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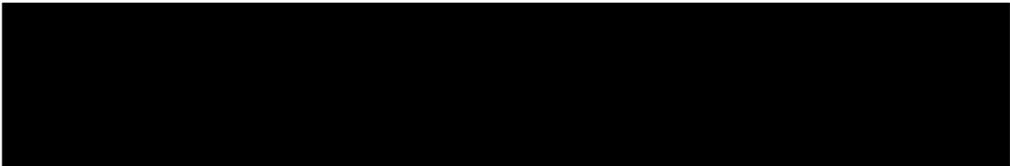
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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Handwritten initials



FILE: SRC 05 167 51726 Office: TEXAS SERVICE CENTER Date: **APR 18 2007**

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 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 and training company that seeks to employ the beneficiary as a 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. On appeal, counsel contends that the director erred in denying the petition.

In making its determination as to whether the beneficiary qualifies to perform the duties of the proposed position, the AAO turns first to the question of the educational background necessary for entry into the profession. The AAO routinely relies upon the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. The AAO agrees with counsel that the duties of the proposed position are similar to those of described by the *Handbook* in its entry for computer systems analysts. In adjudicating this position, the AAO relied upon the 2006-2007 edition of the *Handbook*.

The *Handbook*, at page 117, states the following with regard to the educational qualifications necessary for entry as a systems analyst:

Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). MIS programs usually are part of the business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration (MBA), with a concentration in information systems, as more firms move their business to the Internet.

The AAO notes that counsel reproduces this portion of the *Handbook* in her appellate brief.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The first criterion requires a showing that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary earned his degree abroad, so he does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record contains two evaluations performed by [REDACTED]. The first Globe evaluation, dated May 13, 2005, found the beneficiary's foreign education equivalent to a bachelor's degree and a master's degree in business administration. The second Globe evaluation, dated September 2, 2005, found the beneficiary's foreign education equivalent to a bachelor's degree and a master's degree in business administration, as well as an additional nine credits of undergraduate study in computer science.

These evaluations do not satisfy the second criterion. The *Handbook* does not state that any master's degree in business administration is sufficient preparation for a career in this field. Rather, its discussion of a master's degree in business administration as preparation for a career in this field is limited to a master's degree in business administration, with a concentration in information systems. The evaluations of record do not find the beneficiary's education equivalent to a master's degree in business administration with a concentration in information systems. Nor is the AAO able to make such a finding, as the transcripts indicate that the beneficiary's course of study in his master's degree program included two computer courses.

Counsel's statement on appeal that the beneficiary's foreign education was "determined by a reliable educational and credentials evaluation service to be the equivalent of a Bachelor's Degree in Business Administration with a Specialty in Computer Science and a Master's Degree in Business Administration" is incorrect. This statement by the Globe evaluator was based upon a combination of the beneficiary's education and professional experience. However, in order to qualify under this criterion, an evaluation must be based upon education alone.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as there has been no demonstration that the Globe evaluator possesses the authority to grant college-level credit for training and/or experience in computer science or a related field at an accredited college or university which has a program for granting such credit based upon an individual's training and/or work experience in computer science or a related field.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because, according to

the Globe evaluation, although he does possess the equivalent of a master's degree in business administration, it is not equivalent to a master's degree in business administration with a concentration in information systems.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record does not establish that the beneficiary's previous work experience included the theoretical and practical application of specialty knowledge required by systems analysts, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that he achieved recognition of expertise in a computer-related field as described at section (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of the proposed position, and the petition was properly denied.

Beyond the decision of the director, the AAO finds that the decision may not be approved for another reason, as the record does not establish that the petitioner will employ the beneficiary in a specialty occupation or that the petitioner has submitted an itinerary of employment. 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).

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

The term “employer” is defined at 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.

The evidence of record establishes 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.² See 8 C.F.R. § 214.2(h)(4)(ii).

Although the petitioner will act as the beneficiary's employer, it appears from the evidence of record, as it presently stands, that the petitioner is an employment contractor in that it would place the beneficiary at work locations to perform services established by contractual agreements for third-party organizations. It does not appear as though the beneficiary would perform his duties at the petitioner's place of business.

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 if the beneficiary's duties will be performed in more than one location.

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 it does not appear from the record that the beneficiary would perform his duties directly for the petitioner but would rather perform them for third-party companies, the director in this case should have exercised her discretion to request an itinerary of employment for the period of requested employment.

The record as presently constituted contains no contracts, work orders or statements of work from the entity or entities for whom the beneficiary would provide his services. It does not contain an itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform.

The record also does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A), or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the beneficiary qualifies to perform the duties of the proposed position. Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the

² See also Memorandum from [REDACTED], 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).

Act, 8 U.S.C. § 1184(i)(1) or that the employer has submitted an itinerary of employment. Accordingly, the AAO will not disturb the director's denial of the petition.

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.