

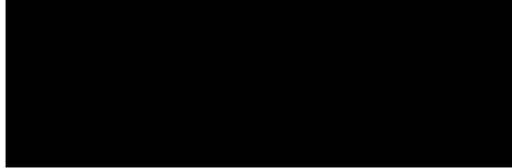
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Services

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FILE: WAC 07 080 52001 Office: CALIFORNIA SERVICE CENTER Date: **MAR 17 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:



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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

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 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 that it had complied with the terms and conditions of employment, as the petitioner has filed an extraordinarily high number of petitions in relation to the number of employees it claims on the instant petition. The director also found that the petitioner had not established that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel states, in part, that the petitioner falls within the definition of a U.S. employer, as demonstrated by the supporting documentation, including a job offer to the beneficiary, contracts with clients, tax documentation, and the beneficiary's W-2 forms and paychecks. Counsel also submits supporting documentation, including a list of all of its H-1 applications, approval notices, withdrawal letters, and tax forms, to demonstrate that the petitioner has honored every employment offer and terms of employment for each of its employees. Counsel states that the proffered programmer analyst position qualifies as a specialty occupation and the beneficiary is qualified to perform the proposed duties as he holds the U.S. equivalent of a bachelor's degree in computer information systems.

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) prior counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with new 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 January 23, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered computer systems analyst position as follows:

- Migration from GENTRAN to GIS, and oversee all aspects of ERP integrate to GIS;
- Design, program, test, and support existing EDI application (coordinate between customer and VAN);

Develop business processes using BPML with error handler routine for email notification;

Develop basic archive process employing the File System Adapter to write files to directory;

Train on GIS administration, mapping, partner envelopes, web services, and business processes for client personnel;

Create WSDL for CIS WebServices to receive Orders and Orders Acknowledgement, and create a Business Process for Get Order Changes by initiating “consume” Oracle WebService;

- Configure to send SOAP message data translation from Oracle SOAP to MDS SOAP format, and develop the On Fault processing to initiate consume Helpdesk WebService and to create trouble ticket; and
- Migrate interfaces for clients from legacy applications to their new global business system, working with programmers to create new extract layouts based on customer EDI requirements, standard version upgrades, and extensive project documentation.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Marlborough, Massachusetts and Irvine, California as a computer systems analyst.

In an RFE to the petitioner, the director requested additional evidence, including an explanation for filing an unusually high number of petitions in proportion to the low number of employees reflected on the petition, 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, or service agreements for the beneficiary.

In response to the RFE, the petitioner's prior counsel stated that the petitioner currently had 36 employees and had 42 employees in 2006, and 66 in 2005. As supporting documentation, she submitted federal income tax returns, W-2 forms, quarterly wage reports, employee dismissal letters, bank statements, corporation and lease documents, photos, and an employment offer.

The director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer, as the petitioner had not provided an end-user client contract or consulting services agreement, as requested in the RFE.

On appeal, counsel states, in part, that the petitioner falls within the definition of a U.S. employer, as demonstrated by the supporting documentation, including a job offer to the beneficiary, contracts with clients, tax documentation, and the beneficiary's W-2 forms and paychecks. Counsel submits supporting documentation, including the petitioner's quarterly tax returns, and business-related information such as a lease, floor plans, and a certificate of incorporation.

The service agreement submitted by counsel on appeal, effective as of October 25, 2004, between the petitioner and ECOM Solutions Inc. (ECOM), is noted. Also noted are the statement of work, signed by the petitioner and ECOM on January 25, 2007, naming the beneficiary as a consultant to perform services at the "Universal/Gateway project at Irvine, CA," and the undated letter containing a description of the proposed duties from Gateway's human resources representative. The petitioner, however, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As discussed above, the director specifically requested in her RFE 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, or service agreements for the beneficiary. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO, however, will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO will not consider this evidence on appeal.

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 job offer letter, dated January 26, 2006, between the beneficiary and the petitioner.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 that the beneficiary would be working at the petitioner's site in Marlborough, Massachusetts and at its client's site in Irvine, California. 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.

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).

When a petitioner is an employment contractor, the petitioner 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 from the entity ultimately employing the alien or using the alien's services. *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 provided a general description of the proposed computer systems analyst duties. The petitioner, however, 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 petitioner must also provide details of the third party's 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 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 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)). Thus, as the nature of the proposed duties are 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)(I).

As the record does not contain a description of duties 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 computer systems 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 computer systems analyst duties the beneficiary would perform under contract with the third party, 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.

The director also found that the petitioner had not established that the beneficiary's education, training, and/or employment experience qualifies him for the proffered position, and that the petitioner had not submitted a credentials evaluation from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). On appeal, counsel states, in part: "The [director] erred in disregarding the bachelor's degree evaluation when [the beneficiary's] academic, training, and professional experience is consistent with the industry standards and the [Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*] for a Computer Scientist and Systems Analyst."

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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.

