

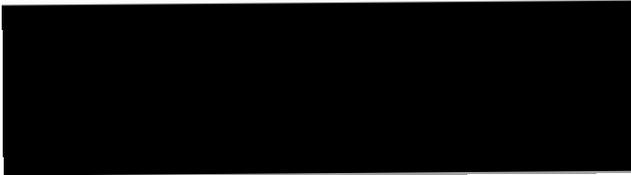
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U.S. Citizenship
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FILE: WAC 07 130 52908 Office: CALIFORNIA SERVICE CENTER Date: **NOV 25 2008**

IN RE: Petitioner:
Beneficiary:



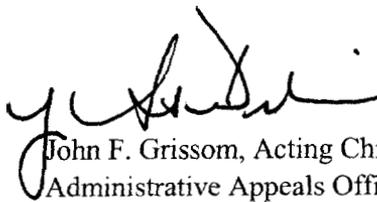
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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.


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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a software development and consulting provider that seeks to employ the beneficiary as a software developer. 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.

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.

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 25, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered software developer position as follows:

Formulate technical requirements to meet business needs and provide both Client-Server and Web-based solutions in a full life cycle production; demonstrate a solid understanding on Client-Server applications and Web applications and discern the varying capabilities between the platforms; maintain system interfaces, design for scalability and modularity, support platform-level architecture and future development; identify software and hardware components to implement IT infrastructure of the organization; build prototypes, design software components, and develop and integrate modules into a complete system; [architect], design, develop, and enhance various components of software platforms to host carrier-grade enterprise applications; perform unit tests; troubleshoot problems; perform thread analysis, code profiling and optimization using one or more of the following languages, tools, hardware and equipment: AUTOCAD, E-Plan, Medoc, E-Designer, C, C++, Visual Basic, VBScript, HTML, DHTML, JavaScript, SQL, Perl, Java, Windows and UNIX.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Edina, Minnesota as a software developer.

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. The director also

requested the petitioner's 2006 federal income tax return and the petitioner's federal and state quarterly wage reports for all of its employees for the first quarter in 2007.

In response to the RFE, the petitioner stated that the petitioner is the actual employer, with full and exclusive authority to hire, fire, pay, supervise, and control the work of its employees. As supporting documentation, the petitioner submitted the following: the petitioner's business plan; a sample employment agreement and related job offer letter provided by the petitioner to its employees; an independent contractor agreement, dated September 18, 2006, between the petitioner and Vytwo Technologies, Inc. (Vytwo), for the petitioner to provide programming, systems analysis, engineering, technical writing, or other specialized services to unnamed third-party user clients of Vytwo; a purchase order, dated September 18, 2006, between the petitioner and a client of Vytwo, that has been redacted of the information relating to the identities of Vytwo's client and the petitioner's employee assigned to the project; various other contracts that have redacted information related to the identities of the parties named in the said contracts; quarterly wage reports; and federal tax returns.

The director denied the petition on the basis of her determination that the petitioner had not submitted any contracts with the petitioner's end-clients for whom the beneficiary would be performing services. Therefore, there was no evidence that the petitioner and beneficiary would have an employer-employee relationship.

On appeal, the petitioner states that the petitioner qualifies as a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii), as the record contains a sample job offer letter and employment agreement, establishing that the petitioner retains control of the beneficiary. The petitioner also states that the beneficiary would be assigned to its in-house project: VMAT SAN Solutions. As supporting documentation, the petitioner submits: a sample job offer and employment agreement; the project details for the petitioner's VMAT SAN Solutions Project; and the petitioner's quarterly wage report for the second quarter of 2007.

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 sample job offer letter and employment agreement.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

The petition may not be approved, however, because the director has not determined whether the proffered position is a specialty occupation. It is noted that the petitioner asserts on appeal that the beneficiary will work in-house on the petitioner's VMAT SAN Solutions project. Although the petitioner also asserts that it had already submitted a detailed description of this in-house project to which the beneficiary would be assigned, the evidence of record does not support this assertion. Neither the petitioner's business plan nor brochure that were submitted in response to the RFE mentions this project. Nor does the petitioner mention this project in its March 25, 2007 and August 27, 2007 letters. 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

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).

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, in the petitioner's August 27, 2007 letter, the petitioner asserts that the beneficiary is both currently overseas and in the United States. 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. at 591.

In addition, the petitioner has not demonstrated that the beneficiary is qualified to perform a specialty occupation. The petitioner asserts that the beneficiary is qualified for a specialty occupation position because she holds a foreign bachelor's degree in engineering and related experience in the specialty occupation. The record, however, does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Nor does the record contain an evaluation of the beneficiary's computer training and work experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit, as required in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The petitioner also has not established that the beneficiary's training and/or work experience includes the theoretical and practical application of specialized knowledge required by a specialty occupation, that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or degree equivalent in a specialty occupation, or that the beneficiary's "expertise" in a specialty occupation has been recognized, as required in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties of a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 24, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.