

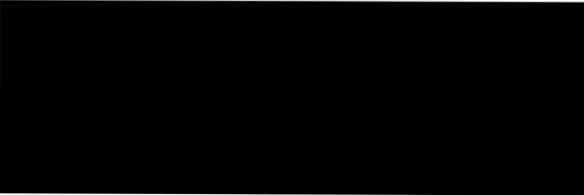
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U.S. Citizenship
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Services

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FILE: WAC 07 139 51963 Office: CALIFORNIA SERVICE CENTER Date: **MAY 30 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:



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 information technology services 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, or that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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

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

In a February 27, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

Design, evaluate, program, and implement computer applications. Maintain computer systems, write program specifications, and undertake technical documentation. Design, write, and develop custom-made software applications as per specific requirements.

Identify problems and study existing systems to evaluate effectiveness and develop new systems to improve production and workflow. Write a detailed description of user needs, program functions, and steps required to develop or modify computer programs. Review computer system capabilities, workflow, and scheduling limitations to determine whether the program can be changed within the existing system.

Assist in developing application software based on specific needs. Provide technical evaluation of new products, assess time estimation, and provide technical support within the organization.

Troubleshoot, install, design, and develop software applications. Maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

Prepare flow charts and diagrams to illustrate the sequence of steps that programs follow, and describe logical operations involved. Prepare manuals to describe installation and operating procedures.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Phoenix, Arizona as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel stated, in part, that the petitioner is the employing entity that exercises day-to-day control over the work of its employees and retains the right to hire and fire its employees. Counsel also indicated that the beneficiary would be working at the petitioner's location on an in-house project for its client Infobahn/Apollo Group in Tempe, Arizona. Counsel submitted supporting documentation, including the following: a February 14, 2007 "Summary of Terms of Oral Agreement under which Beneficiary will be Employed"; pay stubs to show that the petitioner had been paying the beneficiary; a work order signed on February 23, 2007 by the petitioner and Vensoft, naming the beneficiary to perform as a consultant to Vensoft's customer, Infobahn/Apollo Group, with a start date of February 23, 2007, and an end date of "6 months extendable"; and a purchase order from Infobahn Softworld, Inc. (Infoban), signed by representatives of Infoban and the petitioner on February 2, 2007, naming the beneficiary to perform work at Infobahn's client, Apollo Group, University of Phoenix, Phoenix, Arizona, beginning February 12, 2007.

The director denied the petition on the basis that, although the petitioner had submitted a work order between the petitioner and Vensoft, Inc., and a purchase order between Vensoft, Inc. and Infobahn, the petitioner had not provided valid contracts between Infobahn and the actual end-client for whom the beneficiary would perform the proposed duties.

On appeal, counsel asserts that the petitioner will continue to employ the beneficiary in-house to complete its own programming projects, and resubmits the February 14, 2007 "Summary of Terms of Oral Agreement under which Beneficiary will be Employed." Counsel states that the evidence of record demonstrates that the petitioner and the beneficiary have an employer-employee relationship and submits recent contracts, third-party agreements, and work orders as evidence of the availability of sufficient H-1B level work. Counsel resubmits the itinerary that was submitted for the beneficiary at the time of filing and states that the evidence of record complies with the 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). Counsel cites to the *Matter of Hung*, 12 I&N Dec. 501 (Reg. Comm. 1967), to state that a programmer position qualifies as a member of the

professions. Regarding contracts pertaining to the beneficiary, counsel submits a Memorandum of Understanding between DataFactz and the petitioner, signed on March 5, 2007, and a consulting agreement/individual work order, signed by representatives of the petitioner and of DataFactz on July 16, 2007, naming the beneficiary to perform "Software development, design, analysis, maintenance, QA and support" at the petitioner's worksite location, with a start date of October 15, 2007.

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 February 14, 2007 "Summary of Terms of Oral Agreement under which Beneficiary will be Employed."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 nature of the petitioner's business is locating and placing aliens with computer backgrounds into positions with firms that use computer programmers and/or analysts to complete their projects and the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to **perform**.² The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor.

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term “itinerary,” it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment.

The AAO acknowledges counsel’s assertion on appeal that the petitioner will continue to employ the beneficiary in-house to complete its own programming projects. This documentation, however, conflicts with the information reflected in the purchase order from Infobahn, signed on February 2, 2007, naming the beneficiary to perform work at Infobahn’s client, Apollo Group, University of Phoenix, Phoenix, Arizona, beginning on February 12, 2007. 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). In view of the foregoing, the petitioner had not established that it has three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. 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). As discussed above, the beneficiary’s actual assigned work project and proposed duties are unclear. As such, 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

In that the record contains conflicting information regarding 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 specific information pertaining to the beneficiary’s actual work location and

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.

job 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 specific 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.

Counsel's citation to the *Matter of Hung* is also noted. This decision, however, dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act, 8 U.S.C. § 1184(i). That statutory language effectively supersedes *Matter of Hung*.

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.

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.