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U.S. Citizenship and Immigration Services

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SEP 05 2007

FILE: WAC 05 222 51569 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:

[redacted]

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.

James Blanzinger, for
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 provider of information technology solutions. It states that it employs three personnel and has a projected gross annual income of $500,000. It seeks to employ the beneficiary as a systems administrator. Accordingly, the petitioner 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's October 17, 2005 request for further evidence (RFE); (3) counsel's January 2, 2006 response to the director's RFE; (4) the director's February 10, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

On February 10, 2006, the director denied the petition determining that the petitioner had not established that it qualifies as the beneficiary's United States employer, that the record contains sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party end client, or that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner's focus is on software product development and is not a consulting business. Counsel contends that the beneficiary will work on the petitioner's internal product development and will not work at client sites. Counsel also contends that the petitioner qualifies as a U.S. employer, as it has the right to hire, pay, fire, supervise, and control the work of the beneficiary.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 an August 6, 2005 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered position as follows:

1. Analyze, plan, design, install, maintain and monitor LAN/WAN based computer networks and enterprise management systems;

2. Coordinate effective installation and performance of all Windows operating system hardware; maintain and monitor computer system security;

3. Administer IIS Server for intranet projects; install and maintain Oracle server and other application software such as IBM Visual Age Java and MS Visual Studio;

4. Formulate plans outlining steps to develop programs using structured analysis and design;

5. [Formulate] instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages; and

6. Write documentation to describe program development, logic, coding, and corrections; write manual for users to describe installation and operating procedures.

In response to the director's RFE, the petitioner further described the proposed duties as developing and customizing a software system for maintaining and tracking all activities at hospitals in the U.S. healthcare industry.

The record also includes an LCA listing the beneficiary's work location in Sacramento, California as a systems administrator.

On October 17, 2005, the director requested additional evidence from the petitioner, including copies of contracts between the petitioner and the beneficiary and between the petitioner and its clients for whom the beneficiary would be performing services, along with a complete itinerary for the beneficiary.

In a January 2, 2006 response, counsel for the petitioner indicated that the beneficiary would work on the petitioner's in-house software development projects and would not be assigned to work at a client location at the present time.

As discussed above, the director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third party end client. Counsel for the petitioner asserts on appeal that the petitioner's focus is on software product development and is not a consulting business. Counsel contends that the beneficiary will work on the petitioner's internal product development and will not work at client sites. Counsel also contends that the petitioner qualifies as a U.S. employer, as it has the right to pay, hire, fire, supervise, and control the work of the beneficiary.

The AAO finds that the evidence of record, including the service agreements, 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 undated employment agreement between the beneficiary and the petitioner.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii).

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[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).

Turning to the criteria to establish the proffered position as a specialty occupation, the AAO will first discuss the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) for its information about the duties and educational requirements of particular occupations. A review of the Computer Support Specialists and Systems Administrators category in the *Handbook*, 2006-07 edition, finds that the proffered position is primarily that of a computer systems administrator. According to the DOL, network administrators and computer systems administrators perform the following duties:

> [D]esign, install, and support an organization's local-area network (LAN), wide-area network (WAN), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments, including professional offices, small businesses, government, and large corporations. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. These workers gather data to identify customer needs and then use the information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

No evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for computer systems administrator jobs. Many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field. Further, although counsel asserts in the RFE and on appeal that the beneficiary would work in-house as an integral part of the product development team on a product for the U.S. healthcare industry, with duties that entail developing and customizing a software system for maintaining and tracking all activities at U.S. hospitals, the record contains no evidence demonstrating that the petitioner has any contracts with the U.S. healthcare industry requiring the beneficiary's in-house services as a systems administrator.[2] 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). Moreover, although the petitioner claims on the petition a projected gross annual income of $500,000 for 2005, the record contains no evidence, such as federal income tax returns, that the petitioner generates this level of income. 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 view of the foregoing, the record does not establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the generally described position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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[2] The petitioner's website at: ~~http:www.jeevantechnologies.com~~ lists "health management software" under its products category; the record, however, contains no evidence of any U.S. healthcare clients.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the described duties are the duties of a computer systems administrator, duties that are not associated with a bachelor's degree in a specific discipline. The petitioner has not identified any specific duties that elevate the position to one that would require the education obtained through a four-year university program. The petitioner has not established that a baccalaureate or higher degree or its equivalent is common to the industry in parallel positions among similar organizations or, in the alternative, is so complex or unique that it can be performed only by an individual with a degree in a specific discipline. The petitioner has failed to establish the alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. In response to the director's RFE, the petitioner submitted an approval notice as evidence that it currently employs one H-1B nonimmigrant employee. The record, however, contains no evidence that this individual is employed by the petitioner in the capacity of a computer systems administrator. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not sufficiently described the duties of the proffered position or provided other documentary evidence that would establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*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.

Counsel states, in response to the RFE, that the completion of the petitioner's software development projects requires the hiring of software professionals. The petitioner, however, has not established that the proposed duties exceed in scope, specialization, or complexity those usually performed by systems administrators, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. Further, as indicated earlier in this decision, the petitioner's unsupported claims regarding contracted software development work with the U.S. healthcare industry do not establish a requirement for the level of knowledge requisite for this criterion. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

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

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's

qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). 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). For this additional reason, the petition will not be approved.

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.