, pursuant to the terms and conditions reflected on their respective petitions.

Regarding the director's determination that the petitioner's other employees had not been employed on a continual basis, pursuant to the terms and conditions reflected on their respective petitions, the AAO finds that the director erred when referencing evidence not in the record of proceeding. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the ... petitioner and is based on derogatory information considered by the Service and of which the ... petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's reference, although not a basis of denial in this matter, will be withdrawn.

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. 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 17, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Provide computer consulting services to the petitioner's clients, including designing, developing, programming, implementing, maintaining, and testing new and custom commercial

and business software applications, products, packages and computer systems, particularly in the areas of client/server business applications for resource management and product manufacturing; Consult with users, study their work patterns and needs, analyze existing systems and software, evaluate new software products, and consult with other members of the development team in order to determine an individual client's system requirements; Clarify program objectives, determine feasibility and formulate recommendations for developing specialized software applications and systems, including time and cost estimates and programming plans; Resolve issues regarding system compatibility and modifications; Prepare technical documentation of all application systems, including program specifications, flow charts, and diagrams illustrating the sequence of steps for programs and describing the logical operations; Develop manuals describing installation, operations, and testing programs and procedures; Provide technical support, including network installation and troubleshooting; and, Train users in installation, operations, control, and utilization.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Bloomington, Illinois as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary 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, and/or service agreements for the beneficiary. The director also requested the petitioner's 2006 federal income tax return and quarterly wage reports for all the petitioner's employees for the last three quarters.

In response to the RFE, the petitioner asserted that the beneficiary would perform in-house work at its Bloomington, Illinois location. The petitioner also stated that it is the employing entity with authority to hire, pay, fire or otherwise control the beneficiary's work. As supporting documentation, the petitioner submitted the following: a list of eight beneficiaries used for the LCA; the petitioner's job advertisements for the proffered position; the petitioner's 2006 federal income tax return; the petitioner's quarterly federal and state tax returns for the first quarter of 2007 and the second, third, and fourth quarters of 2006; payroll documentation; the petitioner's job offer to the beneficiary; the petitioner's 2007 business plan; a business profile; a list of the petitioner's current employees; employee resignation letters; and the petitioner's organizational chart, business documents, and lease agreement.

The director denied the petition on the basis of her determination that the petitioner had not submitted contracts or purchase orders issued by its end-client for whom the beneficiary would be performing services.

On appeal, counsel states that the petitioner is the beneficiary's employer, as defined in the statutes and regulations. Counsel also states that, in response to the RFE, the petitioner explicitly stated that the beneficiary would perform in-house work and not at a client site. Counsel concludes that the petitioner has a bona fide need for the beneficiary's services, that a bona fide position is available, and that the petitioner has promised to pay the offered wage.

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 15, 2007 "Contract of Agreement."¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's decision finding otherwise.

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, according to the information in the petitioner's March 17, 2007 letter, the nature of the petitioner's business is providing information technology solutions by offering: 1) hourly technical aid, 2) retainer contracts for specific skills or systems, and 3) project consulting. Moreover, the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform.² The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment.

The AAO acknowledges counsel's assertion that the petitioner will employ the beneficiary to work on an in-house project at the petitioner's location in Bloomington, Illinois. Counsel, however, does not specify to which specific in-house project the beneficiary would be assigned, and the record contains insufficient evidence of any such project. The petitioner's 2007 business plan and business profile also do not describe any in-house projects to which the beneficiary would be assigned. 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). Moreover, in its March 17, 2007 letter, the petitioner describes the beneficiary's proposed duties as providing computer consulting services to the petitioner's clients, and describes its mission as providing fast and reliable technical assistance to small office computer users. This information conflicts with counsel's assertion on appeal that the beneficiary will work in-house at the petitioner's location and not at a client site,

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).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

and with the petitioner's assertion in its response to the RFE that the beneficiary will work in-house at its Bloomington, Illinois location. The record contains no explanation for these inconsistencies. 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. at 591. The AAO acknowledges the petitioner's job advertisements for "Software professionals" and "SA with QA skills" positions, stipulating no travel requirement. The advertisements, however, are dated after the April 2, 2007 filing date of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Of further note, the petitioner's 2006 federal income tax return reflects \$340,926.00 in gross receipts or sales, \$41,000.00 paid in compensation of officers, and \$126,000.00 paid in salaries and wages. The petitioner has not submitted sufficient evidence to support its claim that it is a rapidly growing company and intends to employ the beneficiary and 11 other workers, as specified on its LCA, in a specialty occupation. The AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, 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)).

Each petitioner 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 third party must also provide details of its 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.

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). The petitioner did not submit the evidence requested by the director 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. Counsel asserts on appeal that the beneficiary will work on an in-house project. The AAO notes, however, that, at the time the petition was filed, the petitioner did not reference any in-house projects. Rather, it stated that the beneficiary would perform such tasks as providing computer consulting services to the petitioner's clients and consulting with users, studying their work patterns and needs and analyzing their existing systems and software. Such duties do not appear compatible with the assertions that the beneficiary will work in-house and not at a client site. The evidence of record establishes that the beneficiary will perform duties at multiple work sites for the petitioner's clients. As the petitioner has not submitted a credible itinerary, it has not established that it had three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. Accordingly, the petitioner has not established that the beneficiary will be employed in a specialty occupation.

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 general overview of the beneficiary's duties associated with the petitioner's in-house projects 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 computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the actual duties of the beneficiary remain 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 from the entity for whom the beneficiary will perform 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 a descriptive listing of the programmer analyst duties the beneficiary would perform, 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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not demonstrated compliance with the terms and conditions of the LCA. The LCA submitted at the time of filing lists the work location as Bloomington, Illinois, the location of the petitioner. As the beneficiary's actual duties and ultimate worksite are unclear, however, it has not been shown that the work would be covered by the location on the LCA.

The petitioner also has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The evidence of record contains the following documentation related to the beneficiary's qualifications: a Post Graduate Diploma in Business Management from Dhruva College of Management, dated August 26, 2003; a Consolidated Marks Memorandum from Osamia University for the "B.Com Vocational" examination, dated August 17, 2001; and a "Pass Certificate – Cum – Memorandum of Marks" from Aditya Junior College, dated May 30, 1998. The record also contains an academic credentials evaluation from the IndoUS Technology & Educational Services, Inc. (ITES, Inc.), prepared by Dr. Pratap P. Reddy, a professor in the Computer Science Department, at Raritan Valley Community College in New Jersey, who concludes that the beneficiary possesses the equivalent of a master's degree in business administration and a bachelor's degree in computer information systems from an accredited college or university in the United States. The record, however, contains deficiencies. Although the evaluator asserts that the beneficiary holds a Bachelor of Commerce degree, the record does not contain a copy of that degree. Further, although the evaluator points out that Dhruva College of Management is approved by the All India Council for Technical Education (AICTE), which is also notated on the beneficiary's Post Graduate Diploma in Business Management from Dhruva College of Management, the record contains no evidence that Dhruva College of Management is either recognized or accredited as an institution of higher education in India.³ See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluator's conclusions about the beneficiary's master's degree equivalency in business administration and her bachelor's degree equivalency in computer information systems are not probative. 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). Accordingly, it is concluded that the petitioner has not demonstrated that the beneficiary is qualified to perform a specialty occupation. For these additional reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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).

³ It is also noted that Dhruva College of Management does not appear on the Electronic Database for Global Education (EDGE) website at <http://aacraoedge.aacraoedge.org> as an accredited institution.

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.

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.