



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 26 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Software Consulting and Development Firm" with "450+" employees established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Computer Systems Analyst" position, the petitioner seeks 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 visa petition, finding that the petitioner had not established that a *bona fide* job offer exists. On appeal, the petitioner contends that the director's denial of the petition is erroneous and should be reversed.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the basis specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

On the visa petition, the petitioner stated that it would employ the beneficiary as a full-time computer systems analyst at a [REDACTED] location at [REDACTED] in [REDACTED] California from October 1, 2014 to August 6, 2017. The Labor Condition Application (LCA) submitted to support the visa petition is certified for employment at that location as well as two other locations on [REDACTED] in [REDACTED] from August 6, 2014 to August 6, 2017.

The LCA states that the proffered position is a Computer Systems Analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position.

With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor of engineering degree in information technology from [REDACTED] in India. An evaluation in the record states that the beneficiary's degree is equivalent to a U.S. bachelor's degree in information systems engineering.

The petitioner also submitted: (1) a letter, dated March 21, 2014, from [REDACTED] signing as Finance Analyst, Category Supplier Management, Global Procurement Services, [REDACTED]

[REDACTED]; and (2) a letter, dated March 28, 2014, from [REDACTED], signing as the petitioner's "Director and Head – U.S. Immigration & Office Administration."

In her March 21, 2014 letter, [REDACTED] of [REDACTED] stated, *inter alia*:

[REDACTED] has engaged in a Services Agreement with [the petitioner] to provide specialized, technical services to [REDACTED]. As part of the agreement, [the petitioner] intends to draw upon the services of [the beneficiary] to perform work for [REDACTED].

She further stated:

[The petitioner] assures [REDACTED] that it is their intention to employ [the beneficiary] in this capacity in [REDACTED] California through September 2017.

In his March 28, 2014 letter, [REDACTED] asserted that [REDACTED] contracts with the petitioner for the completion of projects, rather than to obtain the services of individual employees. He stated that the beneficiary would work on a project with a team of the petitioner's employees, supervised by the petitioner. He also stated that [REDACTED] issues statements of work (SOWs) in quarterly increments, but that the expiration of those SOWs does not indicate that no more work remains to be done, even on that specific project. He further stated, "Under the Master Services Agreement, it is presently anticipated that [the petitioner] will continue to have ongoing SOWs with [REDACTED] through at least 2017."

On June 20, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, the name of the project the beneficiary is assigned to and the contracted employment dates.

In response, the petitioner submitted (1) portions of an "Offshore Development Agreement" (ODA) dated September 1, 2003; (2) portions of an amendment to the ODA; (3) an SOW for work to be performed between May 5, 2014 and July 18, 2014; and (4) a letter, dated July 23, 2014, from counsel.

The provided portions of the September 1, 2003 ODA contain some of the general terms pursuant to which [REDACTED] might assign work to be developed by the petitioner, in India, which assignments would be evidenced by SOWs. The paragraphs of that contract are numbered from 1.1 to 19.2. Paragraphs from 3.7 to 18.4 were not provided.¹

¹ We note that the ODA, an agreement for "Offshore Development," appears to only refer to services performed in India. While the ODA states at paragraph 2.7 that the petitioner is responsible for "ensuring that [the petitioner's employees have] the legal right to work in the United States, India, or other [REDACTED] offices as

The amendment to the ODA was signed by representatives of the petitioner on November 1, 2007 and by a representative of [REDACTED] on November 12, 2007. It amends various clauses of the ODA. One paragraph of the amendment states:

Section 7.3 of the [ODA] is amended to add a new sentence after the first sentence therein to read as follows: "Further, [petitioner] agrees that such assignment is and shall be perpetual and the assignment shall not lapse under any circumstances including non exercise of such assignment by the assignee for the period of time."²

The amendment further states:

Section 13.1 of the Agreement is amended to delete the second sentence therein and replace it with the following: "This agreement shall be renewed automatically for additional successive one (1) year periods, unless notice of non-renewal is given to the other no later than sixty (60) days prior to the expiration of the then current renewal term."³

That amendment contains tables of monthly rates to be paid to the petitioner's workers utilized by [REDACTED] for the periods November 1, 2007 to July 31, 2008 and August 1, 2008 to July 31, 2009. Those tables include rates to be paid to workers in the United States, which suggests that [REDACTED] may utilize workers who are in the United States, rather than only those in India.⁴ The minimum amount

specified by [REDACTED] the portions of the agreement provided appear to contemplate that the work will exclusively be performed in India. For example, the ODA states the following:

[T]he [petitioner] has represented to [REDACTED] that [the petitioner] has the facilities, personnel, technical capability and expertise in India to form an exclusive offshore development team to design, develop and support hardware and/or software and/or to implement, support and customize third-party application software; and

[REDACTED] wishes to engage [the petitioner] in forming an Indian offshore development team to work exclusively on hardware and/or software development projects for [REDACTED] and/or implement, support and customize third-party application software for [REDACTED].

