

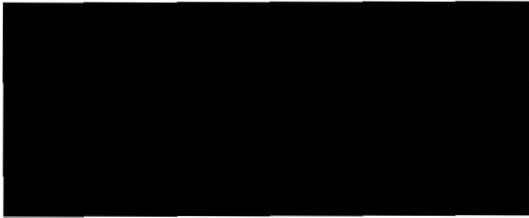
identifying information related to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY



D1

FILE: WAC 07 033 50920 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 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:



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. Kelly*
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 consultancy business that seeks to employ the beneficiary as a software engineer. 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 its labor condition application (LCA) is valid, or that the proffered position is a specialty occupation.

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's response 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 November 3, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered software engineer position as follows:

1. Design, develop, test, analyze and modify computer programs for e-commerce and web development projects using Visual C++, C++, Java, PL/SQL, JSP, JavaScript, JCL, RPG, Visual Age, HTML, XML, Rational Rose, MS Access in Unix, Windows NT and Windows 2000 environment;
2. Use Oracle, DB2, IDMS, VSAM, ASP, and VB Script to develop software applications, and analyze, design, develop, test and document work according to structured methodologies;
3. Perform design, development and technical support of Oracle-based applications and Oracle database administration, performance tuning, and data conversions using TCP/IP, HTTP and SQL;
4. Develop business applications using structural design methodology with data modeling techniques, data normalization, structural flow-charting and prototyping;
5. Prepare technical reports and instructional manuals relative to the establishment and functioning of complete operational systems; and,

6. Use various tools on a variety of platforms for Internet, e-commerce and web applications development.

The record also includes a certified labor condition application (LCA) submitted at the time of filing listing the beneficiary's work location in Omaha, Nebraska as a software engineer.

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. The director also requested information regarding the petitioner's actual business, including the petitioner's business licenses, address, lease, floor plan, and photographs of the premises.

In response to the RFE, counsel stated that the petitioner operates out of the residence of the petitioner's president and is the beneficiary's direct employer, as it has authority to hire, pay, fire, supervise, or otherwise control the beneficiary's work. Counsel also stated that the petitioner's employees "report to Omaha to get oriented with the petitioner's business model and to complete formal employment-related paperwork which is conducted in the spacious home facilities. . . . Since the in-house projects are planned and designed by the [petitioner's president] at his home office and since the projects are managed and hosted electronically and are remotely developed by the employees, this address is used as the beneficiary's place of work because the work actually is 'created and exists' at this location." Counsel stated further that the petitioner is an associate of Zee Tech Solutions, LLC, and that Valley Forge Technology Services and Bank of New York is its client. As supporting documentation, counsel submitted: a consulting agreement, dated January 8, 2007, between Zee Tech Solutions, LLC and the petitioner, for the beneficiary to provide consulting services to Valley Forge Technology Services and Bank of New York "for the creation and support of the 4 database infrastructures (production, contingency, quality assurance and development);" letters of withdrawal and revocation from the petitioner; H and L approval notices for the petitioner; the petitioner's organizational chart and payroll summary; the petitioner's Employer Identification Number (EIN); the petitioner's quarterly federal tax returns; W-2 forms; the petitioner's federal income tax returns for 2004 and 2005; federal tax filing status transcripts; phone bills; a business model describing the petitioner's in-house software development; and evidence of the petitioner's premises.

The director denied the petition on the basis that, although the petitioner had submitted a consulting agreement, dated January 8, 2007, between Zee Tech Solutions, LLC and the petitioner, for the beneficiary to provide consulting services to Zee Tech Solutions, LLC's end-client, Valley Forge Technology Services and Bank of New York, the petitioner had not provided a statement of work from the end-client of the beneficiary's services, or an agreement/contract between Zee Tech Solutions, LLC and the end-client. The director concluded that without a statement of work from Valley Forge Technology Services and Bank of New York, the end-client of the beneficiary's services, and a contract between Zee Tech Solutions, LLC and the end-client, the petitioner had not established that it qualifies as a U.S. employer or agent, that its labor condition application (LCA) is valid, or that the proffered position is a specialty occupation.

