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U.S. Citizenship
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Services

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02

FILE: WAC 07 130 51935 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 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)

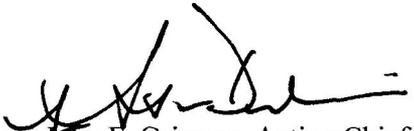
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting 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 consulting business that seeks to employ the beneficiary as a quality assurance 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 the proffered position is a specialty occupation, or that it had complied with the terms and conditions of the certified labor condition application (LCA).

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 the petitioner's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

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 7, 2007 offer of employment and its March 30, 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 that the beneficiary would be working at the petitioner's site in Farmington Hills, Michigan, and, possibly, at other client sites. 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.

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.

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).

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.

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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning

entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

In a March 30, 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:

1. Analyzing client's software and software systems (10% of work time);
2. Perform Manual Testing, Automated Testing (15% of work time);
3. Writing and executing the test plans, test cases, test scripts, bug tracking, bug reporting and traceability matrix (10% of work time);
4. Performing Black box and White box testing of web and client/server applications (10% of work time);
5. Performing SIT (System Integration Testing), functionality testing; GUI testing, unit testing; backend testing, performance testing; stress testing, validation testing, navigation testing, [and] regression testing (10% of work time);
6. Engineering modifications and solutions to client's software system problems (15% of time);
7. Defect tracking management and Bug Reporting using bug tracking (15% of work time);
8. Prepare daily and weekly status reports (10% of work time); and
9. Updating latest testing technologies, which includes 5% of work time.

The record also includes a certified LCA submitted at the time of filing listing the beneficiary's work location in Farmington Hills, Michigan as a quality assurance programmer analyst.

In an RFE, the director requested additional information from the petitioner, including 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.

In a May 11, 2007 letter in response to the RFE, the petitioner's vice president identified one project on which the beneficiary would work. According to the letter, the project work would be performed at JVR Systems, Inc. (JVR Systems) located in Farmington Hills, Michigan; would commence on October 1, 2007; and would last three years. The letter described the attendant job responsibilities as follows:

- Analyze system requirements and develop Test Cases
- Extensively perform **Stress Testing, Regression Testing, Repetitive Testing and Functional Testing**
- Perform Manual Testing and Automated Testing using tools such as **(Win Runner 7.0/8.0, Load Runner, Test Director, Bugzilla)**
- Expected to have Strong command in Software Test Development Life cycle & Test Methodologies
- Prepare and Execute Functional Test Cases
- Write and execute test cases, track and log defects
- Verification of Bugs after each release
- Perform White Box and Black Box testing [that] includes functionality testing
- Perform Functional testing, Regression and User interface Testing
- Coordinate with onsite Development team to solve the problems using defect-tracking tools problems
- Actively attend meetings with fellow testers and other groups to evaluate the progress and performance of the application

The above-described responsibilities generally comport with the duties described in the petitioner's March 30, 2007 letter.

The petitioner's RFE response also includes the following documentation: (1) a subcontract agreement, dated February 27, 2006, between the petitioner and JVR Systems for the petitioner to furnish consulting or project services to JVR Systems or to the clients of JVR Systems; (2) a work order, signed by the petitioner and JVR Systems on March 13, 2007, for the services of a quality assurance programmer analyst for an expected duration of three years, not assigning a specific person, and stipulating: "All Contact with the JVR SYSTEMS' Customers will be conducted by and through Marketing manager, JVR SYSTEMS, Inc."; (3) a letter, dated May 17, 2007, from the president of JVR Systems indicating that the beneficiary would work with JVR Systems' development team and listing, verbatim, the same responsibilities specified in the May 11, 2007 letter of the petitioner's vice-president; (4) a list of the petitioner's employees; (5) copies of wage reports; (6) copies of employee termination letters issued by the petitioner; and (7) copies of quarterly tax reports filed by the petitioner.

The first basis for the director's denial was her finding that the petitioner had failed to provide sufficient information about the specific duties that the beneficiary would perform and therefore failed to establish that

those duties would comprise a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director determined that, although the petitioner had submitted a subcontract agreement between itself and JVR Systems, and a corresponding work order, the work order did not identify either the specific person to perform the work or the specific location at which such work would be performed. The director found that neither the subcontract agreement nor the corresponding work order identified the ultimate end-client for whom the beneficiary would provide consulting services. The director noted, in part, that the work order states that “all contact with JVR SYSTEMS’s Customers will be conducted by and through [the] Marketing manager, JVR SYSTEMS, Inc.” The second, and independent, basis of the director’s denial, was her finding that that, as the ultimate end-client is unknown, the petitioner had not demonstrated compliance with the certified LCA.

