

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D 2

FILE: WAC 07 140 52721 Office: CALIFORNIA SERVICE CENTER Date: **AUG 18 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 a computer consulting, staffing, and software 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 agent, that the petitioner had failed to demonstrate the existence of a specialty occupation, and that the evidence of record contains deficiencies and inconsistencies.

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 RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting 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 25, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

- Analysis of system requirements, (30%);
- Evaluation of interface feasibility between hardware and software, (10%);
- Software system design (using scientific analysis and mathematical models to predict and measure design consequences and outcome, (30%);
- Unit and integration testing, (20%);
- System installation, (5%); and
- Systems maintenance, (5%).

The record also includes a certified labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Rochester Hills, Michigan 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 original, sealed degrees and transcripts for the beneficiary from Osmania University and Glendale University.

In response to the RFE, counsel submitted a letter from the petitioner's president who stated, in part, that the beneficiary would work on an in-house project with the following job duties and time allocations:

1. Analyze the client's software and software systems (15%);
2. Design software to meet the client's needs (10%);
3. Create and maintain relational database management systems in a client/server environment using SQL, PL/SQL, and other database design (10%);
4. Validate, calculate, code, test, and update data (10%);
5. Engineer modifications and solutions to the client's software system problems (15%);
6. Implement client/server communication protocol as application programming interface (15%);
7. Manage local area network systems (10%);
8. Use necessary software tools, including Oracle, SQL Server and Java language (10%); and
9. Update latest web technologies like Java (HTML, XML, JSP, JavaScript) (5%).

Counsel also submitted the following supporting documentation: business documents for the petitioner; income tax returns; a projected income statement as of December 31, 2008; quarterly tax reports; bank documents; and degrees and transcripts for the beneficiary.

The director denied the petition on the basis of her determination that the petitioner had not submitted any evidence to support its claim that the beneficiary would be working on an in-house project or that the petitioner had a history of in-house projects. The director also found that, without an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, the petitioner had not established that it qualifies as a U.S. employer or agent.

On appeal, counsel asserts that the petitioner has previously shown that it qualifies as an employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). Counsel states that the petitioner will pay the beneficiary's compensation, control his work, and perform all activities pertaining to managerial supervision, hiring, firing, and performance evaluations. Counsel asserts the following: information on the petitioner's website shows that the petitioner has been building a corporate database application, evidence that existed at the time of filing the petition; the petitioner does not contract with companies to provide other companies with employees; the petitioner employs individuals to work on in-house projects and employs individuals to work at off-site projects when necessary; and the petitioner submitted original and sealed school documents, in accordance with the director's instructions on the RFE. As supporting documentation, counsel submits the following: information from the petitioner's website and its business plan; a copy of the previously submitted in-house job description for the beneficiary, dated May 30, 2007; the petitioner's EIN number; and a copy of the envelope containing the beneficiary's sealed school documents.

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 25, 2007 letter and its March 26, 2007 employment agreement with the beneficiary.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 on the petition, the nature of the petitioner's business entails computer consulting, staffing, and software development activities, and 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, and the documentation detailing the petitioner's products/services. Counsel, however, has not submitted sufficient evidence demonstrating that the petitioner employs an in-house product development team for its "S20 (SQL server to Oracle)" project, which is described as comprising six team members for the "New Business (Underwriting)" module alone. Nor has counsel overcome the director's concerns regarding the generic nature of the description of the in-house project. The AAO disagrees with counsel's assertion on appeal that the petitioner's website contains information to support that the petitioner has been building a corporate database application. The internet printouts submitted on appeal also contain generalized language, without supporting evidence, and are not convincing evidence that the petitioner is in fact building a corporate database application. 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 AAO notes that the petitioner, with its "Business Plan for S20 (SQL Server To Oracle) Product," intends to develop a

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."

software product to serve as a primary tool for data migration for small and medium companies when they start growing to larger companies. The record, however, contains no evidence that this project is underway or that the petitioner devotes employees' time to building software for sale in the future. It is noted that the petitioner's 2006 federal income tax return reflects \$667,209.00 in gross receipts or sales, no compensation of officers paid, and \$145,703.00 paid in salaries and wages. The petitioner has not submitted sufficient evidence to support its claim that it intends to employ the beneficiary and six workers in a specialty occupation. The AAO agrees with the director's finding that the record does not support a finding that the petitioner is building a corporate database application of its own. 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)).

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 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. Counsel asserts on appeal that the beneficiary will work on an in-house project and that no other work locations are currently anticipated. The AAO notes, however, that, at the time the petition was filed, the petitioner did not reference this in-house project. Rather, it stated that the beneficiary would perform such tasks as evaluating clients' information technology needs, existing programs, and software applications to meet clients' needs within time and cost restraints. He would also analyze and evaluate programs, and prepare the specifications required, to transform business needs. According to the Employment Agreement, the beneficiary was to comply with the policies, standards, and regulations not only of the petitioner, but also to clients of the petitioner to whom he would render professional services. Such duties do not appear compatible with the in-house project introduced with the RFE response.

Moreover, although information on the petition that was signed by the petitioner's president on March 28, 2007 reflects that the petitioner has six employees, the petitioner's quarterly tax report for the third month of the first quarter of 2007, reflects only two employees. 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. In view of the foregoing, the petitioner had not established that it has three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. It has not

submitted a credible itinerary. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).³

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, 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).

Finally, the AAO turns to counsel's assertion on appeal that in response to the RFE, he submitted original and sealed school documents for the beneficiary.

The regulation at 8 C.F.R. 214.2(h)(10)(ii), which governs denials that must be preceded by notice, states:

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

³ Moreover, 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 "S20 (SQL server to Oracle)" project 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.

The director's denial does not comply with the requirements at 8 C.F.R. 214.2(h)(10)(ii). The director has not previously notified the petitioner of suspected fraud. The director's RFE asked for original transcripts but the decision did not give the petitioner copies of the opened transcripts to which it refers. Thus, the AAO will withdraw this portion of the director's decision. The AAO makes no finding on the authenticity of the transcripts. The AAO notes that the beneficiary's master's degree from a U.S. university was obtained from an online, unaccredited university with no address. As the petition will be denied because the position is not a specialty occupation, these issues will not be addressed further.

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.

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.