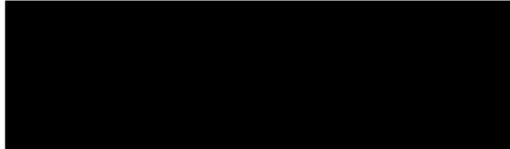




U.S. Citizenship
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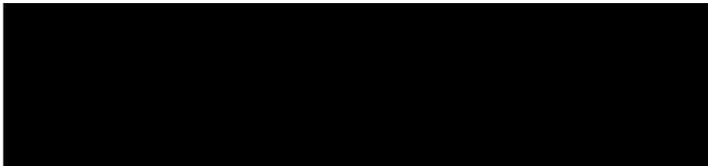


FILE: WAC 05 222 52004 Office: CALIFORNIA SERVICE CENTER Date: DEC 14 2007

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.

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 an information technology development and consulting services business that seeks to employ the beneficiary as a software programmer. 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 because the proffered position is not a specialty occupation and the petitioner does not meet the definition of U.S. employer.

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 director's request; (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.

The director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's U.S. employer and that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third party end client.

Section 214(i)(1) of 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 an August 5, 2005 letter submitted in support of the petition, the petitioner provided the following description of the proffered position of software programmer:

1. Design, code, implement and maintain software applications using C, C++, Java, Visual Basic, HTML, DHTML, Oracle, Developer 2000, etc. under Windows and UNIX operating systems;
2. Convert data from project specifications and statements of problems and procedures to create or modify computer programs;
3. Analyze workflow chart and diagram, applying knowledge of computer capabilities, subject matter, and symbolic logic; confer with supervisor and representatives of departments concerned with program to resolve questions of program intent, data input, output requirements, and inclusion of internal checks and controls;

4. Convert detailed logical flow chart to language processable by computer; enter program codes into computer system; write instructions to guide operating personnel during production runs; analyze, review, and rewrite programs to increase operating efficiency or to adapt program to new requirements;
5. Compile and write documentation of program development and subsequent revisions, assist other workers to use programs; and
6. Analyze project specifications and flow charts; coordinate with team to write, test, and modify computer programs.

The record also includes an LCA listing the beneficiary's work location in [REDACTED], California as a software programmer.

In the RFE, the director requested additional information from the petitioner, including copies of contracts between the petitioner and its clients, an itinerary for the beneficiary, federal income tax returns for the petitioner, and quarterly wage reports.

In response to the RFE, counsel stated that the beneficiary would work on the petitioner's in-house software development projects and on client projects. Counsel also stated that the petitioner had moved its location to the following new location: [REDACTED]. Counsel stated that the petitioner did not have any paid employees prior to September 2005, and that four of the employees listed on the petitioner's employee roster are also its shareholders and do not take a salary.

The director denied the petition finding that there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary will perform the proposed duties. The director also found that the contracts between the petitioner and its clients do not demonstrate that the petitioner exercises control over the beneficiary's working conditions.

On appeal, counsel states, in part, that the director disregarded the evidence, and that the petitioner is a bona fide U.S. employer that exerts full control of the beneficiary. Counsel also states that the petitioner is a consulting company as well as a provider of information technology services, namely that of software product development and related services. Counsel states that the beneficiary will not be assigned to a client's project, but will work on one of the petitioner's internal projects. As supporting documentation, counsel submits a description of the internal project to which the beneficiary will be assigned.

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 oral contract between the beneficiary and the petitioner.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

¹ See also Memorandum from [REDACTED] 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).

Counsel's assertion on appeal that the petitioner's consulting agreements were submitted only to demonstrate the petitioner's viability and to establish that the petitioner is doing active business in the information technology arena, and that the beneficiary would work in-house on an internet project, code named "██████████," for the financial/banking industry, is noted. In counsel's January 6, 2006 response to the director's RFE, however, counsel stated that the contract with ██████████ was submitted as "evidence that the petitioner has immediate job openings for software professionals and has work available at the H-1B level." Counsel also stated that the petitioner would utilize the beneficiary as a part of its in-house product development team and depute her to a client site only if the need arises. Counsel, however, has not submitted sufficient evidence demonstrating that the petitioner employs an in-house product development team or that the in-house "██████████" project requires the theoretical and practical application of a body of highly specialized knowledge. Moreover, although information on the petition that was signed by the petitioner's CEO on August 6, 2005 reflects that the petitioner has four employees, the petitioner's quarterly federal tax return for the fourth quarter of 2005, reflects only one employee. 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 addition, although counsel indicates in a letter dated January 6, 2006 that the petitioner has seven employees, four of whom are also shareholders of the company and do not take a salary, the petitioner's federal income tax returns for 2003 and 2004 reflect only two shareholders. 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 Obaighena*, 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).

The evidence of record indicates that the beneficiary may also provide onsite professional services to the petitioner's clients. 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 his discretion to request additional information regarding the beneficiary's ultimate employment, as counsel's January 6, 2006 letter indicated that the beneficiary might also provide onsite professional services to the petitioner's clients and the record contains evidence of the petitioner's consulting agreements with two end-user clients. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients, and thus can be described as an employment contractor. The evidence of record in this matter indicates that the beneficiary would provide services at the petitioner's location and at the locations of the petitioner's clients.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the

petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

When a petitioner is acting as an employment contractor, the entity ultimately using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In the August 5, 2005 letter attached to the petition, the petitioner provided an overview of the types of duties the beneficiary might be required to provide as a software programmer. It is noted that the evidence of record does not include any work orders or statements of work requesting the beneficiary's services. It is not possible to conclude from the brief description of the duties associated with the beneficiary's ultimate employment 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.

The record of proceeding lacks evidence that establishes the specific work that the beneficiary would perform in-house as part of the "Beta Internet Banking" project and that such work 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.²

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

² 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.

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 "Beta Internet Banking" project, 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)(I).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the "Beta Internet Banking" project and for the petitioner's clients, the petitioner has also failed to satisfy any of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, 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 the two alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform in-house and under contract to third parties, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion; and absent such evidence the petitioner cannot 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. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the Labor Condition Application (LCA) filed by the petitioner is not valid. The LCA lists the work location as Elk Grove, California. The letter of support filed with the petition indicates that the beneficiary will work both on-site at the petitioner's Sacramento office and off-site at the petitioner's clients' premises in Waseca, Minnesota and Mountain View, California. As such, the LCA does not cover all of the geographical areas of proposed employment. 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).

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.