² Because much of the ODA was not provided, including Section 7.3, the effect of that portion of the amendment is unclear.

³ Because Section 13.1 of the ODA was not provided, the effect of that paragraph is not entirely clear. However, it appears to make the ODA automatically renew and remain effective until actively repudiated.

⁴ We note that the fact that [REDACTED] is agreeing to pay a set amount per worker per month casts doubt on the petitioner's assertion that "[REDACTED] contracts with the petitioner for the completion of projects, rather than to

the petitioner would pay for the use of one of the beneficiary's workers in the United States for one month is \$10,000.

The SOW entitled " [REDACTED] " [REDACTED] ' Although that title suggests that the work would be performed during the fourth quarter of [REDACTED] fiscal year, the "Statement of Work Period" included in it is May 5, 2014 to July 18, 2014. That SOW further states a "Maximum Budget" of \$9,200 and identifies "Supplier Key Personnel" as [REDACTED] ." It states that the "Anticipated Headcount" is "1."

Counsel's July 23, 2014 letter states, *inter alia*:

[The beneficiary] will be providing skilled information technology services to [REDACTED] under the arrangements laid out in the master Development Agreement and in accordance with the scope of work outlined in the applicable Statement of Work (SOW). As seen by the enclosed SOWs⁵ (**Exhibit 4**), [REDACTED] creates SOWs governed by the Master Services Agreement in quarterly increments, but the end date of a given SOW does not imply that there is not further work to be completed (even on the same project). [REDACTED] issuance of SOW's in quarterly increments is solely due to its internal accounting practices, not whether work on a project remains to be completed. That is, even when projects are designed to be multi-year engagements, SOWs are issued in quarterly increments. Under the Master Services Agreement, it is presently anticipated that [the petitioner] will continue to have ongoing SOWs with [REDACTED] through at least 2017.

The director denied the petition on August 2, 2014, finding, as was noted above, that the petitioner had not demonstrated that a reasonable and credible job offer exists in this matter, as the petitioner has not demonstrated that it has employment for the beneficiary to perform throughout the period of requested employment at the location where the petitioner asserts it would employ the beneficiary.

On appeal, the petitioner submitted purchase orders, additional SOWs, a brief, and additional copies of evidence previously provided.

A purchase order provided, [REDACTED] is dated July 28, 2014 for "[REDACTED] " [REDACTED] " It states that the delivery date for those services is October 25, 2014 and that the total to be paid is \$85,000.

obtain the services of individual employees."

⁵ Only one SOW had then been provided.

Another purchase order, [REDACTED], is dated May 28, 2014 for [REDACTED]. It states that the delivery date for those services is July 25, 2014, and that the total to be paid is \$20,000.

A third purchase order, [REDACTED], is dated January 24, 2014 for [REDACTED]. It states that the delivery date for those services is April 25, 2014, and that the total to be paid is \$61,640.

A fourth purchase order, [REDACTED], is dated October 25, 2013 for [REDACTED]. It states that the delivery date for those services is January 25, 2014, and that the total to be paid is \$55,950.

The SOW entitled "[REDACTED]" is for work to be performed from October 27, 2013 to January 25, 2014 at a maximum budget of \$55,950. [REDACTED] is identified on that SOW as "Supplier Key Personnel." It does not state any "Anticipated Headcount."

The SOW entitled "[REDACTED]" is for work to be performed from January 27, 2014 to April 25, 2014 at a maximum budget of \$61,640. [REDACTED] is identified on that SOW as "Supplier Key Personnel." It states "Anticipated Headcount[:] 5."

The SOW entitled "[REDACTED]" is for work to be performed from May 22, 2014 to July 25, 2014 at a maximum budget of \$20,000. [REDACTED] is identified on that SOW as "Supplier Key Personnel." It states "Anticipated Headcount[:] 5."

The SOW entitled "[REDACTED]" is for work to be performed from July 27, 2014 to October 25, 2014 at a maximum budget of \$85,000. It identifies no "Supplier Key Personnel." It states "Anticipated Headcount[:] 2."

On appeal, the petitioner asserts that the evidence demonstrates that the petitioner has sufficient work at which to employ the beneficiary throughout the period of requested employment pursuant to the terms of the visa petition and consistent with the terms of H-1B employment.

