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FILE: WAC 07 211 51082 Office: CALIFORNIA SERVICE CENTER Date: JUN 02 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

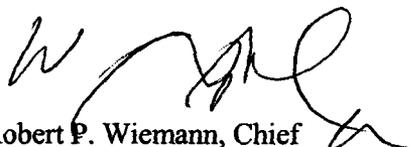
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


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 development and consulting business that seeks to employ the beneficiary as a software consultant. 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 the proffered position is a specialty occupation, that its labor condition application (LCA) is valid, or that the petitioner has complied with the terms and conditions of employment.

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 counsel's brief. 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 July 3, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered software consultant position as follows:

Create and develop computer programs and applications that are custom tailored for each individual client using Oracle and Visual Basic. Design advanced client/server applications utilizing a variety of object oriented software principles and methodologies. Employ techniques such as structured analysis, data modeling, and programming. Plan, develop, and test computer programs.

Design and create new or modified programs based on the clients' current operating procedures and program objectives using C, C++, JAVA, J2EE, .Net, SQL, PL/SQL, Microsoft Windows, MS DOS, UNIX Server, MS SQL Server, MS Access, Oracle, HTML, XML, JSP, Servlets, TSL, UNIX Shell Scripting, Java Script, and VB Script.

Prepare flow charts and diagrams to illustrate the sequence of steps the program must follow and to describe the logical operations involved. Integrate and blend existing hardware, software, and information retrieval systems with the newly provided programming solutions.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in

Beavercreek, Ohio and Dayton, Ohio as a software consultant.

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, the petitioner's president stated that the beneficiary would work in-house as a programmer analyst on projects for the petitioner's clients. As supporting documentation, the petitioner submitted contract agreements, a federal income tax return, quarterly wage reports, bank statements, a lease agreement, and a job offer letter. The petitioner's president further describes the beneficiary's duties and time allocations as follows:

- Develop full system model for clients, 25%;
- Develop architectural model/system architect, 15%;
- Design and develop the projects/products, 50%; and
- Test and debug new applications and enhancements, 10%.

The director denied the petition on the basis that, although the petitioner had submitted contracts between itself and Evoke Technologies, Cincinnati Bell Technology Solutions Inc., Strategic Data Systems, Inc. and Moparty Clinic, LLC, the petitioner provided no end-contracts showing who has control over the beneficiary's work. The director also found that, without such contracts, the petitioner had not demonstrated that the proffered position qualifies as a specialty occupation or that the petitioner had complied with the terms and conditions of the LCA. The director also found the following discrepancies: the contract between the petitioner and the beneficiary reflects the job title "programmer analyst," which is different from the job title "software consultant" reflected on the petition and the LCA; the petitioner's master contracts and/or work orders indicate that the beneficiary will work in Spring, Texas for Moparty Clinic, LLC, a location that is not covered by the LCA; information on the petition reflects the petitioner's gross annual income as \$400,000.00, which is inconsistent with the \$117,059.00 adjusted gross annual income reported on the 2006 federal income tax return of the petitioner's president; and the photographs submitted in response to the RFE reveal different addresses from the petitioner's address reported on the petition.

On appeal, counsel states, in part, that the director misinterpreted the evidence. Counsel states that the petitioner has complete control over its employees, the employees' work and work schedules, and the benefits to be paid. Counsel states further that the beneficiary will work on an in-house project at the petitioner's worksite in Dayton, Ohio, the location reflected on the LCA, and that the job title reflected on the application and LCA, "software consultant" is a generic term that encompasses the job duties of software engineers, programmer analysts, and system analysts. Counsel also states that her office inadvertently reported the petitioner's income as \$400,000.00, when it should have specified that \$400,000.00 was the petitioner's projected income for 2007. Counsel states that the address on the petition is that of the petitioner's permanent

mailing address, while the building number 7887 that appears in the photos corresponds with the location reflected in the “space sharing agreement,” which was submitted in response to the RFE.

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 June 25, 2007 employment agreement between the petitioner and the beneficiary, and in the July 24, 2007 affidavit from the petitioner’s president.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 LCA reflected that the beneficiary would be working at the petitioner’s site in Beavercreek, Ohio and at its client’s site in Dayton, Ohio. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

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). In an undated letter submitted in response to the RFE, the petitioner’s president stated that the beneficiary would be working on the Flex Bank Café application. On appeal, counsel submits a letter dated September 5, 2007, from the president of Strategic Data Systems, Inc., located at 10785 Yankee St., Centerville, Ohio, who states, in part, as follows:

Currently, [the petitioner] is working with us to develop the Flex Bank Café application. [The petitioner] is working at our location to develop this application and it is [the petitioner’s] responsibility to select resources to complete the project on-time.

