

Identifying data deleted 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

Di



FILE: WAC 07 139 50133 Office: CALIFORNIA SERVICE CENTER Date: SEP 24 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:

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.

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 consulting, training, and development business that seeks to employ the beneficiary as a 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 the proffered position is a specialty occupation or that it has sufficient work for the requested period of intended employment.

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 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 March 29, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered systems analyst position as follows:

- Identify systems and business requirements for new/revised automated systems;
- Develop specifications and conduct internal and external specification reviews for functionality;
- Develop and write test plan specifications to incorporate all design features for new products, and make enhancements to existing systems due to legal changes or system upgrades;
- Research system problems, and document and communicate findings;
- Evaluate and make recommendations about the feasibility of designing/revising new or existing computer systems;
- Facilitate business meetings to develop or revise business workflow and documents;

- Facilitate timely decision-making by articulating issues, plans, and risks;
- Manage requirement-gathering sessions, and solicit, document, and prioritize requirements;
- Provide linkage and continuity to business units, development, operations, architecture and technical support groups;
- Document project artifacts, such as scope documents, business rules, use cases, process flow diagrams, content analysis, page flow and navigation requirements, technical specifications, performance requirements, vendor contracts, and user guides;
- Understand usability modeling, web design using wireframes and comps, content management and delivery, workflow management, taxonomy management, and website content management governance; and
- Participate in developing unit objectives to align with overall business plan.

The petitioner further described the time allocations of the proposed duties as follows:

- Business system requirement gathering, 15%;
- Business systems requirement analysis, 40%;
- Business system evaluation and design, 15%;
- Coordination with technical and business teams, 10%;
- Functional/system testing, 10%; and
- Documentation, 10%.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Arlington Heights, Illinois as a systems analyst.

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 the petitioner's federal income tax returns and quarterly wage reports.

In response to the RFE, the petitioner stated that the petitioner was a certified partner to SAP with an SAP Services Partner Agreement. The petitioner also stated that it was waiting for the approval of the visa petition before actually hiring the beneficiary. As supporting documentation, the petitioner submitted the following: a list

of the current employment status of the petitioner's employees and related documents; the petitioner's business-related documentation, including a business license, company brochure, and website printouts; the petitioner's SAP Services Partner Agreement, dated May 8, 2007, with SAP America, Inc. (SAP), for the petitioner's employees to demonstrate SAP software products and solutions to potential SAP customers; various consulting services agreements between the petitioner and its clients, including Walgreen Co., MailCode, Inc., and Atos Origin IT Services, Inc., and work orders for employees other than the beneficiary; the petitioner's federal income tax returns for 2004, 2005, and 2006; the petitioner's quarterly federal tax returns; the petitioner's benefit plan for its employees; the petitioner's job offer letter to the beneficiary; the petitioner's job announcements; and the petitioner's W-2 forms and payroll information.

The director denied the petition on the basis of her determination that the petitioner had not submitted any contracts with the petitioner's end-clients for whom the beneficiary would be performing services. The director also determined that, as the petitioner's May 8, 2007 contract agreement with SAP is dated after the April 20, 2007 filing date of the petition, the petitioner had not established eligibility at the time of filing.

On appeal, the petitioner states that the petitioner is the actual employer and that the beneficiary will be employed at the petitioner's business premises in Arlington Heights, Illinois for the requested period of intended employment through 2010.

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 job offer letter.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 nature of the petitioner's business is providing software consulting, training, and development services to its clients. 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**.² 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.

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).

² 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."

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.

The AAO acknowledges the petitioner's assertions that the beneficiary will be employed at the petitioner's business premises in Arlington Heights, Illinois for the requested period of intended employment through 2010, and that, should the beneficiary be assigned to complete a project with another entity, the petitioner would then provide the specific contract. The petitioner, however, does not specify to which specific in-house project the beneficiary would be assigned, and the record contains insufficient evidence of any such project. The petitioner's contract agreements also do not describe any in-house projects to which the beneficiary would be assigned. 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)). Moreover, as discussed by the director in her decision, the petitioner's SAP Services Partner Agreement with SAP is dated May 8, 2007, after the April 20, 2007 filing date of the petition, and thus the petitioner had not established eligibility at the time of filing. 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). 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

In this matter, 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. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The petitioner did not submit the evidence requested by the director 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. The petitioner asserts that the beneficiary will work on in-house projects. The AAO notes, however, that, at the time the petition was filed, the petitioner did not reference any in-house projects. The record contains no evidence of such in-house projects. Rather, the evidence of record establishes that the beneficiary will perform duties at multiple work sites for the petitioner's clients. As the petitioner has not submitted a credible itinerary, it has not established that it had three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. Accordingly, the petitioner has not established that the beneficiary will be employed in a specialty occupation.

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 associated with the petitioner's in-house projects 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. 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)(1).

In that the actual duties of the beneficiary remain unclear, the petitioner has not met 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 systems analyst duties the beneficiary would perform for the particular client to which she is 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 view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

Beyond the decision of the director, 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 Arlington Heights, Illinois, the location of the petitioner. As the beneficiary's actual duties and ultimate worksite are unclear, however, it has not been shown that the work would be covered by the location on the LCA.

The petitioner also has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The evidence of record contains the following documentation related to the beneficiary's qualifications: a U.S. Master of Science degree with a major in International Public Service, conferred on June 9, 2006; a Post Graduate Diploma in Public Relations from Rajendra Prasad Institute of Communication & Management, dated July 30, 2003, at Mumbai, India; the beneficiary's Statement of Marks for Parts I and II of the "B. Com. Three Year Honours Examination"; documents related to the beneficiary's "secondary" education; computer-related diplomas for training at "Aptech" in India; a letter from the beneficiary's foreign employer; and payroll documents from the petitioner. The petitioner indicated that the beneficiary is qualified for the proffered position based upon her U.S. master's degree in public service, her foreign bachelor's degree in commerce, and her U.S. and foreign employment experience. The record, however, does not contain a copy of the beneficiary's foreign bachelor's degree 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). Nor does the record contain 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, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). For these additional reasons, 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).

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.

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.