On appeal, counsel states, in part, that the petitioner has an employer-employee relationship with the beneficiary, as it has the authority to hire, supervise, control the work of, and fire the beneficiary, as shown in the supporting letter from the petitioner's president and in the agreement with Zee Tech Solutions. Counsel also states that, as stated in response to the director's RFE, the beneficiary will initially report to the

petitioner's business in Omaha "to get oriented with [the] petitioner's business model and to be made familiar with [the] petitioner's in-house software development modules via the web," and "[o]nce the beneficiary is ready, then he will begin working client projects with other employees out of Omaha prior to working on the project in the Agreement with Zee Tech Solutions." Counsel states further that the beneficiary will initially work at the Omaha office for several months before being placed at a new worksite and, therefore, the petitioner's LCA is valid. Counsel also states that the petitioner provided a business model showing that its employees work on both in-house projects and client projects, and that the proffered position meets all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. 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 counsel's April 25, 2007 letter and the consulting agreement, dated January 8, 2007.¹ 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 and withdraws the director's decision to the contrary.

The petition may not be approved, however, as the documentation submitted in response to the RFE 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 petitioner provided a business model showing that its employees work on both in-house projects and client projects. The consulting agreement between the Zee Tech Solutions, LLC and the petitioner, for the beneficiary to provide consulting services to Valley Forge Technology Services and Bank of New York, is dated January 8, 2007, and signed by Zee Tech Solutions, LLC and the petitioner on January 8, 2007 and January 20, 2007, respectively, after the November 9, 2006 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."

Moreover, the petition contains inconsistencies regarding the location of work, and the petition does not establish that the beneficiary will be employed in a specialty occupation. 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 is a software consultancy business. Although counsel asserts that the beneficiary will initially report to the petitioner's office site in Omaha, Nebraska to work on the petitioner's in-house software development projects, as shown on the petitioner's business model, the consulting agreement between the Zee Tech Solutions, LLC and the petitioner, for the beneficiary to provide consulting services to Valley Forge Technology Services and Bank of New York, specifies that the beneficiary "will provide consulting services

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).

with a start date on or about January 24, 2007 at the CLIENT location.” (Emphasis in the original.) Neither counsel nor the petitioner has provided any 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.

In addition, although the record contains the petitioner's business model indicating that the petitioner has the in-house software development projects, “Project KAPS” and “Project MBOS (Medical Back Office System),” the record does not contain a comprehensive description of these projects. The petitioner describes the “Project KAPS” as “a collection of related programs to manage web accessibility and various accounting, employee and client management processes” and the “Project MBOS” as “a prototype system to enable medical offices to manage their patient interaction, record keeping and web accessibility.” The projects are described only generically and neither counsel nor the petitioner specifies to which project the beneficiary will be assigned or provides a detailed description of the beneficiary's duties in relation to that project. 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). 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 is 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.

As discussed above, the record of proceeding contains inconsistent evidence pertaining to the specific work that the beneficiary would perform, and thus the petitioner has not established that the proffered position would require the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. 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 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)).

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 overview of the beneficiary's duties described in counsel's April 25, 2007 letter, in the petitioner's January 8, 2007 consulting agreement with Zee Tech Solutions, LLC, and in the petitioner's in-house software development projects, "Project KAPS" and "Project MBOS," 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 computer-related field.

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, 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).

In that the record contains insufficient and conflicting information regarding the beneficiary's proposed duties, 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 specific information pertaining to the beneficiary's actual work location and job 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 consistent information pertaining to the beneficiary's actual work location and job duties, 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.

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 a statement of work from Valley Forge Technology Services and Bank of New York, the end-client of the beneficiary's services, and a contract between Zee Tech Solutions, LLC and the end-client, the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the beneficiary's specific duties and ultimate worksite are unclear, and thus it has not been shown that the work would be covered by the locations 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Science degree in Computer Science from an accredited institution of higher education in the United States. The evaluation, however, is based upon the beneficiary's formal education and computer training. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Moreover, the record does not contain a copy of the beneficiary's transcripts from Osmania University or any evidence that the National Centre for Information Technology is either recognized or accredited as an institution of higher education in India.² 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 previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

² It is also noted that the National Centre for Information Technology does not appear on the Electronic Database for Global Education (EDGE) website at <http://aacraoedge.aacraoedge.org> as an accredited institution.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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