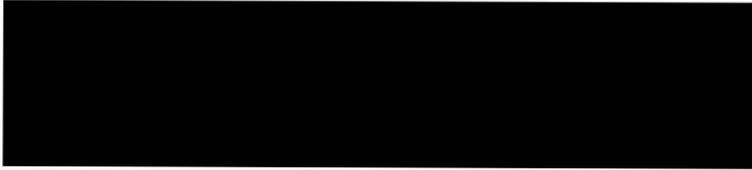


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FILE: WAC 07 131 53431 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2008

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 The director's decision will be withdrawn.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 firm specializing in software development. It seeks to employ the beneficiary as a quality assurance 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 director also determined that, due to its unusual pattern of H-1B petition filings, the petitioner had not established that it would comply with the terms and conditions of employment.

Regarding the director's determination that, due to its unusual pattern of H-1B petition filings, the petitioner had not established that it would comply with the terms and conditions of employment, the AAO finds that the director erred when referencing evidence not in the record of proceeding. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the ... petitioner and is based on derogatory information considered by the Service and of which the ... petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's reference, although not a basis of denial in this matter, will be withdrawn.

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 documentation in support of the appeal. 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 March 30, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered quality assurance analyst position as follows:

- Write, revise, and verify quality standards and test procedures for program design and product evaluation to attain quality of software economically and efficiently;
- Review new or modified programs, including documentation, diagram, and flow chart, to determine if programs will perform according to user requests and conform to guidelines;

- Provide regular ongoing process consulting to project teams including tailoring, dissemination, definition, deviation analysis, and approval;
- Review computer operating log to identify program processing errors;
- Enter instructions into computer to test program for validity of results, accuracy, reliability, and conformance to establishment standards;
- Identify differences between establishment standards and user applications and suggest modifications to conform to standards;
- Monitor program performance after implementation to prevent reoccurrence of program operating problems and ensure efficiency of operation; and
- Write documentation to describe program evaluation, testing, and correction.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Columbus, Ohio as a quality assurance analyst.

In an RFE, the director requested additional information from the petitioner, including a list of the petitioner's clients, quarterly wage reports, federal income tax returns, and evidence pertaining to the beneficiary's educational qualifications and immigration status.

In response to the RFE, the petitioner stated that the petitioner directly controls, manages, and supervises all of its employees, and that the evidence of record firmly establishes that a specialty occupation exists for the beneficiary at the petitioner's headquarters in Columbus, Ohio. As supporting documentation, the petitioner submitted the following: a copy of the beneficiary's post graduate diploma in client/server technology and corresponding transcript from Sudha Info-Tech in India; an employment letter from the beneficiary's foreign employer; the petitioner's federal income tax returns for 2005 and 2006; pay stubs for the beneficiary's husband; quarterly wage reports for the first quarter of 2007; and an unsigned subcontractor agreement and purchase order.

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

On appeal, the petitioner states that the petitioner has complete authority to oversee, hire, and fire all of its employees. The petitioner also states that all of its software development is performed at its home office in Columbus, Ohio, and that the beneficiary will assist the quality assurance team in testing Web-based applications for the petitioner's products, such as Skoolmate, Emergency Vehicle Dispatch, and Tracking System (EVDTS). As supporting documentation, the petitioner submits a description of its products and a description of the beneficiary's work assignment and responsibilities.

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 19, 2007 employment offer/employment agreement and March 30, 2007 letter.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

The petition may not be approved, however, because the director has not determined whether the proffered position is a specialty occupation. In this case, the petitioner asserts that the beneficiary will work in-house assisting the quality assurance team in testing Web-based applications and "working closely with other Testers, Developers, and Program Managers on a daily basis." The petitioner, however, has not demonstrated that it employs a quality assurance team or other testers, developers, and program managers. It is noted that the petitioner's 2005 and 2006 federal income tax returns reflect no salaries or wages paid. Moreover, the petitioner does not provide evidence in support of its claim of five employees on the visa petition that was signed by the petitioner's chief operating officer on March 30, 2007. The petitioner's quarterly wage report for the State of Ohio for the first quarter of 2007 reflects two employees, and its quarterly wage report for the State of California for the first quarter of 2007 reflects zero employees for the first month, one employee for the second month, and zero employees for the third month. 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. at 591. As the petitioner's organizational hierarchy is unclear, the exact nature of the beneficiary's duties associated with the petitioner's in-house projects and the complexity of the proffered position also remain unclear. Thus, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A).

In addition, the petitioner has not demonstrated that the beneficiary is qualified to perform a specialty occupation. The petitioner asserts that the beneficiary is qualified for a specialty occupation position because she has the U.S. equivalent of a Master of Business Administration degree, a foreign post-graduate diploma in client/server technology, and computer-related employment experience. The record, however, does not contain an evaluation of the beneficiary's computer training and work experience 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 in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Nor does the petitioner establish that the beneficiary's training and/or work experience includes the theoretical and practical application of specialized knowledge required by a specialty occupation, that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or degree equivalent in a specialty occupation, or that the beneficiary's "expertise" in a specialty occupation has been recognized, as required in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The director must afford the petitioner reasonable time to provide evidence

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).

pertinent to the issues of whether the proffered position is a specialty occupation and 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 September 14, 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.