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FILE: WAC 07 148 52402 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 200**

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 development and consulting provider that seeks to employ the beneficiary as a programmer 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 demonstrated that the proffered position is a specialty occupation or that a specialty occupation exists for the beneficiary. The director also determined that the petitioner had failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the terms and conditions of employment, and that its labor condition application (LCA) is valid.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on August 31, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal was received by Citizenship and Immigration Services (CIS) on October 5, 2007, or 35 days after the decision was issued. Counsel asserts that the denial was not posted until September 6, 2007, as can be seen on the attached envelope. As a matter of discretion, the applicant's failure to file the appeal within the period allowed will be excused as reasonable and beyond the control of the petitioner. Accordingly, a decision will be made on the merits of the case.

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.

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 April 1, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer analyst position as follows:

- Install, configure and support networks, maintain software and hardware, and monitor networks to ensure network availability to all system users and perform necessary maintenance;
- Evaluate user requirements, procedures, and problems to automate processing or to improve existing computer networks for the petitioner's customers;

- Confer with the petitioner's customers' technical and management personnel to analyze current operational procedures and identify problems;
- Perform maintenance support for computerized maintenance management systems, write detailed descriptions of user needs, program functions and steps required to develop or modify computer systems, and review computer system capabilities and limitations to determine if requested program or program change is possible within existing system;
- Specify in detail the logical and mathematical operations to be performed, and prepare technical manuals for use by others;
- Identify problems and learn specific output requirements, such as forms of data input, how data is to be summarized, and formats for reports; study existing systems to evaluate effectiveness, and develop new systems to improve production and workflow;
- Install and maintain operating systems, standard and customized application software, and antivirus software utilities on servers and desktop machines;
- Perform administration of Compaq and HP machines, and troubleshoot networks, connectivity, server computers, desktop computers, notebook computers, network printers, proxy servers, and email server;
- Perform administration of Windows 2000/NT servers, Microsoft Exchange server and Windows 2000/NT work stations;
- Manage the WAN/LAN infrastructure and maintain connectivity to all sites;
- Mentor team members; design, implement, and maintain networks; troubleshoot network problems; maximize network performance while enhancing data integrity and identifying system improvements; provide onsite and remote support; upgrade, install, and configure systems; and monitor system performance;
- Provide network security; and,
- Provide standards for hardware and software, network maintenance performance tuning, system administration, security, network, and server troubleshooting, problem solving, active directory design, and DNS expertise.

The record also includes a certified LCA submitted at the time of filing, listing the beneficiary's work location in Cincinnati, Ohio as a programmer 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 2006 federal income tax return and state and federal quarterly wage reports for all four quarters in 2006 and the first quarter in 2007, and a payroll summary.

In response to the RFE, the petitioner submitted: a current employment status report; 2006 and 2007 state and federal quarterly wage reports; 2005 and 2006 W-2 forms; the petitioner's 2006 federal income tax return; the petitioner's 2007 Corporation Franchise Tax Report; a Consultant Agreement between the petitioner and Systems Pros (SPI), signed on January 26, 2007, for the petitioner to provide personnel for assignments provided by SPI, and naming [REDACTED] to work at Interdigital in New York; a Vendor Contract, dated January 10, 2006, between the petitioner and Openbox Solutions, Inc., for the petitioner to perform consulting services for Openbox Solutions, Inc. or its clients, and a corresponding work order naming [REDACTED] to work for HP in Houston, Texas; a Consultant Agreement, dated February 15, 2007, between the petitioner and Spearhead Technologies, Inc., for the petitioner to render consulting services on behalf of Spearhead Technologies, Inc. and its clients, and a corresponding work order naming [REDACTED] to work at Long Drugs Store in Walnut Creek, California; a Subcontract, dated January 1, 2007, between the petitioner and h3 Technologies, LLC, for the petitioner to provide services to h3 Technologies, LLC and its customers, and a corresponding work order naming [REDACTED] to work at the Cincinnati Children Hospital; a Service Agreement, dated February 1, 2007, between the petitioner and DCR System House, Inc., for the petitioner to provide personnel services to DCR System House, Inc. and its clients, and corresponding work statements, naming [REDACTED], and to work at the client locations of DCR Systems House, Inc.