The record contains the following documentation pertaining to the beneficiary's qualifications:

- A credentials evaluation from Morningside Evaluations and Consulting, dated May 19, 2004, based on the beneficiary's foreign education, training, and work experience, concluding that the beneficiary holds the U.S. equivalent of a Bachelor of Science degree in computer information systems;
- A three-year bachelor's degree in commerce issued by the Indian institution University of Bombay on January 22, 1992;
- A credentials evaluation from the Comparative Education Service at the University of Toronto, dated April 12, 2004, concluding that the beneficiary's foreign bachelor's degree in commerce is the equivalent of a three-year bachelor's degree in commerce from a Canadian university;
- A diploma in "Accounting & Computers," issued on May 22, 1998, from The Toronto School of Business;
- A letter, dated October 30, 1998, corresponding transcript, and diploma in "Applied Information Technology," issued on October 30, 1998, from the Information Technology Institute in Toronto, Canada, for a nine-month program with 1,500 to 1,600 hours of instruction and project work;
- Various Microsoft Certified Professional certificates;
- A letter dated January 10, 2006, from the "Project Lead – IT and Consulting" of Oxford Consulting Group, Inc., stating that the beneficiary has been employed since June 2004 as a senior systems analyst;
- Letters dated March 29, 2004 and April 21, 2004, respectively, from the manager of Sterling Commerce, located in Dublin, Ohio, confirming that the beneficiary has been employed by its service partner agency Armer & Haines Advisory Group as a computer systems analyst since September 2000;
- A letter dated September 6, 2000, from the delivery manager of IBM, located in Ontario, Canada, confirming that the beneficiary worked from May 5, 1997 to August 31, 2000, as an "Advanced Support Representative"; and
- A letter dated December 14, 1996, from the manager of the Indian business Bhatia Industrial Co., certifying that the beneficiary worked in the capacity of a "Network Analyst."

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a computer-related field. The beneficiary holds a foreign Bachelor of Commerce degree, a foreign diploma in "Accounting & Computers," and a foreign diploma in "Applied Information Technology." The beneficiary, however, does not hold a baccalaureate degree from an accredited U.S. college or university in a computer-related field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in a computer-related field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (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 credentials evaluation listed above is based on the beneficiary's foreign education, training, and work experience. Although Professor ██████ the evaluator from Morningside Evaluations and Consulting, concludes that the beneficiary holds the U.S. equivalent of a Bachelor of Science degree in computer information systems, he does not state that he has the authority to grant college-level credit in a computer-related field based on experience; he states that he has the authority to grant college-level credit for training, and/or courses taken at other U.S. or international universities. Moreover, the record contains no corroborating evidence of such credit-granting authority, such as a letter from the university dean or provost. For these reasons, the evaluator's conclusion regarding the equivalency of the beneficiary's academic qualifications, training, and professional experience carries no weight in these proceedings. 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 other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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 occupation²;
- (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 record contains employment letters indicating that the beneficiary has computer-related work experience. The record also contains diplomas and other evidence of computer-related training. The record, however, contains insufficient evidence that this documentation is equivalent to a baccalaureate degree in a computer-related field.

Upon review, the record does not contain evidence that the beneficiary's prior work experience included the theoretical and practical application of specialized knowledge required by the specialty. The record does not contain evidence that the beneficiary's duties for his prior employers involve the theoretical and practical application of a body of highly specialized knowledge relating to the occupation of systems analyst. The record contains a January 10, 2006 letter from Oxford Consulting Group, Inc., stating that the beneficiary has

² *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).

been employed since June 2004 as a senior systems analyst providing consulting services to its clients. The record also contains employment letters, dated March 29, 2004 and April 21, 2004, respectively, from Sterling Commerce indicating that the beneficiary was employed by its service partner agency Armer & Haines Advisory Group as a computer systems analyst since September 2000. The record, however, does not contain letters from the clients of Oxford Consulting Group, Inc. or from a representative of Armer & Haines Advisory Group describing the beneficiary's duties. The letter from IBM in Canada does not contain a description of the beneficiary's duties, and the letter from Bhatia Industrial Co. does not specify the duration of the beneficiary's employment. In view of the foregoing, the petitioner has not established that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge. Further, the employers do not indicate that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. The record also contains no evidence of the recognition of expertise required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Likewise, the training diplomas/certificates submitted are insufficient to establish that the beneficiary's computer-related training is comparable to academic courses taken at a four-year university that are a realistic prerequisite to attaining a bachelor's degree in a specific specialty in computer science or a related field. The record does not contain sufficient information regarding the computer training to evaluate the training as more than vocational coursework that results in technical skill.

The petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation according to the standards of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

The director also found that the petitioner had not established that it had complied with the terms and conditions of employment, as it had filed an extraordinarily high number of petitions in relation to the number of employees it claims on the instant petition, and that, based upon the petitioner's quarterly wage reports, it appears that some of the petitioner's employees have not been employed on a continual basis, pursuant to the hours specified on the corresponding petitions. As the petition will be denied because the position is not a specialty occupation and the beneficiary is not qualified to perform the duties of a specialty occupation, these issues will not be addressed.

The record provides no basis for disturbing the director's decision. 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.