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).

This information conflicts with counsel's assertion on appeal that the beneficiary would not work at the location of an end-client business, but would work in-house at the petitioner's Dayton, Ohio location reflected in the "space sharing agreement." 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. 582, 591 (BIA 1988). 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). In addition, the president of Strategic Data Systems, the end-user of the beneficiary's services, does not provide a detailed description of the work to be performed by the beneficiary. Thus, 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.

In addition, the AAO observes that the petitioner's description of the beneficiary's work on the Flex Bank Café project and the Moparty Clinical solution provides a generic overview of computer occupations.² The AAO declines to accept a broad overview of an occupation as definitive of a particular position's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. The petitioner and its clients or client's clients utilizing the beneficiary's services must detail the expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and its clients or client's clients 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, however, must rely on a detailed, comprehensive description demonstrating what the petitioner and the ultimate end-user expect from the beneficiary in relation to its business and to third party projects, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. Due to the broad array of vocational and educational tracks as well as simple experience leading to employment in the computer field, the petitioner must demonstrate that

² 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 record 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 specific discipline.

the beneficiary's work includes the theoretical and practical application of specialized knowledge attained only through study at the bachelor's level in a specific discipline. In this matter, the petitioner has failed to provide such evidence.

Further, the AAO notes that the petitioner has provided a statement of work dated June 1, 2007 for the "Flex Bank Café Application" that allocates the scope of work on this project between the petitioner and Evoke Technologies, a company with which the petitioner shares office space. The allocation of the scope of work between the petitioner and a third party contractor further clouds the issue of the beneficiary's actual work on this project. The AAO is unable to determine that the beneficiary in this matter will perform work that requires a bachelor's degree in a specific discipline. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, 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 a job description entailing programmer analyst 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 a descriptive listing of the programmer analyst duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. It is also noted that the petitioner's Internet job posting for multiple "programmer analyst" positions stipulates that a Bachelor of Science degree in computer science, engineering, mathematics, or physics, is preferred, not required. 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.

The advisory opinion from the university associate professor opining that only a person possessing a Bachelor of Science degree in computer science or other relevant fields has the necessary knowledge for a computer consultant job, is noted. The record, however, does not indicate that the writer has adequate knowledge of this matter. The opinion does not include a discussion of the proposed duties and/or the actual work that the beneficiary would perform within the context of this particular petitioner's business and/or the end-user of the beneficiary's services. The writer does not relate any personal observations of those operations or of the work that the beneficiary would perform. The opinion does not relate the conclusion to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position at issue. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinion of the writer is not based on a factual foundation, the AAO does not find it probative in this matter.

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.

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 the petitioner's master contracts and/or work orders indicate that the beneficiary will perform services at Spring, Texas, for Moparty Clinic, LLC, a work location that is not covered by the LCA.

On appeal, counsel asserts that the beneficiary will work on an in-house project at the petitioner's worksite in Dayton, Ohio, the location reflected on the LCA. Counsel submits a letter from the president of Moparty Clinic LLC, who asserts that the petitioner is developing applications/projects for Moparty Clinic LLC at the petitioner's location, and that Moparty Clinic LLC does not require any of the petitioner's employees to work at its locations.

The letter from the president of Moparty Clinic LLC is noted. As discussed above, however, the evidence of record indicates that the beneficiary would be working on-site at Strategic Data Systems, Inc., located in Centerville, Ohio, which is inconsistent with counsel's claim on appeal that the beneficiary would be working in-house at the petitioner's location in Dayton, Ohio. Again, 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. 582, 591 (BIA 1988). In view of the foregoing, the beneficiary's ultimate worksite remains unclear and thus it has not been shown that the work would be covered by the locations on the LCA. For this additional reason, the petition may not be approved.

As discussed above, the director found additional discrepancies, such as the petitioner's claimed gross annual income as \$400,000.00. As the petition will be denied because the position is not a specialty occupation and the petitioner has not demonstrated compliance with the terms and conditions of the LCA, these issues will not be addressed.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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