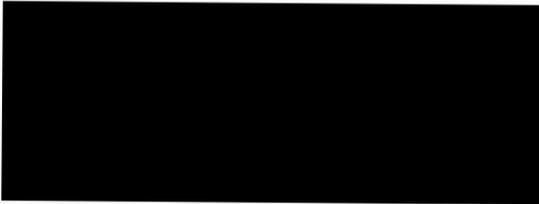


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FILE: WAC 07 163 50823 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2008

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:

SELF-REPRESENTED

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, appearing to read "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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is an information technology services business¹ 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.

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) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's statement and additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

On the I-290B, signed by the petitioner on September 14, 2007, the petitioner asserted that the petitioner provides IT resources/consultants to various clients in the United States. The petitioner provided a contract agreement to show that a specialty occupation is available for the beneficiary.

The petitioner checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to the petitioner on September 9, 2008, informing him that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. However, the petitioner did not respond and no further documents have been received by the AAO to date. The record is considered complete.

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,

¹ The website "CyberDriveIllinois" for the State of Illinois Secretary of State at <http://www.ilsos.gov/corporatellc/CorporateLlcController> reports that the petitioner is not in good standing. In view of the foregoing, it is not clear that the petitioner is an active company.

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 May 23, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered programmer/analyst position as working for the petitioner's clients in the following:

1. Obtain system requirements for the design, development, and implementation of commercial software applications per user requirements (20%);

2. Provide business process reengineering, customize management reports for decision making, develop business process flow charts, analyze, design and code software applications by using C, C++, VB, VB.Net, ADO.Net, ASP.Net, Visual Studio, and IIS on HP Unix and Linux platforms (40%);
3. Analyze, review and alter program to increase operating efficiency and/or adapt to new requirements and provide documentation to describe program development, logic and coding (15%);
4. Plan, develop, test and document computer programs, applying programming techniques (15%); and
5. Optimize system performance and maintain compliance with user requirements (10%).

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Middleton, Wisconsin 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. The director also requested the petitioner's 2006 federal income tax return and state and federal quarterly wage reports for the first quarter in 2007.

In response to the RFE, the petitioner's president stated that the petitioner was an agent performing the function of an employer, with the right to hire, pay, fire, supervise and control the beneficiary's work. The petitioner also stated that the proffered position qualifies as a specialty occupation, as it requires a theoretical and practical application of acquired specialized knowledge. As supporting documentation, the petitioner submitted the following: articles of incorporation; the petitioner's employment agreement with the beneficiary; vendor agreements and purchase orders; invoices and copies of checks received from vendors; bank statements; state and federal quarterly wage reports for the first quarter in 2007 and a federal income tax return for 2006; and a letter from the petitioner's president indicating that the petitioner's office address is: [REDACTED], Schaumburg, Illinois 60193.

The director denied the petition on the basis of her determination that the petitioner had not submitted an itinerary for the beneficiary or any contracts with the petitioner's end-clients for whom the beneficiary would be performing services.

On appeal, the petitioner's president states that the petitioner is an employer with an Internal Revenue Service Tax Identification Number and various clients in the United States. He provides the following supporting documentation: an agreement for consulting services between the petitioner and The Warranty Group, dated September 3, 2007, for the petitioner to provide consulting services to The Warranty Group, as agreed upon in written work specifications; and a project confirmation, signed on September 3, 2007 by the petitioner and

The Warranty Group, for the beneficiary's consulting services, with a start date of November 12, 2007 and an end date of October 1, 2008.

The AAO observes that the documentation submitted on appeal does not comply with the requirement that 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 this matter, the agreement for consulting services between the petitioner and The Warranty Group for the petitioner to provide consulting services to The Warranty Group, and the corresponding project confirmation are both dated September 3, 2007, after the April 2, 2007 filing date of the petition. 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." It is noted that the record contains an agreement for consulting services between the petitioner and Aon Warranty Group, dated January 18, 2005. The record, however, contains no evidence that The Warranty Group and Aon Warranty Group are one and the same.

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 March 29, 2007 employment agreement and May 23, 2007 letter.² See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding. Nevertheless, the petition may not be approved based upon the present record.

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, according to the information in the petitioner's May 23, 2007 letter, the beneficiary will work for the petitioner's clients as a programmer/analyst. Moreover, 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.³ 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.

² 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).

³ 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."

In this matter, the petitioner did not submit the requested evidence in the director's RFE pertaining to an itinerary for the beneficiary and 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)). The record does not contain a master contract between the petitioner and The Warranty Group or any other agreement, statement of work, or work purchase order dated prior to filing the petition on April 2, 2007. Thus, the record does not contain evidence that a specialty occupation position existed when the petition was filed. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I). Moreover, even if the AAO were to accept the petitioner's contracts with The Warranty Group as timely, the submission would still be deficient, as the record does not contain a comprehensive description of the beneficiary's proposed duties from The Warranty Group, the end-client for whom it is asserted that the beneficiary will provide such services. It is noted that the beneficiary's job responsibilities are described only generically in the September 3, 2007 project confirmation. For example, the beneficiary is described as interacting primarily with technical leads, the development team, project managers, and business analysts, and having responsibility for the "day to day development in Web Services area writing," "trouble-shooting" and "testing and repairing existing source code and present[ing] design options for long-term replacement." As the record does not contain a comprehensive description of the proposed duties from the petitioner's end-client, The Warranty Group, the AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, 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. at 165.

Each petitioner 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 third party must also provide details of its 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 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 general descriptions of the beneficiary's duties provided in the petitioner's May 23, 2007 letter and in the September 3, 2007 project confirmation are 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 computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description detailing the specific duties from the entity for whom the beneficiary will perform services, 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 for the particular clients to which assigned, 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. Absent a detailed description of the substantive work that the beneficiary would perform for the particular clients to which assigned, the record fails to establish the level of specialization and complexity required by this criterion.

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In addition, the petitioner has not demonstrated compliance with the terms and conditions of the LCA. The LCA submitted at the time of filing lists the work location as Middleton, Wisconsin, the mailing address of the petitioner. It is noted that the August 5, 2007 letter submitted in response to the director's RFE lists the petitioner's office address as: [REDACTED], Schaumburg, Illinois 60193, and the September 3, 2007 project confirmation indicates that the beneficiary would work onsite at The Warranty Group's address in Chicago, Illinois. As the beneficiary's actual duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the location on the LCA. Furthermore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The record does not contain university transcripts for the beneficiary, or an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation, whether the petitioner complied with the terms and conditions of the LCA, whether the beneficiary is qualified to perform the duties of a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at

it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 27, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.