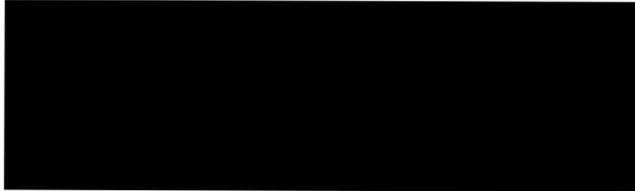


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dz

FILE: EAC 06 181 51932 Office: VERMONT SERVICE CENTER Date: **MAR 31 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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and a subsequent motion to reopen and reconsider. 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 software development and 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).

On February 23, 2007, the director denied the petition on the basis that the beneficiary is not qualified to perform the duties of a specialty occupation. On March 22, 2007 an attorney filed an appeal consisting of a Form I-290B (Notice of Appeal), a Form G-28 (Notice of Entry of Appearance), documents in support of the appeal, and a brief that described the filing as “both a Motion to Reopen and/or Reconsider and an Appeal.” The Form I-290B identified the attorney as representing the beneficiary. The Form G-28 was signed only by the beneficiary as consenting to representation by the attorney, and it identifies only the beneficiary as the person or entity on whose behalf the attorney was entering an appearance.

On April 5, 2007, the director issued a decision that denied the appeal/motion on the basis that it was not filed by an affected party, as required by the regulations at 8 C.F.R. §§ 103.3(a)(2)(i) and 103.3(a)(1)(iii)(B). On April 24, 2007, the attorney filed the present appeal of the director’s decision. This appeal includes a new Form G-28, signed by the petitioner, and a Form I-290B that identifies the petitioner as the entity represented. The attorney asserts that “an error occurred in the filing of the appeal” on March 22, 2007; that the attorney represented both the petitioner and the beneficiary at the time of filing; that the error could have been corrected if Citizenship and Immigration Services (CIS) had given timely notice; and that, under the circumstances, the matters presented in the filing of March 22, 2007 should be considered on the merits. .

The beneficiary of a petition does not have standing to file an appeal or motion before CIS. *See*, 8 C.F.R. §§ 103.3(a)(1)(iii)(B); (a)(2)(i); and (a)(2)(v)(A)(1); and 8 C.F.R. §§ 103.5(a)(1). Further, an appeal filed by a person or entity not entitled to file it is subject to rejection. 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The record of proceeding before the director when he issued his decision established that the appeal was filed on March 22, 2007 by an attorney acting solely for the beneficiary, who, under CIS regulations, is not an affected party and has no standing to file an appeal before CIS. The director’s determination to the effect that the appeal was filed on behalf of a person without standing is legally and factually correct, and it provided a proper basis for the director to not only deny but to reject the appeal. Therefore, the director’s decision to deny the appeal and uphold his previous decision is supported by CIS regulations as applied to the facts in this case. Accordingly, there is no regulatory basis for counsel’s request to have CIS treat the matters submitted on April 24, 2007 “as being filed on March 21, 2007” and effectively substituted for the matters filed as an appeal in March. The appeal will be dismissed, and the petition will be denied.

The AAO also finds that the director's initial decision, issued on February 23, 2007, to deny the petition for insufficient evidence to establish the beneficiary meets the H-1B qualification standards of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D) was correct and would not have been overcome even if the matters presented on appeal by the beneficiary had been filed by the petitioner.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is seeking the beneficiary's services as a programmer analyst. According to the petitioner, the beneficiary is a qualified candidate for the job because he possesses a bachelor's degree in economics and business administration and over two years of professional experience as a business analyst with expertise in design and analysis.

In the request for additional evidence (RFE), the director requested additional information from the petitioner, including the beneficiary's bachelor's degree, employment letters from the beneficiary's employers, and evidence of the beneficiary's computer classes and training.

In response to the RFE, the petitioner's vice president submitted the following: the beneficiary's transcript for a computer course at the Indian business NIIT; and the beneficiary's "marksheet" for the first semester at the Indian computer institute Jetking.

The director found that the beneficiary was not qualified for the proffered position because the evidence does not establish that the beneficiary's education, specialized training, and/or experience are equivalent to a baccalaureate degree in a specific field of study directly related to the specialty occupation. On appeal, counsel states, in part, that the petitioner's former counsel failed to submit the beneficiary's Bachelor of Arts degree from Rutgers, The State University of New Jersey, even though the beneficiary obtained this degree prior to the filing of the petition. Counsel also states that the beneficiary's curriculum in economics and business administration required sharp mathematical skills and a grasp of complex computer programs. Counsel states that in addition to obtaining a U.S. bachelor's degree, the beneficiary also completed a course entitled Introduction to Business Computing at the University of Kansas, has completed computer training at NIIT and the Jetking Computer Institute in India, and has related employment experience, as reflected on his resume.

Preliminarily, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. In this case, the petitioner was requested to submit the beneficiary's bachelor's degree. 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). Moreover, although counsel asserts that "[the beneficiary's] previous counsel" failed to submit the requested degree, the record contains no evidence of such representation. The record does not contain any explanation for this inconsistency. 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). In view of the foregoing, the appeal will be adjudicated based on the record of proceeding before the director.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a computer-related field. The beneficiary holds a transcript of his U.S. bachelor's degree program in economics with a minor in business administration, a transcript from a second U.S. institution reflecting completion of a course entitled Introduction to Business Computing, evidence of computer training in India, and a resume reflecting related employment. The beneficiary, however, does not hold a baccalaureate degree from an accredited U.S. college or university in a computer-related field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in a computer-related field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

As discussed above, the petitioner indicated that the beneficiary is qualified for the job because he possesses a bachelor's degree in economics with a minor in business administration, and over two years of professional experience as a business analyst with expertise in design and analysis. Although the director requested employment letters in the RFE, no such letters were submitted by the petitioner in response to the RFE or by counsel on appeal. Counsel's assertions on appeal that the beneficiary's resume demonstrates related job experience and that the beneficiary held prestigious positions in these jobs, are noted. The record, however, contains no evidence in support of the assertions of the petitioner, the beneficiary, and counsel regarding the beneficiary's employment experience. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record also contains evidence that the beneficiary completed computer training at the NIIT and the Jetking Computer Institute in India. The record, however, contains no evidence that the NIIT and the Jetking Computer Institute are either recognized or accredited as institutions of higher education in India. Likewise, the beneficiary's training certificates are insufficient to establish that this computer-related training is comparable to academic courses taken at a four-year university that are a realistic prerequisite to attaining a bachelor's degree in a specific specialty in computer science or a related field. The record does not contain sufficient information regarding the foreign computer training to evaluate the training as more than vocational coursework that results in technical skill.

As discussed above, the petitioner did not submit the requested employment letters and thus the record does not contain evidence that the beneficiary's prior work experience involved the theoretical and practical application of a body of highly specialized knowledge relating to the occupation of programmer analyst. Nor does the record contain evidence that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. The record also contains no evidence of the recognition of expertise required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

In short, the record provides no basis for disturbing the director's decision. The petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation according to the standards of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and thus has also failed to establish that the proffered position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.² Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition may not be approved.

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).

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

² The AAO observes that the DOL's *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.

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.