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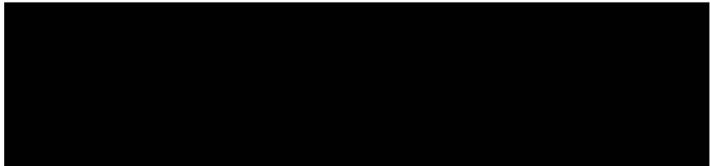
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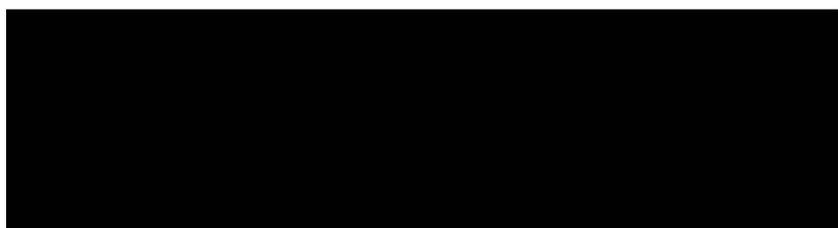


FILE: WAC 07 130 51992 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2008**

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.

for Michael T. Delany
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 applications development and consulting business that seeks to employ the beneficiary as a computer specialist/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 the proffered position is a specialty occupation or that it had complied with the terms and conditions of the labor condition application (LCA).

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 counsel's brief 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 31, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered computer specialist/programmer analyst position as follows:

Develop Java, J2EE, Servlets, EJBs, WebLogic application server middle tiers; Apply knowledge of development skills with tools such as Tomcat, JBoss, JSP, Servlets, XML, Struts, Spring, Hibernate, and Eclipse IDE.

The record also includes a labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Fremont, California as a computer specialist/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.

In response to the RFE, the petitioner's CEO stated, in part, that the petitioner is the beneficiary's employer, with supervisory, hiring, and firing authority. The petitioner's CEO also stated that the beneficiary would initially work in-house at the petitioner's Fremont, California location, and also at the site of its client, Bay Area Tech Workers. He stated further that he was not providing an itinerary, as there were no immediate plans for the beneficiary to work off-site. The following was submitted as supporting documentation: an employment agreement, dated October 3, 2007, between the petitioner and the beneficiary; a Master Services Agreement between the petitioner and Bay Area TechWorkers Inc. (TechWorkers), dated January 25, 2007, for the petitioner to provide programming and/or engineering and other specialized services directly to the Third Party User (TPU) who has

engaged TechWorkers to locate temporary staffing for the TPU; a Statement of Work, signed by the petitioner and TechWorkers on January 26, 2007, for the beneficiary's consulting services in the position of HTML Developer on VMWare's "Milestones" project, to commence on or about February 5, 2007 and terminate on August 5, 2007; and printouts from the petitioner's website.

The director denied the petition on the basis that the petitioner had not sufficiently identified the end-client of the beneficiary's services and thus had not established that the proffered position is a specialty occupation or that the petitioner had complied with the terms and conditions of the LCA.

On appeal, the petitioner's president/CEO asserts that the beneficiary will be rendering services in the field of "Oracle-based software applications" at the petitioner's location in Fremont, California. He also states that it is not certain that the beneficiary will work at another location, and that the master contract with TechWorkers confirms this, as the end-client or third party is not known at this time. He states further that, in view of the foregoing, the petitioner has not violated the terms and conditions of the LCA.

Preliminarily, 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 31, 2007 and July 18, 2007 letters and in its October 3, 2007 employment agreement with the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary.

The petition may not be approved, however, as the evidence of record contains several inconsistencies regarding the location of work, and the petition does not establish that the beneficiary will be employed in a specialty occupation. 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 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 nature of the petitioner's business is software applications development and consulting. In response to the RFE, the petitioner submitted a Master Services Agreement between the petitioner and TechWorkers, dated January 25, 2007, and a Statement of Work, signed by the petitioner and TechWorkers on January 26, 2007, for the beneficiary's consulting services in the position of HTML Developer on VMWare's "Milestones" project, to commence on or about February 5, 2007 and terminate on August 5, 2007. This additional evidence submitted in response to the director's RFE conflicts with the petitioner's assertions on appeal that the beneficiary will work in-house at the petitioner's location in Fremont, California, and that it is not certain that the beneficiary will work at another location. The petitioner's assertions on appeal also conflict with the information provided by the petitioner in its March 31,

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).

2007 letter at the time of filing, indicating that the petitioner was in need of computer specialists and other technically qualified persons to assist itself and its customers, and that the beneficiary's skills would aid the petitioner in providing better service to its clients and in developing its business. The record contains no explanation for these inconsistencies. 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.

It is also noted that although the petitioner asserts on appeal that the beneficiary will render services in the field of "Oracle-based software applications" at the petitioner's location in Fremont, California, neither the petitioner nor counsel has submitted sufficient evidence of specific in-house projects to which the beneficiary will be assigned. Nor do the printouts from the petitioner's website provide any details of the specific projects to which the beneficiary will be assigned. Rather, the petitioner's website contains only general information, such as the petitioner's vision, mission, values, philosophy, and an overview of the petitioner's products and services. Of further note, although information on the petition that was signed by the petitioner's CEO on April 11, 2007 reflects that the petitioner was established in 2004, has five employees and a gross annual income of \$2 million, the record contains insufficient evidence in support of these claims, such as federal income tax returns and quarterly wage reports. 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)).

In view of the foregoing, the beneficiary's ultimate employment is unclear. Due to the inconsistencies and deficiencies discussed above, it is not possible to conclude that the beneficiary's employment will include the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation.

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.

Counsel contends that the job duties are complex and the position is a specialty occupation without reference to the end-user of the beneficiary's services. 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. Thus, without a detailed job description regarding the work to be performed on a specific project, the AAO is unable to determine whether the project requires the theoretical and practical application of a body of highly specialized knowledge.

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). 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)).

In this matter without a comprehensive description of the beneficiary's actual duties from the entities utilizing the beneficiary's services, and without concrete information as to the specific duties that the beneficiary would perform with regard to the petitioner's "Oracle-based software applications" projects, the AAO is precluded from determining that 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)(1).

The record contains no evidence regarding parallel positions in the petitioner's industry or from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a programmer analyst. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Neither counsel nor the petitioner addresses this issue on appeal. The record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical

and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding contains unexplained inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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, without contracts and work orders from the ultimate end-client for whom the beneficiary will provide his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the record does not contain specific details of the project to which the beneficiary will be assigned. As the beneficiary's specific duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the location on the certified LCA. For this additional reason, the petition may not be approved.

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.