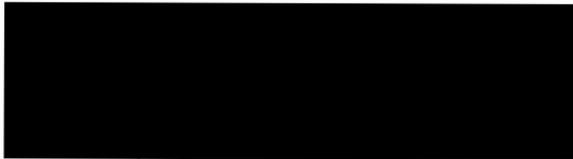


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FILE: WAC 07 167 54079 Office: CALIFORNIA SERVICE CENTER Date: **AUG 05 2008**

IN RE: Petitioner:
Beneficiary:



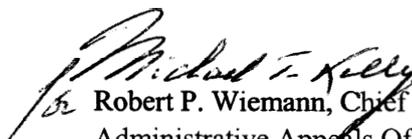
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


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 staffing and placement business that seeks to employ the beneficiary as a computer 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 determining that the petitioner had not established that it qualifies as a U.S. employer, that a credible offer of employment exists, or that it had complied with the terms and conditions of the certified 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 May 1, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered computer programmer position as follows:

Analyze, review, and rewrite programs using workflow chart and diagram; Convert detailed logical flow chart to language processible by computer; Resolve symbolic formulations, prepare flow charts and block diagrams, and encode resultant equations for processing; Develop programs from workflow charts or diagrams; Compile and write documentation of program development and revisions; Prepare or receive detailed workflow chart and diagram to illustrate sequence of steps to describe input, output, and logical operation; Revise or direct revision of existing programs to increase operating efficiency or adapt to new requirements; Determine the feasibility, cost, and time required to improve computer systems and equipment and to detect any failures and defects in the system or equipment; Enter program codes into the computer system; Replace, delete, and modify to correct errors; Write manual for users to describe installation and operating procedures; Assist users to solve operating problems; and, Recreate steps taken by users to locate source problems and rewrite programs to correct errors.

The record also includes a certified LCA submitted at the time of filing listing the beneficiary's work locations in Orange, California and Los Angeles, California as a computer programmer.

In an RFE, the director requested additional information from the petitioner, including an itinerary of definite employment and information on any other services planned for the period of time requested, and copies of any contracts between the petitioner and the beneficiary to establish that the petitioner guarantees the beneficiary's wages and other terms and conditions of employment.

In response to the RFE, the petitioner's president stated, in part, that the proposed duties are so complex as to require the services of an individual with a Bachelor of Science degree in computer science or information systems. He also cited the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the *O*Net*, and the PERM regulation to state that the minimum requirement for a computer programmer position is a bachelor's degree. He stated that the beneficiary previously had been granted H-1B classification for a computer programmer/analyst position with the same duties as the proffered position, and submitted Internet job postings as evidence that a bachelor's degree in a computer-related field is the normal requirement for a computer programmer throughout the United States. The petitioner also submitted the following supporting documentation: the petitioner's 2005 federal income tax return; printouts from the petitioner's website; an employment agreement, dated April 16, 2007, between the petitioner and the beneficiary reflecting that the beneficiary would be placed by the petitioner to work at its client sites located in Orange and Los Angeles Counties; a "Preferred Staffing Plan Agreement", signed by the petitioner and McKenna Long & Aldridge LLP (McKenna) on April 16, 2007 and April 17, 2007, respectively, whereby the petitioner agreed to recruit and select qualified IT Consultants to work at McKenna's office site for as long as their services are needed; printouts from McKenna's website; *O*Net* information; approval notices reflecting the beneficiary's current H-1 status; and earning statements for the beneficiary.

The director denied the petition on the basis that the petitioner had not submitted any specifics of the proffered position or the proposed duties, or provided any contracts from the end-client for whom the beneficiary would provide services. The director concluded that the petitioner had not established that it qualifies as a U.S. employer, that a credible offer of employment exists, or that it had complied with the terms and conditions of the certified labor condition application (LCA).

On appeal, counsel states that, in response to the RFE, the petitioner detailed the position as a specialty occupation and submitted contracts between the petitioner and the beneficiary and between the petitioner and McKenna, thereby demonstrating a credible offer of employment for the position of computer programmer. Counsel also states that in the RFE the proposed duties, which are parallel to the duties of a computer programmer under the *Handbook*, the *O*Net*, and the PERM regulation, were sufficiently detailed and consistent with the business activities of the petitioner and [REDACTED] and that the beneficiary's itinerary and work location at [REDACTED] Los Angeles office were clearly stated, which is consistent with the Los Angeles location reflected on the certified LCA. Counsel states further that the petitioner qualifies as an employer, as it has authority to hire, pay, fire, supervise or otherwise control the work of its employees, has a Federal Employment Identification Number, and remits withholding taxes to the California Employment Development Department and the Internal Revenue Service. As supporting documentation, counsel submits earning statements from the petitioner for the beneficiary's services at McKenna.

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.

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 April 16, 2007 employment agreement with the beneficiary.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 petitioner is a staffing and placement business that locates and places individuals into job assignments for its clients and 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.

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.

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

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."

entry into the occupation in the United States. Although counsel and the petitioner have provided descriptions of the proposed duties, 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). The petitioner did not submit the requested evidence in the director's RFE 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. As discussed above, the record contains a "Preferred Staffing Plan Agreement" signed by the petitioner and [REDACTED] on April 16, 2007 and April 17, 2007, respectively, whereby the petitioner agrees to recruit and select qualified IT Consultants to work at [REDACTED]'s office site for as long as their services are needed. The record, however, does not contain a work order that pertains specifically to the beneficiary. The record also does not contain a comprehensive description of duties from the end-user of the beneficiary's services, in this case, [REDACTED] which specifies and details the project or projects to which the beneficiary will be assigned. The petitioner and its clients or client's clients utilizing the beneficiary's services must detail the expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and its clients or client's clients 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, however, must rely on a detailed, comprehensive description demonstrating what the petitioner and the ultimate end-user expect from the beneficiary in relation to its business and to third party projects, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. Due to the broad array of vocational and educational tracks as well as simple experience leading to employment in the computer field, the petitioner must demonstrate that the beneficiary's work includes the theoretical and practical application of specialized knowledge attained only through study at the bachelor's level in a specific discipline. In this matter, the petitioner has failed to provide such evidence. 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 remains 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. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).³

³ Moreover, 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. As the record does not contain a detailed description of duties from the end-user of the beneficiary's services, in this case, McKenna, the AAO is unable to determine whether the duties of the

In that the record does not provide a sufficient job description from the end user of the beneficiary's services, 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 a job description detailing the specific 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 a descriptive listing of the programmer duties the beneficiary would perform under contract, 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 an itinerary, the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the petitioner did not submit the requested evidence in the director's RFE pertaining to a work order between the petitioner and its client that pertains specifically to the beneficiary, or a comprehensive description of duties from the end-user of the beneficiary's services, McKenna, which specifies and details the project or projects to which the beneficiary will 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. at 165. Without a description of duties and a work order from the end-client specifically naming the beneficiary, the beneficiary's ultimate worksite remains unclear. 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.

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 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.