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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 [REDACTED] with 22 employees. It seeks to employ the beneficiary 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, concluding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) two responses by the petitioner to the director's RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief and supporting evidence. The AAO reviewed the record in its entirety before reaching its decision.

The AAO affirms the director's finding that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring a degree in business administration or a related field under 8 C.F.R. § 214.2(h)(4)(iii)(C).

The petitioner provides web-based VOIP communication solutions to its clients. The petitioner has stated that it requires a Chief Programmer to normalize critical databases, design and implement databases, and maintain and manage databases and servers. The petitioner further stated as follows:

Although [the beneficiary] does not possess an actual baccalaureate degree, he has some college training, extensive training specific to the languages critical to the position, and over 16 years of experience in all of the computer software, languages, applications, and development that will make him a perfect fit for the position of [REDACTED] for [the petitioner].

Other than affidavits from the petitioner and beneficiary as well as a copy of the beneficiary's resume, no other evidence regarding the beneficiary's experience or education was submitted. Further, the petitioner did not include an educational evaluation.

On May 4, 2009, the director issued an RFE requesting documentation that the beneficiary possesses the U.S. equivalent of at least a bachelor's degree or higher along with additional documentation regarding the petitioner.

The petitioner submitted two responses to the RFE, one on [REDACTED] 2009 and one on [REDACTED] 2009. In the first response, the petitioner submitted letters from the beneficiary's previous employers. The petitioner's second RFE response included two affidavits from professors, one from [REDACTED] and one from [REDACTED].

The petition was denied on July 28, 2009. On appeal, counsel argues that he believes the affidavits from [REDACTED] and [REDACTED] were not considered by the director because they were

submitted after the initial RFE response. The AAO notes that even if the director did not consider the affidavits from [REDACTED] and [REDACTED] as counsel claims, this was proper in accordance with 8 C.F.R. § 103.2(b)(11), which states that “[a]ll requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.” (Emphasis added). Because the petitioner did not submit all the documents in support of the RFE response at one time, the director was not authorized to consider the documentation submitted with the second RFE response.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit all of the requested evidence in accordance with 8 C.F.R. § 103.2(b)(11) and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.¹

¹ Nevertheless, even if the director had considered all of the petitioner’s documentation, including the second RFE response, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation because the affidavits from [REDACTED] and [REDACTED] do not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Both [REDACTED] and [REDACTED] are [REDACTED] of [REDACTED]. [REDACTED] states that the beneficiary’s work level is at or above the level of an average bachelor-level graduate. Further, [REDACTED] never states that the beneficiary has the U.S. equivalent of a bachelor’s degree in any field. [REDACTED] certifies that the beneficiary’s training, expertise, and work experience in the field of Computer Science is at least equivalent to a four-year bachelor’s degree. Although [REDACTED] states that the beneficiary has completed two years of computer science from a school in Romania, no supporting documentation from the school was ever provided. 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)).

No documentation was submitted that [REDACTED] and [REDACTED] have the authority to grant credit for training and/or work experience at [REDACTED] or that [REDACTED] has a program for granting such credit based on an individual’s training and/or work experience, which are requirements under the regulation. Therefore, these affidavits do not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Further, neither affidavit establishes that the beneficiary has the equivalent of a U.S. bachelor’s degree in a specific specialty.

Aside from the decisive fact that the evidence of record does not establish [REDACTED] or [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, the content of their evaluations of the beneficiary’s education and experience would merit no weight even if they were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The evaluations of [REDACTED] and [REDACTED] appear to be based primarily on oral interviews with the beneficiary, rather than education documents or other supporting documentation. As these affidavits do not establish a substantive basis for their conclusions, they would have no probative value even if they were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The evidence in the record of proceeding does not satisfy any of the first three criteria above. So, the focus should next be upon the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C), which involves the application of the evidentiary framework specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant

questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record of proceeding lacks evidence that satisfies any criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1) through (D)(4).

It is worth noting that, as discussed previously, the petitioner did not submit a credential evaluation with the petition even though the beneficiary does not have a U.S. degree. The director issued an RFE and gave the petitioner an opportunity to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. However, the evidence of record only includes experience letters from the beneficiary's previous employers and does not include any foreign education documents, even though the beneficiary states that he completed two years of computer science coursework at a foreign university. Moreover, a credential evaluation that accords with the regulatory requirements for content, evaluator competency, and timely submission was not provided even though the beneficiary does not have a U.S. degree.

This brings us to the issue of whether the petitioner submitted sufficient evidence to establish the beneficiary as qualified under the regulation regarding service, i.e. USCIS, determination, at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . *It must be clearly demonstrated* [(1)] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [(3)] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade

journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[Emphasis added.]

For the reasons already outlined earlier in this decision, the submissions from [REDACTED] and [REDACTED] merit no evidentiary weight.

Neither the letters from the beneficiary's former employers nor any other evidence in the record of proceeding contains substantive detail sufficient to meet the mandatory "clearly demonstrated" thresholds of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). In other words, the petitioner has failed to clearly demonstrate, as required by the regulation, "[(1) that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2) that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [(3) that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation [as exemplified in this regulation].]" In fact, the AAO finds that the documentary evidence submitted with regard to the beneficiary's qualifications fails to satisfy even one of the mandatory thresholds. For example, based upon the skeletal nature of the relevant evidence, it is not clearly demonstrated to USCIS how many years of experience the beneficiary has in computer-related occupations and whether this experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in a computer-related field. Likewise, the record lacks the required showing of the beneficiary's expertise in a computer-related field. The evidence does not establish that the beneficiary is qualified to perform the duties of a specialty occupation.

For the reasons related in the preceding discussion, the AAO affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation. 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.