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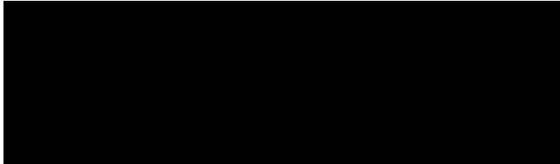
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U.S. Citizenship
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Services

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FILE: WAC 07 148 53042 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2009

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 service center director 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 corporation that provides consulting, technical support, and services to the Information Technology (IT) industry. To employ the beneficiary as a software engineer, the petitioner endeavors to classify him 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 on two independent grounds, namely: (1) that discrepancies in records provided by the petitioner with regard to the wages of its H-1B beneficiaries and an “unusual pattern” of H-1B filings by the petitioner provided reasonable grounds to doubt that the petitioner would comply with the terms and conditions of employment for the beneficiary of the present petition; and (2) that the evidence of record fails to establish a specialty occupation position.

The AAO finds that the petitioner’s submissions on appeal (which, in pertinent part, include copies of corrected wage records, a letter of acknowledgement of error from the firm handling the petitioner’s payroll, and a letter from counsel with explanatory comments on the corrected records) have effectively resolved the discrepancies upon which the first ground of the director’s decision was based. Accordingly, the AAO withdraws the director’s determination that denial of the petition was merited by wage-record discrepancies and the petitioner’s “unusual pattern of H-1B filings.”

The remaining issue is whether the evidence of record demonstrates that the director was correct in determining that the petitioner failed to establish that the position that is the subject of the petition is a specialty occupation. This aspect of the director’s decision focused on variations between the petition as initially filed and the information presented in the petitioner’s response to the service center’s request for additional information (RFE). Therefore, it will be beneficial to first review the evidence about the proffered position submitted prior to the director’s decision.

The offer-of-employment letter from the petitioner to the beneficiary states that the beneficiary will work as “a Software Engineer,” but it is silent as to particular projects to which the beneficiary would be assigned. The Labor Condition Application specifies St. Charles, Illinois as the work location, and the petitioner is located there. The Form I-129 indicates the petitioner’s office address in St. Charles, Illinois, as the address where the beneficiary will work.

In its March 20, 2007 letter submitted with the Form I-129, the petitioner described itself as a firm that “provides consulting, technical support and services to the Information Technology (IT) industry,” and that “provides a full range of information technology services in systems evaluation, design, development and integration, working for both small and Fortune 500 companies.” It is in this context that the letter provides the following description of the proffered position:

As a Software Engineer with our team of computing systems professionals currently working on fine tuning and improving a variety of sophisticated software implementation projects, [the beneficiary] will utilize his training and industry expertise as he performs a broad range of business analysis and engineering duties. He will liaise with business and engineering management to formulate and define system scope and objectives through research and fact-finding to develop and modify information systems.

After analyzing the software and engineering requirements to determine the software which will best serve our needs, he will design a computer system integrating hardware and software which will process the data in the most timely and cost effective manner. This will encompass preparing detailed specifications from which programs will be written and designing, coding, testing, debugging, and documenting those programs. He will generate fundamental reports, create high-level test data and execute test plans. Drawing on his high level of business and software engineering knowledge, he will develop a thorough knowledge of business operations, including a thorough knowledge of business operations, including knowledge of business operations, including knowledge of data structures and usage, as he oversees the installation of system software and its customization to specific requirements.

Throughout this process, [the beneficiary] will interact with client’s management explaining each phase of the system development process, responding to questions, comments and criticisms, and modifying systems to address concerns raised. He will be required to constantly revise and revamp systems as they are being created, not only to meet management concerns, but to respond to unanticipated hardware, software and engineering anomalies. The development of the systems include[s] the following phases:

PHASE	DESCRIPTION
1	Analysis of the existing software, system and user needs
2	Communication and interaction with current systems users
3	Design and implementation of a customized software application
4	Writing and testing of newly designed software applications
5	Imp[lementation of the newly developed application
6	Provide technical support after implementation

DAY TO DAY RESPONSIBILITIES OF [THE BENEFICIARY]

DAILY TASK ACTIVITY	% OF TIME ALLOCATED
Development of Engineering Software Applications	25%
Analysis of Coding Requirements within the Application	20%
Development of System Specifications	15%
Evaluate Operational Systems and Recommend Design Modifications	15%
Implementation, Testing and Documentation of the Software Application	20%
Meeting and Discussions	5%

The AAO finds it noteworthy that the narrative section of the March 20, 2007 letter states that the beneficiary will work not on one project, but on “a variety of sophisticated software engineer projects,” and that throughout his work he will interact with “client’s management,” rather than the petitioner’s.

On June 14, 2007, the service center issued an RFE, which, in part, requested a “complete itinerary” of the beneficiary’s employment, including, but not limited to, the entities for which he would perform work and “copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists [the beneficiary] on the contract and provides a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any related evidence.”