The director denied the petition on the basis of her determination that the petitioner had not submitted a contract between itself and the beneficiary describing the employment conditions, an itinerary for the beneficiary, and contracts or purchase orders issued by its end-client for whom the beneficiary would be performing services.

On appeal, counsel states that the petitioner had an oral contract of employment with the beneficiary and thus no employment agreement was previously available. Counsel now submits a written employment contract to show that it is the beneficiary's employer, as it has control over the beneficiary's work. Counsel also submits a contract between the petitioner and WebAreas.com LLC to show that the beneficiary is an employee of the petitioner and assigned to complete the work set out in the service contract. Counsel also states that the duties detailed in the contract between the petitioner and the beneficiary are so specialized and complex as to qualify the proffered position as a specialty occupation. Counsel submits a written explanation from the petitioner concerning a discrepancy between the gross annual income reflected on the petition and the gross receipts of sales reflected on the petitioner's 2006 tax returns. Counsel states further that the petitioner's LCA is valid, as the location of the beneficiary's first project is with WebAreas.com LLC, which is located in Cincinnati, Ohio, the same location listed on the LCA.

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 2, 2007 employment agreement.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications,

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 petitioner "will assign the beneficiary to various client locations in Cincinnati, Ohio." 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 Subcontractor Agreement, dated March 2, 2007, between the petitioner and WebAreas.com LLC, located at 149 West Herrick, Suite 2B, Wellington, Ohio 44090, for the petitioner to provide consultation and technical support services related to software consulting services to WebAreas.com LLC and/or the clients of WebAreas.com LLC, and the corresponding Statement of Work, dated March 2, 2007, executed by the petitioner and WebAreas.com LLC, naming the beneficiary to perform system/network administration services. The Statement of Work, however, does not specify the location of the beneficiary's assignment or indicate whether the beneficiary is assigned to WebAreas.com LLC or to one of its clients. Moreover, although the Statement of Work specifies that the beneficiary will perform system/network administration services, the record does not contain a comprehensive description of the proposed duties from the end-client for whom the beneficiary will provide such services. 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 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). Of further note, although information on the petition that was signed by the petitioner's president on April 1, 2007 reflects that the petitioner was established in 2004, has seven employees and a gross annual income of more than \$1 million, the petitioner's quarterly federal tax return for the second quarter of 2007 reflects only four employees, and the petitioner's 2006 federal income tax return reflects \$768,342.00 in gross receipts or sales. The petitioner's assertion on appeal that the \$1 million gross annual income amount was an approximation is noted. It is incumbent upon the petitioner, however, to resolve

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."

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. 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). On appeal, counsel submits a contract and corresponding work statement between the petitioner and WebAreas.com LLC to show that the beneficiary is assigned to complete the work set out in the service contract. As discussed above, the work statement does not specify the location of the beneficiary's assignment or indicate whether the beneficiary is assigned to WebAreas.com LLC or to one of its clients. Nor does the record contain a comprehensive description of the proposed duties from the end-client for whom 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 WebAreas.com LLC 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 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 programmer analyst duties the beneficiary would perform for the particular client to which he 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).

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 contracts and work orders from the ultimate end-client for whom the beneficiary will provide his services, the name and location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated that its LCA is valid. As discussed above, the record does not contain specific details of the beneficiary's work with WebAreas.com LLC. As the beneficiary's specific duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the location 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 demonstrated that the beneficiary is qualified to perform a specialty occupation that requires a bachelor's degree in a computer-related field. The credentials evaluation is based on both the beneficiary's academic background and work experience. The record, however, does not contain evidence that the evaluators are officials who have 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). Thus, the evaluators' conclusion is not supported by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D). An evaluator may evaluate academic credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

Moreover, the evaluation is not signed by the three evaluators who are described on the first page as the committee of academicians formed to evaluate the beneficiary's U.S. educational equivalent. In addition, although the evaluators conclude that the beneficiary's foreign education, training, and professional work experience are the U.S. equivalent of a Bachelor of Science degree in information technology, they have not presented a sufficient factual basis to support their conclusions regarding this equivalency. The evaluation contains only a minimal discussion of the beneficiary's computer-related training and does not contain any discussion of the beneficiary's work experience. Thus, the evaluators' conclusion that the beneficiary's foreign education combined with his training and work experience are the U.S. equivalent of a Bachelor of Science degree in information technology carries no weight in these proceedings. 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 other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). 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.

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