On appeal, the petitioner’s vice president states, in part, that the “Ultimate End Client” for whom the beneficiary will provide quality assurance programmer analyst services is JVR Systems, located at [REDACTED] Farmington Hills, MI 48335, and that the beneficiary will work on-site at this location on the Middleware Monitoring Manager project, which is described as “an application that is being developed by JVR Systems in their own office located in Farmington Hills, MI.” The petitioner’s vice president also submits a “To Whom It May Concern” memorandum dated August 17, 2007 from the vice president of JVR Systems that states that the beneficiary will work for a period of three years with JVR Systems’ development team on-site at its Farmington Hill, Michigan location, on the Middleware Monitoring Manager Project. This memorandum includes a list of proposed duties (“Detailed Job [R]esponsibilities”) which substantially comports with the list of job responsibilities provided in the May 11, 2007 letter from the petitioner’s vice president. This JVR Systems list reads as follows:

- Analyze system requirements and develop Test Cases
- Extensively perform **Stress Testing, Regression Testing, Repetitive Testing and Functional Testing, User Interface testing of the Middleware Monitoring Application to make sure [the] application is holding up to the standards desired.**
- Perform Manual Testing and Automated Testing *to check for JVM Memory usage, Server Response Time, CPU Utilization by the application* using tools such as **(Win Runner 7.0/8.0, Load Runner, Test Director, Bugzilla).**
- Expected to have Strong command in Software Test Development Life cycle & Testing Methodologies.
- Prepare and Execute Functional Test Cases *from the initial stages of the application development in order to eliminate any surprise towards the end of the development phase.*
- *Document, track and generate detail reports in order for them to be fixed by the application development team.*
- Verification of Bugs after each release.

- Perform White Box and Black Box testing.
- Coordinate with onsite Development team to solve the problems using defect-tracking tools.
- Actively attended meetings with fellow testers and other groups to evaluate the progress and performance of the application.

The AAO notes that this JVR Systems list of job responsibilities has deleted the following elements of the list provided by the petitioner's vice president: the responsibility identified as "Perform Functional testing, Regression and User interface Test"; and, from the "perform White Box and Black Box testing," the descriptive phrase "[that] includes functionality testing."

On appeal, the petitioner also includes a "Documentation of the Project," The Table of Contents, and pages 4 through 10 of a 15-page JVR Systems, Inc. document entitled "Middleware Monitoring Manager[:] High Level Design v1.1." The AAO notes that the evidentiary value of this document is minimized by the fact that it is only a partial submission (missing pages 1 to 3 and 11-15). The AAO also finds that the eight (8) pages of the document that were submitted do not illuminate either the substantive work that the beneficiary would perform or the educational credentials required to perform it.

When, as here, 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 has not provided 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 AAO acknowledges the August 17, 2007 memorandum from the vice president of JVR Systems that states that the beneficiary will work for a period of three years with JVR Systems' development team on-site at its Farmington Hill, Michigan location, on the Middleware Monitoring Manager Project, and the corresponding list of proposed duties and "Documentation of the Project." As noted above, the documentation pertaining to the Middleware Monitoring Manager project to which the beneficiary will be assigned is incomplete. The record contains no explanation for this deficiency. 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. 582, 591 (BIA 1988). In addition, although the vice president of JVR Systems states that the beneficiary will work as a part of a development

team on the Middleware Monitoring Manager project, the attendant duties are described only generically and the project documentation does not contain a division of duties for the development team members or a timeline for the completion of such duties. It is also noted that, although in the RFE, the director requested documentation from the petitioner and the end-client about the specific qualifications that are required to perform the proposed duties, the record does not contain such information. 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. *See 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. On appeal, counsel submits a second letter from JVR Systems but does not submit the requested work order identifying the beneficiary and the ultimate work location of 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 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 description of the beneficiary's duties associated with JVR Systems' Middleware Monitoring Manager 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. 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)(1).

The record does not include any evidence regarding parallel positions in the petitioner's industry or from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the proffered position involves duties with the requisite level of complexity or uniqueness; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business or the end-client's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a *specialty occupation* under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 petitioner does not address this issue on appeal. The record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a *specialty occupation*. CIS must examine the *ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation*. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, the petitioner asserts that a bachelor's degree in computer science/application, information systems, engineering, or a related field, is necessary in order "to comprehend the complex computer applications and scientific theoretical principles involved in the evaluation and analysis of computer program and software systems used in engineering application." The AAO here incorporates its discussion about the lack of 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 end-client for whom beneficiary would be providing services. As noted in the *Handbook*, while some computer related positions may qualify as *specialty occupations*, others require an associate's degree, computer training, or work experience. 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 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).

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.

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.

The director also found that, without a work order from the ultimate end-client for whom the beneficiary will provide his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the certified LCA. The evidence of record indicates that the beneficiary's employment site will be JVR Systems, located in Farmington Hills, Michigan. As such, the work would be covered by the location on the certified LCA. Thus, the petitioner has overcome this portion of the director's objections.

The petition may not be approved, however, as the petitioner has not demonstrated that the offered position is a specialty occupation. 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.