In response to the RFE’s request for the beneficiary’s itinerary and documentary evidence related to the specific end-clients for which he would perform his work, the petitioner provided a letter, dated August 31, 2007, that asserts that “[a]s stated in the original petition, [the beneficiary] will work on an in-house project,” and “that the duration of the project is ongoing and expected to exceed three

years.”¹ The letter consists of a two-page discussion of the requirements of the in-house project, which is described as “Project Portfolio Management [PPM].”

This RFE-response letter describes PPM as follows:

PPM is a multi-user project management system that allows [the petitioner’s] employees to quickly, enter their project information to track time, resource budget and performance management.

To consolidate terminology, processes, and resources towards a common [petitioner] Technology IT Governance viewpoint.

To implement an Enterprise Portfolio Management software project that will provide [the petitioner] with processes and data that enable effective IT governance and business management.

The letter’s “Scope of Work for [the beneficiary]” lists the following duties and time expenditures for the beneficiary’s work on the PPM project:

Job Duties	Percentage of Time
Working on converting business requirements to technical requirements	20%
Documenting technical requirements	10%
Giving Estimates for Programming	5%
Programming and debugging	25%
Creating test cases	5 %
Partnering with testing team and performing test conditions	10%
Preparation of Unit Test cases and Test Plans. Creating test scenarios for a thorough testing of the required Business Processes	10%
Extensional functional Testing of the module post customization	10%

¹ Contrary to the petitioner’s statement here, the AAO’s search of the record reveals no statement that the beneficiary “would work on an in-house project.”

Validating and explaining the Functional design
to the technical team 5%

According to this August 31, 2007 letter, the PPM project “is ongoing and expected to exceed three years.” The letter ascribes three components to the “Future Scope of the Project”:

- Develop project portfolio management
- Develop timekeeping metrics
- Develop project performance metrics

The letter includes a chart briefly summarizing three progressive stages for each of the following nine components of the PPM Project: Scope, Cost, Approach, Consistency, Time, Quality, Risk, People, Communication, Documentation.

There are two prongs to the director’s denial of the petition for failure to establish a specialty occupation position. The AAO will separately address each of them below.

The first prong is the director’s finding that the description of duties that the petitioner presented in response to the service center’s RFE so differed from the duties previously described as to amount to an attempt to materially alter the petition, in violation of precedent decisions cited by the director. The director stated, “In consequence, USCIS [U.S. Citizenship and Immigration Services] will disregard these material changes, and will consider only that evidence that was initially submitted with the petitioner.” On appeal, counsel contends that, contrary to the director’s view, the petitioner’s response to the RFE “did not offer a new petition to the Beneficiary, change job titles, or materially alter the job responsibilities,” but “merely provided a more detailed and specific list of the Beneficiary’s job duties in response to the USCIS request..” Counsel further asserts that the job duties described in the petitioner’s letter filed with the Form I-129 were not to be “the absolute and exhaustive and comprehensive list of every possible task or function to be performed by the Beneficiary.” Counsel also asserts that the duties described in the RFE reply are encompassed within the duty descriptions initially provided. The AAO disagrees with, and accordingly withdraws, this aspect of the director’s decision, but only to the extent the description of duties submitted in the RFE response did not relate to the newly introduced in-house PPM project. The AAO finds that the general duty descriptions submitted in response to the RFE are consistent with and could reasonably be encompassed by the broad duties as described in the petitioner’s March 20, 2007 letter submitted with the Form I-129.

The second prong of the director’s decision on the specialty occupation issue is her finding that the petitioner has not presented sufficient evidence to establish that the beneficiary would be working on an in-house PPM project, as claimed in the RFE reply.

As evident in the following excerpt from her decision, the director found that the record did not provide a sufficient evidentiary basis for the petitioner’s claim of an in-house PPM project which would engage the beneficiary in specialty occupation work for the employment period stated in the petition. In pertinent part, the decision states:

The petitioner has been in operation since 1998. It appears from the record that the petitioner is not a computer programmer or software firm that uses computer programmers, analysts or others to complete their own projects but, rather, subcontracts workers with a variety of computer skills to other companies that need computer programming services. Even though the petitioner claims that the beneficiary will be working on an in-house project, there is no history that the petitioner has its own proprietary software to develop.

Since the record lacks evidence to back up the claim that the petitioner is developing an in-house project, Project Portfolio Management, the petitioner's assertions are not persuasive. In the instant case, the petitioner is obligated to clarify the inconsistent and conflicting evidence by independent and objective evidence. The develop[ment of] a Project Portfolio Management [system] raises serious questions regarding the truth of the facts asserted. Matter of Bueno, 21 I&N Dec. 1029, 1033 (BIA 1997); Matter of Ma, 20 I&N Dec. 394 (BIA 1991). Merely asserting that the beneficiary will be working on an in-house project does not qualify as independent objective evidence. Simply going on record without supporting evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm'r 1972). Furthermore, evidence that is created by the petitioner after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of USCIS' notice.

