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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services



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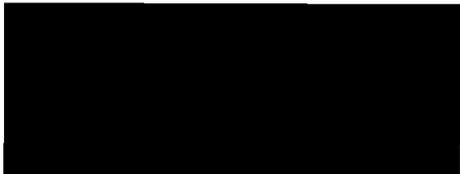
Date: Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: **FEB 07 2012**
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:

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 initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on December 11, 2006. The petitioner indicated that it is a for-profit, software consulting firm with 3 employees and a gross annual income of approximately \$150,000 and a net annual income of \$75,000.

Seeking to employ the beneficiary in what it designates as a senior programmer analyst position, the petitioner filed this H-1B petition in an endeavor to classify her 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 approved the petition on March 12, 2007.

The AAO will first call the petitioner's attention to some aspects of the approved extension petition that are critical factors in the adverse outcome of this appeal. The petition was filed for a position regarding which the petitioner's December 4, 2006 letter of support filed with the petition asserted, in part, "The minimum requirement for this job is a Bachelor's Degree in the Computer Sciences, or Engineering and at least three years of related experience." The record of proceeding, however, contains no evidence that the beneficiary possessed either such a degree or the equivalent in education, training, and/or experience.

Subsequent to the petition's approval, the United States Consulate in Chennai returned the petition to the director for review. The Consulate notified USCIS that during the course of a visa interview, which was held on January 31, 2008, the beneficiary presented information that was not available to USCIS at the time the petition was approved. Specifically, the Consulate indicated that it requested the beneficiary present documentation regarding her qualifications to serve in the proffered position. The beneficiary presented a Bachelor of Commerce and Master of Commerce. The beneficiary therefore needed to provide additional documentation regarding her work experience and/or training to qualify for the position. The officer questioned the beneficiary about her qualifications and the beneficiary decided not to proceed with the visa application. She provided an affidavit withdrawing her application "due to lack of qualifying education and work experience." The beneficiary signed affidavit and swore/affirmed that the content of the affidavit was true and correct. The statement was witnessed by the Vice Consul.

Thereafter, the director issued a NOIR to the petitioner, stating that USCIS had obtained new information indicating that the beneficiary was not eligible for H-1B classification. The NOIR contained a detailed statement regarding the information that USCIS received from the Consulate in Chennai. The petitioner was afforded an opportunity to provide evidence to overcome the stated ground for revocation. The petitioner responded by providing an unsworn letter from the beneficiary, which purports to recant her affidavit. The petitioner, however, provided no

documentation to substantiate that the beneficiary possessed the degree or degree-equivalency credentials that the petitioner asserted as necessary for performance of the proffered position.

After reviewing the petitioner's response to the NOIR and finding the evidence submitted insufficient to refute the findings in the NOIR, the director revoked the approval of the petition on December 8, 2009.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR; (3) the response to the NOIR; (4) the director's revocation letter; (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition. The record does not establish that the beneficiary possesses the requisite education, specialized training and/or progressively responsible experience equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence

presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO finds that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, namely, that the approval of the petition violated the regulatory requirements regarding the beneficiary's qualifications (at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (h)(4)(iii)(D)).

Counsel submitted a timely Form I-290B appeal. Counsel asserts that that the director erred in revoking the petition, stating the following:

The original record in the matter contains all information about her experience and education. The service erred in denying the petition because the preponderance of the evidence (the original record and the beneficiary's affidavit) clearly establishes that she possesses the required experience for the position. Notwithstanding the beneficiary's experience of lack thereof, there is no doubt either with the USCIS of (sic) the Chennai Consulate that she possesses a Masters degree. By virtue of the fact that she possesses an advanced degree in specialty field she is entitled to H1B classification even without the work experience that is in question.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualifications to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (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 are 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.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent the petitioner must satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), by establishing that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require 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;¹
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant 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 AAO will first address counsel's assertion that the director "erred in denying the petition because the preponderance of the evidence (the original record and the beneficiary's affidavit) clearly establishes that she possesses the required experience for the position."

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In the instant case, the proffered position is for a senior programmer analyst. In order for the beneficiary to qualify for a specialty occupation requiring a degree in a specific specialty, the record must demonstrate that she has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in a computer-related specialty.

¹ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

The petitioner provided a letter of support, dated December 4, 2006, with the Form I-129 petition that asserts that the beneficiary is qualified for the proffered position. However, there are inconsistencies in the information provided by the petitioner within the letter, as well as in connection with the record of proceeding. Specifically, the petitioner states that the beneficiary "has already demonstrated to the Service her qualifications for the position of Senior Programming Analyst because she currently holds that position on H1B visa with our company." The petitioner claims that "[s]ince she continues to work for the same company in the same position the need to document her qualifications is superfluous." However, later in the letter of support, the petitioner asserts that the beneficiary "has already demonstrated to the Service her qualifications for the specialty position because she currently holds the same position with one of our competitors." The petitioner states that the beneficiary possesses a Master of Commerce and a Bachelor of Commerce both from Osmania University in India, along with a Post Graduate Diploma in Computer Applications and a Diploma in Internet Applications.² No information regarding the beneficiary's work experience was provided.

