

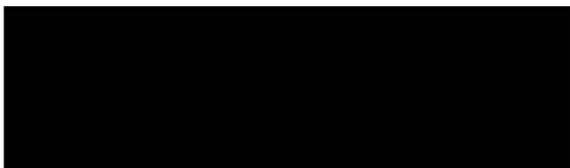
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



02

FILE: WAC 07 149 50349 Office: CALIFORNIA SERVICE CENTER Date: **OCT 02 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 information systems consulting and development business that seeks to employ the beneficiary as a computer systems 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 its labor condition application (LCA) is valid, 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 statement. The AAO reviewed the record in its entirety before reaching its decision.

Counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on September 8, 2008, informing him that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. In response, counsel indicated that he did not submit a brief and/or additional evidence. Thus, the record is considered complete.

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 31, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered systems analyst position as follows:

Analyze user requirements, procedures and problems at client sites to automate processing, improve existing computer systems and prepare new highly customized operations and software applications. Perform Websphere server administration and support, and work with UNIX, Lotus Domino Domain, production, and test support.

The record also includes a certified LCA submitted at the time of filing, listing the beneficiary's work location in Columbus, Ohio as a computer systems 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 stated that the evidence of record shows that the petitioner is the employer with a bona fide job offer for the beneficiary. As supporting documentation, counsel submitted the following: the petitioner's tax documentation, including quarterly federal tax returns and a federal income tax return for 2006; the petitioner's bank documentation; a Master Contract Agreement, dated June 18, 2007, between the petitioner and Vaktech Corp., located in Plainsboro, New Jersey, for the petitioner to provide temporary staffing services to a third-party client; a purchase order, dated June 18, 2007, between the petitioner and Vaktech Corp., assigning one of the petitioner's employees, other than the beneficiary, as a consultant for the client, "MARSH NJ"; a Subcontractor Agreement, dated July 13, 2007, between the petitioner and Nutech Information Systems, for the petitioner to supply its employees' services at the customer's facility referenced on the approved purchase orders; payment information addressed to the petitioner's president from the Ohio business, SoftQuest Technologies; photos of the petitioner's premises; and information on small businesses.

The director denied the petition on the basis of her determination that the contracts submitted by the petitioner in response to the RFE were insufficient to show that the petitioner is the beneficiary's employer. Specifically, the director found that an employee other than the beneficiary had been assigned to perform the duties described in the petitioner's contract with Vaktech Corp., and the petitioner's contract with Nutech Information Systems had not been properly signed.

On appeal, counsel states that the director erred in her findings. Counsel also states that the petitioner is the beneficiary's employer, that the proffered position is a specialty occupation, and that the beneficiary is qualified to perform the proffered position based upon his bachelor's degree.

The AAO observes that the documentation submitted on appeal does not comply with the requirement that 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 this matter, the contracts submitted by counsel in response to the director's RFE are both dated after the April 2, 2007 filing date of the petition. As stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

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 31, 2007 employment offer and employment services contract.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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

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).

employment, as, according to the information in the petitioner's March 31, 2007 letter and on the petitioner's certified LCA, the beneficiary will work for the petitioner's client in Columbus, Ohio as a computer systems analyst. Moreover, 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.

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.

In this matter, 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)). As discussed above, the record does not contain a master contract between the petitioner and either Vaktech Corp. or Nutech Information Systems or any other agreement, statement of work, or work purchase order dated prior to filing the petition in April of 2007. Thus, the record does not contain evidence that a specialty occupation position existed when the petition was filed. Moreover, even if the AAO were to accept the petitioner's contracts with Vaktech Corp. and Nutech Information Systems as timely, the submission would still be deficient, as the record does not contain a purchase order pertaining to the beneficiary, and thus the exact nature of the proposed duties is not clear. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. Again, 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 record does not contain a detailed description of the work to be performed by the beneficiary from the end-user of the beneficiary's services. The AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

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."

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)).

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business, and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

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. The general description of the beneficiary's duties provided in the petitioner's March 31, 2007 letter is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description detailing the specific duties from the entity for whom the beneficiary will perform services, 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 for the particular clients to which assigned, 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. Absent a detailed description of the substantive work that the beneficiary would perform for the particular clients to which assigned, the record fails to establish the level of specialization and complexity required by this criterion.

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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 the requested contracts, the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the beneficiary's specific duties and ultimate worksite are unclear, and thus it has not been shown that the work would be covered by the locations on the certified LCA. 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The record 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). 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 eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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