

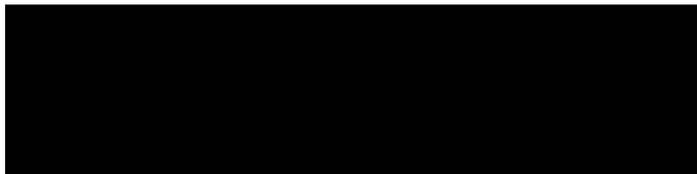
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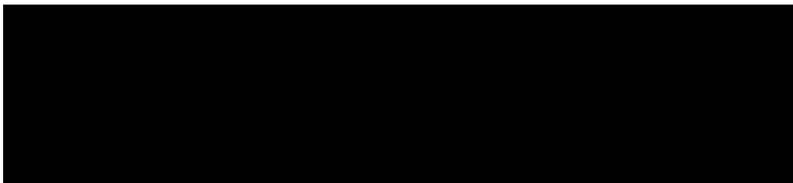
FILE: WAC 07 148 53645 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 2008

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting 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 manufacturing and IT consulting services provider 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 submitted the requested documentation and thus the nature, complexity, and viability of its business were unclear. The director also found that the petitioner had not established that the proffered job offer was authentic, that the petitioner qualifies as a U.S. employer or agent, that the proffered position is a specialty occupation, or that the petitioner had sufficient work available for the beneficiary 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) counsel'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 an April 1, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered systems analyst position as working for the petitioner's client, Goodrich AIP, located in Phoenix, Arizona in the following:

- Responsible for software development cycle, including design, development, and unit testing – 30%;
- Responsible for requirement gathering, development of new reports, writing functional specification and program specification, technical design, coding reviews and drafting detailed unit test plans – 30%;
- Responsible for running various reports and monitoring process scheduler, implementing password controls – 10%;
- Responsible for creating, planning, designing & execution of test scenarios, test cases, test script procedures and debugging – 15%; and

- Responsible for working with the Quality Control team during integration testing and resolving any issues uncovered during the debugging process – 15%.

The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Phoenix, Arizona as a systems 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. The director also requested the petitioner's 2005 and 2006 federal income tax returns.

In response to the RFE, counsel stated that the director's request for additional documentation was overly broad and burdensome and contradicts the guidance in a memorandum issued by Louis D. Crocetti, Associate Commissioner, to all the Service Center Directors (referring to the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995)). Counsel also stated that the petitioner was not required to submit an itinerary without specific reasons for such a request, pursuant to a memorandum issued by Michael Aytes (referring to the 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)). Counsel stated further that the director's RFE violated the memorandum issued by William Yates (referring to the memorandum from William Yates, Associate Director, Operations, U.S. Citizenship and Immigration Services (CIS), *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* (February 16, 2005)). As supporting documentation counsel submitted: a consulting services agreement, dated September 6, 2006, between the petitioner and CPI Aero, for the petitioner to perform services as an independent contractor, pursuant to a work order; a maintenance contract for Directory Distributing Associates (DDA), dated June 29, 2006, which is a proposal for the petitioner to provide maintenance support services to DDA; the petitioner's brochure; the petitioner's job posting; a list of all of the petitioner's nonimmigrant receipt numbers; and copies of the petitioner's 2006 W-2 forms.

The director denied the petition on the basis of her determination that the petitioner declined to submit the employer information requested in the RFE, including a contractual agreement between the petitioner and the beneficiary, the petitioner's federal income tax returns for 2005 and 2006, an itinerary for the beneficiary, and a consulting agreement between itself and Goodrich, AIP, for whom the beneficiary would be performing services. The director concluded that the nature, complexity, and viability of the petitioner's business are unclear, that the petitioner had not established that the proffered job offer was authentic, that the petitioner qualifies as a U.S. employer or agent, that the proffered position is a specialty occupation, or that the petitioner had sufficient work available for the beneficiary for the requested period of intended employment.

On appeal, counsel asserts that the petitioner is a bona fide business entity that has met the requirements under the regulations for H-1B classification for the beneficiary. Counsel also asserts that much of what the director requested in the RFE was not required information under the immigration statutes and regulations, and cites to the three CIS memoranda discussed above. As supporting documentation, counsel submits: copies of previously submitted documentation; a copy of the petitioner's most recent federal income tax return, for

calendar year 2005 or tax year beginning October 1, 2005 and ending September 30, 2006, reflecting \$6,272,490.00 in gross receipts or sales, \$2,859,895.00 in compensation of officers, and \$5,880,044.00 in salaries and wages; an employment offer, dated September 15, 2006, addressed to the beneficiary from the petitioner; a contract between the petitioner and Goodrich Corporation (Goodrich (AIP)), dated January 10, 2007, for the petitioner to provide professional services for various projects to work on-site and offshore on INFOR XA (MAPICS XA) Support projects, in accordance with a statement of work for each assignment; and copies of the petitioner's web pages.

Preliminarily, the AAO also 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 September 15, 2006 employment offer and the January 10, 2007 contract.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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, according to the information in the petitioner's April 1, 2007 letter, the beneficiary will work for the petitioner's clients as a systems analyst. 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.

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 January 10, 2007 contract submitted on appeal, between the petitioner and Goodrich (AIP), for the petitioner to provide professional services for various projects to work on-site and offshore on INFOR XA (MAPICS XA) Support projects, in accordance with a statement of work for each assignment. Although the petitioner's "vice president and partner strategic relations" stated in an April 1, 2007 letter that the petitioner would assign the beneficiary to work on a project for Goodrich (AIP), the evidence of record does not contain a statement of work or purchase order for the beneficiary. Nor does the record contain a comprehensive description of the proposed duties from the petitioner's end-client, Goodrich

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."

(AIP). 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)). 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). 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. Counsel asserts on appeal that the petitioner is a bona fide business entity that has met the requirements under the regulations for H-1B classification for the beneficiary. Again, the record does not contain a statement of work or purchase order for the beneficiary or a comprehensive description of the proposed duties from Goodrich (AIP), the end-client for whom it is asserted that the beneficiary will provide such services. 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 project with the petitioner's client, Goodrich (AIP), 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)(I).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet 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 clients to which 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 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 Management Information Systems from an accredited U.S. college or university. The evaluator states that he bases his conclusion on copies of the original documents provided by the beneficiary. The evaluator, however, does not specify what original documents were provided to him. It is noted that, although the record contains copies of the beneficiary's Bachelor of Science degree in Management Information Systems from the National University of Ireland, and two examination judgments, the record does not contain a copy of the beneficiary's transcripts. 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).

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.