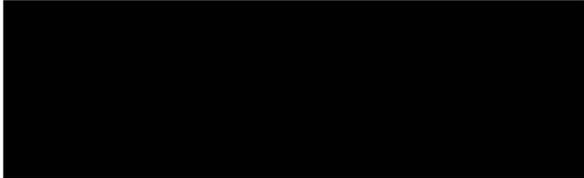




U.S. Citizenship
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FILE: WAC 07 015 53963 Office: CALIFORNIA SERVICE CENTER Date: MAR 17 2008

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 an IT 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, that the proffered position is a specialty occupation, or that its labor condition application (LCA) is valid. The director also found that the petitioner had not established that it has complied with the terms and conditions of employment, due to the discrepancies in the amount of wages paid to some of the petitioner's employees as compared to the wages specified on their respective petitions.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's 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 an October 16, 2006 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered programmer analyst position as follows:

- Research, design and develop computer software systems, in conjunction with hardware choices, for medical, industrial, communications, scientific, engineering, commercial and financial applications which require use of advanced computational and quantitative methodologies, (10%);
- Apply principles and techniques of computer sciences and quantitative methodology and techniques to determine feasibility of design within time and cost constraints, (5%);
- Complete life cycle development of software projects, 24X7 production support and maintenance experience of J2EE/Java Web based projects, (5%);
- Use Web Technologies involving Core Java, J2EE, EJB, Servlets, Java Server Pages (JSP), JDBC, XML and Perl, (10%);

- Analyze, design and also use application and web servers, which include Web Logic 8.1/7.0, IBM Web Sphere 5.0, and Apache Tomcat Web Server, (5%);
- Prepare Data Architecture/Data Modeling tools like Erwin and in Database programming using Oracle, MS SQL Server and MS Access, (5%);
- Analyze the communications, informational, database and programming requirements of clients; plan, develop, design, test and implement software programs for engineering applications and highly sophisticated network systems, (5%);
- Design, program and implement software application packages customized to meet specific client needs, (10%);
- Review existing computer systems to determine compatibility with projected or identified client needs; research and select appropriate system, including ensuring forward compatibility of existing systems, (5%);
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs, assist as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions, (5%);
- Train end user on use of software applications and computer systems developed; provide trouble shooting and debugging support, utilize mature (3rd and 4th Generation) programming methodologies and languages, (5%);
- Test and implement the system to provide analytical support to monitor operation of assigned application system; support the project team by participating in enhancements and develop accurate documentation that complies with the company standards, (5%);
- Assist as part of the team to resolve technical problems, (5%);
- Adhere to coding standards, procedures and techniques while contributing to the technical code documentation and document the detailed application specification; adhere to IT control policies throughout design, development and testing, and incorporate Corporate Architectural Standards into application design specifications, (10%);
- Review complex specifications to identify problems in the systems package for systems development requiring need for revision of project scope and operational strategies, (5%); and
- Participate in project planning session with project managers, business analysts and team members to analyze business requirements and to outline the proposed IT solution, (5%).

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Richmond, Virginia and Denver, Colorado as a 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 response to the RFE, counsel for the petitioner stated that the petitioner, not the contractor or end-client, employs the beneficiary. Counsel submitted an Agreement For Information Systems Services, dated October 6, 2006, between the petitioner and Infinitum, Inc.; a purchase order, signed on October 6, 2006, between the petitioner and Infinitum, naming the beneficiary to work as a programmer analyst for the Virginia Department of Health (VDH) in Richmond, Virginia, from October 16, 2006 to December 22, 2008; and a letter, dated February 22, 2007, from the Application Development Manager of the Office of Information Management of the VDH in Richmond, Virginia, confirming that the beneficiary "is currently under contract and assigned to work in the Office of Information Management at the [VDH]" and "is working on HR and Financials application to migrate the system from its current client server environment to a browser based J2EE application."

The director denied the petition finding that the petitioner failed to provide a contract between its client Infinitum, Inc. and the claimed end-client, VDH. Upon contacting the VDH to verify the claimed employment, the director also found that VDH's contract was with Radiant Systems Inc., not with the petitioner or Infinitum, Inc. The director also found discrepancies in the amount of wages paid to some of the petitioner's employees as compared to the wages specified on their respective petitions. The director concluded that, based on the wage discrepancies and the absence of contracts between Infinitum and Radiant Systems, and between Radiant Systems and the VDH, the petitioner had not established that the proffered position is a specialty occupation, that it had complied with the terms and conditions of the LCA, or that it qualifies as a U.S. employer.

