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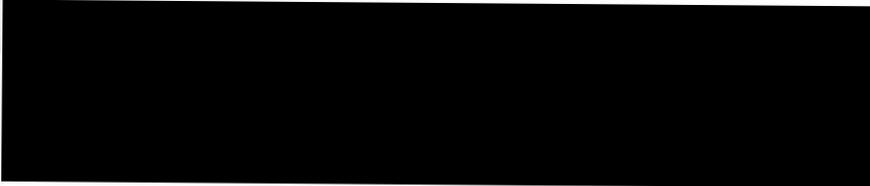
FILE: WAC 07 131 53132 Office: CALIFORNIA SERVICE CENTER Date: **MAY 29 2008**



IN RE: Petitioner: 
Beneficiary: 

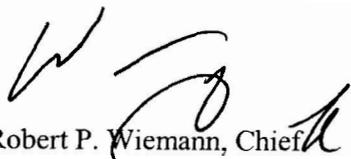
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 software and semiconductor development and consulting 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 proffered position is a specialty occupation, or that its labor condition application (LCA) is valid.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief 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 23, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Analyze client requirements; design and develop web-based software applications that are cost-effective and scalable; integrate designed applications with clients' existing systems; optimize performance; write test plans; perform testing and troubleshooting; and provide user support.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Santa Clara, California 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, the petitioner's CEO stated that the beneficiary had been assigned to provide services to "Gamestop through Sogeti USA." The petitioner submitted the following supporting documentation: a subcontract agreement, dated January 26, 2007, between the petitioner and Sogeti USA LLC, located in

Centerville, Ohio; a statement of work naming the beneficiary to perform services at Gamestop, with a start date of October 9, 2007, for "12+ months" in duration; and a new LCA listing the beneficiary's work location in Dallas, Texas as a programmer analyst.

The director denied the petition on the basis that, although the petitioner had submitted a contract between itself and Sogeti USA LLC, the petitioner had not provided a contract between Sogeti USA LLC and the claimed end-client, where the beneficiary would perform her services. The director also found that, without such a contract, the petitioner had not demonstrated that the proffered position qualifies as a specialty occupation, or that the petitioner had complied with the terms and conditions of the LCA.

On appeal, counsel states, in part, that the petitioner, which has its own development, implementation, and consulting services, satisfies all the statutory requirements to be a qualified U.S. employer. As supporting documentation, counsel submits the following: a document entitled "Policy and Claims Tracking System: Integration with SAP/Oracle Financial modules, Product Requirements" (PCTS) created on January 19, 2007 by an employee of the business IQ Infotek Inc., located in Albany, New York; an itinerary for the beneficiary to work as a programmer analyst on IQ Infotek Inc.'s PCTS project development team "from October 1, 2007"; and a May 17, 2007 letter from the Director of Fiscal Information Technology of the New York State Insurance Fund (NYSIF), addressed to the president of IQ Infotek Inc., regarding its PCTC product.

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 petitioner's March 14, 2007 job offer 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

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).

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 Santa Clara, California, and would place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. 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. As 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, the director properly exercised her discretion to require an itinerary of employment.²

Although the petitioner submitted a subcontract agreement, a statement of work, and a new LCA in response to the director's RFE, the petitioner did not identify the location of the beneficiary's ultimate work site or provide a detailed description of the beneficiary's duties. The subcontract agreement between the petitioner and Sogeti USA LLC and the statement of work naming the beneficiary to perform services on "Gamestop" are insufficient to establish that the petitioner has sufficient work at the specialty occupation level to employ the beneficiary in H-1B status.

The AAO acknowledges the documentation submitted on appeal: a document entitled "Policy and Claims Tracking System: Integration with SAP/Oracle Financial modules, Product Requirements" (PCTS); an itinerary for the beneficiary to work as a programmer analyst on IQ Infotek Inc.'s PCTS project development team from October 1, 2007; and a May 17, 2007 letter from the Director of Fiscal Information Technology of the New York State Insurance Fund (NYSIF), addressed to the president of IQ Infotek Inc., regarding its PCTC product. This documentation, however, does not provide sufficient information identifying the beneficiary's actual work location. While the IQ Infotek, Inc. documents reflect an Albany, New York address, the petitioner's original LCA indicated that the beneficiary would be working in Santa Clara, California, and the petitioner's new LCA submitted in response to the RFE indicated that the beneficiary would be working in Dallas, Texas. Thus, the beneficiary's actual work location remains unclear. Moreover, the record does not provide the master contract, if any, between the petitioner and IQ Infotek Inc. and the date it was entered into. Thus, the AAO is unable to determine if the IQ Infotek Inc. contract was in existence when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot

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."

consider facts that come into being only subsequently to the filing of the petition." In view of the foregoing, the petitioner has not established that it has three years' worth of H-1B level work for the beneficiary to perform. The petitioner has not complied with the requirements at 8 C.F.R. §214.2(h)(2)(i)(B) and the petition was properly denied.

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 itinerary from Database Resources, Inc., which names the beneficiary to work as a programmer analyst on IQ Infotek Inc.'s PCTS project development team from October 1, 2007 does not correspond to either the submitted subcontract agreement or the statement of work, and the work site location reflected on the IQ Infotek, Inc. documents, including the itinerary, does not correspond to the locations listed on the petitioner's LCAs. 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 addition, the itinerary naming the beneficiary to work as a programmer analyst on IQ Infotek Inc.'s PCTS project development team conflicts with the statement of work in the record naming the beneficiary to work on the project "Gamestop" in Texas. The record contains no 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). Thus, as the nature of the actual proposed duties is 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)(1).³

³ 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. Thus, without a detailed job description regarding the work to be performed on a specific project, the AAO is unable to determine whether the project requires the theoretical and practical application of a body of highly specialized knowledge.

In that the record contains conflicting information regarding the beneficiary's actual assigned project, duties, and work location, 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 resolving the inconsistent information pertaining to the beneficiary's actual assigned job duties and work location, 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 consistent information pertaining to the beneficiary's actual work location and job duties, 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.

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 the record did not establish that the LCA was valid for all work locations. As the beneficiary's actual work location remains unclear, it cannot be determined that the submitted LCAs are valid. 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.