II. ANALYSIS

In her March 21, 2014 letter, [REDACTED] of [REDACTED] referred to a "Services Agreement" that would govern the terms of the beneficiary's employment in the United States. The petitioner repeatedly refers to a "Master Services Agreement" governing the work the beneficiary would perform. The SOWs refer to a "Master Agreement." However, the agreement provided by the petitioner is titled "Offshore Development Agreement." The ODA appears to pertain to work performed by the petitioner's employees offshore and exclusively in India. The record does not demonstrate that the

ODA pertains to any work to be performed in the United States. As such, it has not been shown to have any direct relevance to any material issue in this case.

Further, as was noted earlier, the petitioner did not submit complete copies of the ODA and the amendment that it claims are pertinent to the submitted SOWs. Even if they were shown to be relevant, many of the terms of those documents has not been revealed. For both reasons, it cannot be found that the ODA is evidence of the terms of work available for the beneficiary in the United States throughout the requested validity period.

We also note that most of the SOWs are for work which was to end prior to October 1, 2014, which is the first day of the period of employment requested in this case. As such, they are not sufficient evidence of employment available through August 6, 2017, which is the last day of the period of requested employment.⁶

The SOW which by its title appears to be for work during the first quarter of [REDACTED] fiscal year 2015 is for work to be performed from July 27, 2014 to October 25, 2014. As such, it includes work to be performed during only 25 days of the period of employment requested in the instant visa petition. Further, it is for an Anticipated Headcount of only two of the petitioner's "450+" workers. For both reasons, it is not evidence that the petitioner would have sufficient work at which to employ the beneficiary as a full-time computer systems analyst from October 1, 2014 to August 6, 2017, the period of employment requested in the visa petition.

Counsel asserted, in his July 23, 2014 letter, "Even when projects are designed to be multi-year engagements, SOWs are issued in quarterly increments"⁷ and that "Under the Master Services Agreement, it is presently anticipated that [the petitioner] will continue to have ongoing SOWs with [REDACTED] through at least 2017."

Counsel appears to urge that the Master Services Agreement, which may or may not be the ODA that was submitted, and the series of SOWs, considered together, constitute persuasive evidence that the petitioner would have sufficient work for the beneficiary to perform at [REDACTED] location throughout the period of requested employment.

⁶ Further, the SOWs for FY14 evince work for an "Anticipated Headcount" of as few as one and as many as five of the petitioner's workers. Although some of those SOWs identify key personnel, none identifies the beneficiary as such. On the visa petition, the petitioner stated that it has "450+" employees in the United States. Even if those SOWs pertained to the proffered position, those SOWs would not show that the petitioner had work for any appreciable number of its U.S. employees or that it had work specifically available for the beneficiary.

⁷ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaiqbena*, 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).

We observe, first, that even if the ODA is the agreement governing the beneficiary's proposed work for [REDACTED] in [REDACTED], California, which has not been demonstrated, the only evidence that the ODA is still in effect, other than the amendment to its terms, which indicates that it remains in effect until repudiated,⁸ is the statement of [REDACTED] a finance analyst at [REDACTED] that [REDACTED] "has engaged in a Services Agreement with [the petitioner]." Even if construed to mean that the provided ODA, rather than a Master Services Agreement that has not been provided, remains in effect, there is no indication that it will remain in effect through the end of the period of requested employment in 2017.

[REDACTED] letter does state: "[The petitioner] assures [REDACTED] that it is their intention to employ [the beneficiary] in this capacity in [REDACTED] California through September 2017." That is far short of a statement that [REDACTED] agrees to utilize the beneficiary full-time throughout that period, or that it will utilize an appreciable number of the petitioner's workers full-time throughout that period, or even that it will continue its contractual relationship with the petitioner through 2017. We also note that Ms. [REDACTED] does not specify what the agreement is called, nor does she provide the date of the agreement to which she refers. There are simply not enough details in her letter to determine that the ODA provided bears any direct relevance to the work the beneficiary would perform.

[REDACTED] stated, in his March 28, 2014 letter, "Under the Master Services Agreement, it is presently anticipated that [the petitioner] will continue to have ongoing SOWs with [REDACTED] through at least 2017." Counsel echoed that assertion in his July 23, 2014 letter.

Even if this present anticipation, which has not been shown to be likely, is realized, the record contains insufficient evidence that any appreciable number of the petitioner's "450+" employees would work pursuant to those anticipated SOWs or that, more particularly, the beneficiary would work pursuant to them. The record also fails to demonstrate that the petitioner's workers who might be utilized by [REDACTED] would work full-time.

For all of these reasons, the evidence submitted is insufficient to show that the petitioner is able to employ the beneficiary in the capacity specified in the visa petition and the LCA and pursuant to the terms and conditions of H-1B employment. As such, the petitioner has not demonstrated that a reasonable and credible job offer exists in this matter. The appeal will be dismissed, and the petition will be denied.

⁸ Although the record contains no evidence that the ODA has been repudiated by either party, it also contains no evidence sufficient to demonstrate that it has not been repudiated.



III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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