On appeal, counsel for the petitioner submits an employment contract with the beneficiary to show that the petitioner is the beneficiary's actual employer. Counsel also submits copies of the following previously submitted documentation: an Agreement For Information Systems Services, dated October 6, 2006, between the petitioner and Infinitum, Inc.; a purchase order, signed on October 6, 2006, between the petitioner and Infinitum, naming the beneficiary to work as a programmer analyst for the VDH in Richmond, Virginia, from October 16, 2006 to December 22, 2008; and a letter, dated February 22, 2007, from the Application Development Manager of the Office of Information Management of the VDH in Richmond, Virginia. In addition to this previously submitted documentation, counsel submits a Subcontractor Agreement, signed on October 1, 2006, between Radiant Systems, Inc. and Infinitum, Inc. that includes a Statement of Work at Item 15, naming the beneficiary to perform "computer information services or other specialized services (Java/J2EE) as a contractor to [Radiant Systems, Inc.] at [VDH]." Counsel also asserts that the petitioner is not in violation of any terms and conditions of employment, as its six current employees are being paid their annual compensation in accordance with the wage amounts reflected on their respective petitions and their employment-start dates.

The October 1, 2006 Subcontractor Agreement submitted by counsel on appeal, between Radiant Systems, Inc. and Infinitum, Inc., which includes a Statement of Work at Item 15, naming the beneficiary to perform

“computer information services or other specialized services (Java/J2EE) as a contractor to [Radiant Systems, Inc.] at [VDH],” is noted. The petitioner, however, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As discussed above, the director specifically requested in her RFE 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, or service agreements for the beneficiary. The petitioner failed to submit 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 AAO will not consider this evidence on appeal.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the job offer letter, dated October 1, 2006, between the beneficiary and the petitioner.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 Denver, Colorado and at its client's site in Richmond, Virginia. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. 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

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).

baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter, the petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not contain a detailed description of the work to be performed by the beneficiary for VDH, the end user of the beneficiary's services. Thus, as the nature of the proposed duties are unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).²

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description entailing programmer analyst duties, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

² The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

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 contract from the ultimate end-client where the beneficiary will perform his services, the LCA is invalid.

On appeal, counsel states, in part, that the beneficiary has a bona fide job offer in accordance with the petitioner's LCA.

As discussed above, the petitioner did not submit the requested evidence in the director's RFE pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services. Specifically, the petitioner failed to provide a contract between its client Infinitum, Inc. and the claimed end-client, VDH. 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)). As the beneficiary's ultimate worksite is unclear, it has not been shown that the work would be covered by the locations on the LCA. For this additional reason, the petition may not be approved.

The director also found that the petitioner is not in compliance with the terms and conditions of employment, as its other employees have not been compensated at the pay rate reflected on their respective petitions.

On appeal, counsel states, in part, that the petitioner is not in violation of any terms and conditions of employment, as its six current employees are being paid their annual compensation in accordance with the wage amounts reflected on their respective petitions and their employment start dates. As supporting documentation, counsel submits a chart and copies of W-2 forms and paychecks.

As discussed above, the director found that the petitioner's employees have not been compensated at the pay rate reflected on their respective petitions. For example, [REDACTED] was paid \$31,332.00, not the proffered wage of \$46,250. On appeal, counsel asserts that the employment start date for [REDACTED] is October 1, 2006, and that she was paid \$3,916.67 monthly, which totals \$11,750.01 for October, November, and December of 2006, which is consistent with the annual salary of \$46,250 reflected on the petition filed on her behalf. The 2006 W-2 form for [REDACTED], however, reflects only \$7,833.34. To explain this inconsistency,

counsel submits a chart with a notation that [REDACTED]'s 2006 W-2 form is for October and November only. This explanation, however, is not clear, as the beneficiary worked for three months and should have been paid \$11,750.11. It is noted that the chart reflects this same explanation for the wage inconsistencies for the petitioner's employee [REDACTED]. Again, this explanation is unclear. 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. 582, 591 (BIA 1988). Upon review of the information submitted by counsel, the wage inconsistencies have not been resolved. Counsel's assertion on appeal that that the petitioner is not in violation of any terms and conditions of employment is noted. Without documentary evidence to support the claim, however, 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). Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2) the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the alien's stay. The record does not establish that the petitioner has complied with the terms and conditions of previously filed LCAs. The petitioner has not established with consistent evidence that it will comply with the terms and conditions of the current LCA. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the petition may not be approved.

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.