Upon review of the entire record, the AAO concludes that this finding by the director was correct; that the director's statement of the finding clearly noted the lack of independent and objective to resolve the credibility issue; and that the petitioner has failed to provide such evidence on appeal. Accordingly, the director's decision to deny the petition shall not be disturbed. The appeal will be dismissed, and the petition will be denied.

As originally filed, the petition contained no mention of the PPM project or of any other project for the petitioner, but, instead, focused on the petitioner's clients as the sources of work. The petitioner's March 20, 2007 letter filed with the Form I-129 contains no mention of the PPM project or of the beneficiary being employed to work on any such in-house project. Further, the tenor of the letter is that the beneficiary would be assigned to a variety of projects from clients that would require continual interaction with clients' management, rather than to a single project like the PPM project described in the record, which is generated by the petitioner and for its own employees to help them track "time, resource budget, and performance management." Thus, the RFE reply's interjection of the PPM project was a material departure from the previously provided information about the source of the beneficiary's work. It also effected a material change in the nature of documentary evidence that would substantiate the petitioner's claim that the beneficiary would be performing specialty occupation

work. Instead of itineraries and documentation of contract performance requirements set by clients, substantiation of the petitioner-generated PPM work would consist of internal documents from the petitioner, generated in the ordinary course of business before the petition's filing, that would include information critical to planning a multi-year project requiring a team of workers, which the PPM project is claimed to be, such as the project's timelines and chronological milestones; conceptual outlines and schemata; by-name identification of the project team; by-name assignment of specific aspects of the project; and descriptions of the tasks that specific team members would perform and when they would perform them. Instead of such independent and objective evidence of the PPM project and the beneficiary's role in it, the petitioner's RFE reply only provides generalized descriptions of PPM work that might relate to any such project undertaken by any firm in any industry.²

*In this evidentiary context, the AAO first finds that there was a reasonable basis in the record for the director to doubt the credibility of the petitioner's assertion in the RFE that the petition was filed in order to secure the beneficiary's services on an in-house project for the petitioner. In newly identifying the petitioner itself as the source of the work to be performed, the RFE reply included no documentary evidence demonstrating that, at the time the petition was filed, the referenced PPM project actually existed and had identified the need for the software-engineer position that is the subject of this petition.*³

The AAO also finds that the matters submitted on appeal have not remedied the lack of credibility that the director noted about the PPM program as the basis of the asserted specialty occupation position. Despite the director's decision's clear notice of her finding an absence of independent and objective evidence to support the in-house PPM project as establishing a specialty occupation for the beneficiary, the petitioner still provides no such evidence on appeal. In this regard, the AAO acknowledges but finds no probative value in the 18-page document entitled "Project Portfolio Management" that counsel submits on appeal. The document bears an issue date ("10/05/2007") and an effective date ("10/01/2007"), both of which postdate the April 2, 2007 filing of the petition and even the September 18, 2007 filing of the RFE reply. As such, the document possesses no inherent indication that the plan that it discusses was in existence at the time the petition was filed. In addition, as the document bears none of the three approval signatures for which space is provided on its cover sheet, its authenticity as a document adopted for implementation is in question. Moreover, the role ascribed to the Software

² In this regard, the AAO notes that the record does not support counsel's statement on appeal that the 18-page Project Portfolio Management document presented on appeal had been submitted earlier, as part of the reply to the RFE. The record of proceedings contains only the appeal copy of this document. Further, the issue date stated on the document, "10/05/2007," postdates the filing of the RFE reply, which the record indicates occurred on September 18, 2007.

³ The petitioner's statement in its August 31, 2007 letter that "the duration of the project is ongoing and expected to exceed three years" merits no evidentiary weight, as its truth is not demonstrated by any documentary evidence. 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)).

Engineer in the Project Portfolio Management document is materially inconsistent with the information described in the RFE-reply letter. Specifically, while the RFE-reply letter describes the PPM project as an in-house project to improve the petitioner's internal operations, the Project Portfolio Management document describes the project's Software Engineer's "role" as "serv[ing] as the primary liaison between *the client* and the technical team." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); and unless resolved by independent objective evidence, 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. 582, 591 (BIA 1988).

Accordingly, the AAO finds that the petitioner has not established the credibility of its claim that, at the time the petition was filed, an in-house PPM project existed that required a software engineer's specialty occupation work for the period declared in the petition. The record is devoid of independent documentary evidence establishing that, at the time the petition was filed, the referenced PPM project existed, required the services of the software engineer for the employment period of the petition (10/01/2007 to 9/17/2010), and required that the software engineer be performing specialty occupation work for that period.

For the reasons discussed above, the AAO finds that the director's determination that the petitioner had not provided credible evidence that the PPM project would provide specialty occupation work for the beneficiary was correct.

The petition will be denied and the appeal dismissed for the above stated reasons.

As always, 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.