The beneficiary submitted a sworn statement to the consular officer at the U.S. Consulate in Chennai, stating that she wished to withdraw her H-1B visa application "due to lack of qualifying education and work experience." The director sent a NOIR to the petitioner and outlined the information provided to USCIS by the Consulate and offered the petitioner an opportunity to submit additional evidence or arguments for consideration.

In response to the NOIR, the petitioner provided a letter from the beneficiary stating that she believes that she is qualified for the proffered position. The beneficiary claims that she mentioned her "work experience and educational details" to the consular officer, who then informed her that the experience was insufficient to qualify and that the beneficiary would "need to have more experience" to qualify for H-1B classification. The beneficiary claims that she felt pressured to withdraw the application.

The AAO notes that the letter that was provided by the beneficiary is not an affidavit as it was not sworn to or affirmed by the beneficiary before an officer authorized to administer oaths or affirmations who has, having confirmed the beneficiary's identity, administered the requisite oath or

² In response to the NOIR, the petitioner provided a letter from the beneficiary in which she claims that she is qualified [for H-1B classification] based upon her "work experience and educational details." However, in the petitioner's letter of support submitted with the Form I-129, the petitioner only describes the beneficiary's academic credentials (bachelor's and master's degrees) and diplomas in computer and internet applications. The petitioner does not assert that the beneficiary's qualifications for the proffered position include prior work experience, nor does the petitioner claim to have submitted documentation regarding the beneficiary's work experience to USCIS. Further, although the NOIR clearly focused on the petitioner's need to provide corroborating documentation, the petitioner's NOIR response includes no such documentation with regard to related work experience and/or training, and no creditable evaluation of any educational equivalency to be attributed to the beneficiary's experience or training.

affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746.

Furthermore, while the letter may provide some insight into the beneficiary's reasons for withdrawing the visa application, the petitioner should note that the letter represents a claim by the beneficiary (that she is qualified for the position), rather than evidence to support that claim. In response to the NOIR, the petitioner did not provide any documentation to support the beneficiary's assertion that she is qualified for H-1B classification.

Upon a complete review of the record of proceeding, the AAO finds that there is a lack of documentary evidence establishing the beneficiary's qualifications for the proffered position. The petitioner failed to submit evidence of the beneficiary's educational credentials, specialized training, and/or progressively responsible experience. Further, the petitioner did not provide evidence to establish that the beneficiary's credentials are equivalent to a U.S. baccalaureate or higher degree in a computer-related specialty. Thus, the record of proceeding does not establish that the beneficiary is qualified for classification as an H-1B nonimmigrant worker in a specialty occupation under the regulations.

The record of proceeding lacks documentary evidence that establishes or corroborates the substantive nature of the beneficiary's academic credentials, specialized training and/or work experience. 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)). Also, it is incumbent upon the petitioner to resolve 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. 582, 591.

In sum, the record does not contain adequate documentation regarding the beneficiary's academic credentials, specialized training and/or progressively responsible experience to establish that she possesses the equivalent of a United States baccalaureate or higher degree in a specific specialty related to the occupation. Moreover, the petitioner did not provide sufficient evidence to overcome the beneficiary's sworn statement withdrawing her application "due to lack of qualifying education and work experience." Therefore, for the reasons discussed above, the record of proceeding does not establish that the beneficiary possesses the equivalent to a bachelor's degree or higher from an accredited institution in the United States in a specific computer-related specialty that would be the minimum required to perform the proffered position.

The AAO will now address counsel's unpersuasive contention that the Master's degree that the petitioner asserts as held by the beneficiary was sufficient to qualify her to serve in what the petitioner described as a senior programmer analyst position that, according to the petitioner's aforementioned letter of support, has as "a minimum requirement" of "a Bachelor's Degree in the Computer Sciences, or Engineering and at least three years of related experience."

As previously noted, the petitioner is a for-profit, software consulting firm. The proffered position is for a senior programmer analyst. In the letter of support submitted with the Form I-129 petition, the petitioner claimed that the "minimum requirement for this job is a Bachelor's Degree in the Computer Sciences, or Engineering and at least three years of experience of related experience."

In the appeal, counsel claims that the director erred in revoking the petition because the beneficiary possesses a Master's degree. Purportedly, the beneficiary possesses a Master's degree in Commerce.

The AAO notes that such an assertion, i.e., the duties of the proffered position of a senior programmer analyst can be performed by a person with a degree in commerce, implies that the proffered position is not, in fact, a specialty occupation.

More specifically, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the acceptance of a degree in the unrelated field of commerce does not establish the position as a specialty occupation. Thus, the beneficiary's advanced degree in commerce does not, in itself, qualify her to serve in a computer programming analyst position in H-1B classification for the petitioner.³

Based upon a complete review of the appeal and the record of proceeding, the petitioner and counsel have failed to overcome the grounds specified in the NOIR for revoking the petition.

The burden of proof in this proceeding 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 revoked.

³ The director indicated that the petition was revoked because the petitioner failed to establish that the beneficiary qualified for H-1B classification. No other reasons were provided by the director. As a result, the AAO will not examine additional issues or deficiencies in the record, including the issue of whether the petitioner established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions.