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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: WAC 07 076 50515 Office: CALIFORNIA SERVICE CENTER Date: MAY 29 2008

IN RE: Petitioner: [redacted]
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:

[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.

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 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 a specialty occupation is available for the beneficiary, or that a bona fide job offer was available at the time of filing.

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 and the petitioner's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with two briefs from counsel, dated August 8, 2007 and September 6, 2007, respectively, and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

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 a January 11, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

> Plan, develop, test, and document computer programs; evaluate user requests for new or modified programs; formulate plans outlining steps required to develop programs using structured analysis and design; prepare flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers; write manuals and document operating procedures and assist users in solving problems; replace, delete, and modify codes to correct errors; analyze, review, and alter programs to increase operating efficiency and adapt the system to new requirements; oversee the installation of software and provide technical assistance to clients; maintain clients' networks and software builds; coordinate with various locations during transitioning; and oversee network administration and create test scripts and applications to manage and test the various functionalities of builds and network administration.

The record also includes a labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Newark, Delaware 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 a direct employer with total control over its employees, including the ones assigned to work off-site. Counsel also stated that the petitioner always has some employees, including computer analysts, working on-site. In response to the RFE, the petitioner stated, in part, that the beneficiary will work on its in-house projects and that it will file a new LCA and amended petition when it decides to send the beneficiary to a client location.

The director denied the petition on the basis that the petitioner did not submit any contracts with its clients naming the beneficiary to perform duties related to a specialty occupation. The director also found that, as the petitioner had not submitted a comprehensive description of its in-house projects, the exact nature of the proffered position was unclear.

On appeal, counsel states, in part, that the petitioner is a well-established information technology business with more than $5.3 million in gross annual sales in 2006, 46 professional employees, and more than $3.3 million paid in salaries and wages. Counsel also states that the petitioner, which is a bona fide U.S. employer with direct control over its employees, places its employees into on-site and off-site projects. Counsel also states that the petitioner provides full services solutions for specific turnkey project development, and that the petitioner will place the beneficiary at its headquarters until it decides to send the beneficiary to a client location, whereupon a new LCA and amended petition will be filed. As supporting documentation, counsel submits the following: the petitioner's 2006 federal income tax return and quarterly federal tax returns for the first two quarters of 2007; promotion material for the petitioner; copies of approval notices for the petitioner's H-1B employees; an undated "Proposal for a Software Testing Project, Version 1.1, HubConnex"; bank statements and payroll records; a copy of 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); CIS instructions regarding the request for contracts; and an AAO decision in another matter.

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 June 10, 2007 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 properly exercised her discretion to request additional information regarding the beneficiary's ultimate employment, as the petitioner indicated in its January 11, 2007 letter that it provides consulting and systems development and design services to its clients. 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]

The AAO acknowledges counsel's assertion on appeal that the petitioner provides full services solutions for specific turnkey project development, and that the petitioner will place the beneficiary at its headquarters until it decides to send the beneficiary to a client location, whereupon a new LCA and amended petition will be filed. The evidence of record, however, contains only an undated proposal for a software-testing project; it does not contain evidence of specific in-house, turnkey project development projects to which the beneficiary would be assigned. 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, as the record does not contain any dated contracts, the AAO is unable to determine if a valid contract for the beneficiary's services 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 consider facts that come into being only subsequently to the filing of the petition." In view of

---

[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."

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 record does not contain a detailed description of the specific work to be performed by the beneficiary. 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]

In that the record contains insufficient information regarding the beneficiary's actual assigned duties, 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 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 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.

---

[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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Science degree in computer science awarded by an accredited institution of tertiary education in the United States. The evaluation, however, is based upon the beneficiary's formal education and computer training. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. Although the evaluator asserts that Aptech Computer Education has been approved by the All India Council of Technical Education/AICTE, the record contains no evidence that Aptech Computer Education is either recognized or accredited as an institution of higher education in India.[4] *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Thus, the evaluator's conclusion about the beneficiary's technical or vocational training in computer science is not probative. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

[4] It is also noted that Aptech Computer Education does not appear on the Electronic Database for Global Education (EDGE) website at http://aacraoedge.aacraoedge.org as an accredited institution.