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FILE: WAC 06 262 50504 Office: CALIFORNIA SERVICE CENTER Date: **APR 30 2008**

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.

Robert R. 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 an information technology consulting business that seeks to employ the beneficiary as a computer programmer. 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 established that it qualifies as a U.S. employer, that the proffered position is a specialty occupation, or that its labor condition application (LCA) is valid. The director also found discrepancies in the petitioner's contracts, agreements, and purchase orders, and in the beneficiary's earnings statements.

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) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. 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.

Citizenship and Immigration Services (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 an August 22, 2006 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer position as follows:

Design, develop, test, and implement software products and applications using a variety of programming languages, operating systems, databases, and graphical user interfaces. Develop product/application specification, data validation rules and business logic in accordance with client and business needs and requirements.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Piscataway, New Jersey as a computer programmer.

In an RFE, the director requested additional information from the petitioner, including contracts from authorized officials of the ultimate client companies, statements of work, work orders, and service agreements for the beneficiary.

In response to the RFE, counsel for the petitioner stated that the beneficiary was already working on an active project for the employer. Counsel submitted additional supporting documentation, including a purchase order "for and on behalf of" the petitioner and Info Technologies, Inc., naming the beneficiary to work on the "Quality

Assurance” project for Verizon Wireless, beginning March 6, 2006 and terminating on March 7, 2007

The director denied the petition on the basis that the petitioner had not established that a specialty occupation is available for the beneficiary, as the petitioner did not submit a master consulting agreement or contract with Info Technologies, or a valid contract between Info Technologies and the actual end-client firm, Verizon Wireless. The director also found that the petitioner’s supporting documentation contained numerous discrepancies, including missing signatures on the contracts, agreements signed after the filing date of the petition, agreements for employees other than the beneficiary, agreements that do not identify any consultant, unexplained name variations for the petitioner, and missing work locations and duty descriptions.

On appeal, counsel states, in part, that the petitioner has established that it qualifies as a U.S. employer, as it is the sole decision maker concerning its employees, including hiring, firing, and payment of wages. As supporting documentation, counsel submits a letter, dated June 29, 2007, from the petitioner’s account executive, who states that the discrepancies in its contracts were due to clerical and administrative error, and have been corrected. Counsel also submits the following documentation related to the beneficiary:

- An Employment, Nondisclosure and Noncompetition Agreement, signed by the petitioner and the beneficiary on August 15, 2006;
- A letter dated March 4, 2007, from the staff vice president of Verizon Wireless, regarding the “Master Agreement for IT Consulting Services” between itself and Info Technologies, Inc., naming the beneficiary to work on the “system test for VISION Enterprise Releases” project at Verizon’s facilities located at 30 Independence Blvd., Warren, New Jersey, from March 4, 2007 through September 1, 2008;
- A Supplier Agreement between the petitioner and Info Technologies, Inc., signed by both parties on July 14, 1999, and corresponding Purchase Order, signed on March 1, 2007, naming the beneficiary to work on the “Quality Assurance” project for Verizon Wireless; and
- Earning Statements for the beneficiary.

The assertion from the petitioner’s account executive that the discrepancies in the petitioner’s contracts were due to clerical and administrative error does not qualify as independent and objective evidence. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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)). Furthermore, evidence that the petitioner creates after CIS 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 to be proven and existent at the time of the director's notice.

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.

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 Employment, Nondisclosure and Noncompetition Agreement.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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 the petitioner indicated that the beneficiary would be working at the petitioner's site in Piscataway, New Jersey and at its client's site in Warren, New Jersey. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

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. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The AAO notes the additional evidence submitted by counsel on appeal, namely, the

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

supplier agreement between the petitioner and Info Technologies, Inc., signed by both parties on July 14, 1999, and the corresponding Purchase Order, signed on March 1, 2007, naming the beneficiary to work on the “Quality Assurance” project for Verizon Wireless. Counsel’s submission, however, does not comply with the director’s direction that the petitioner submit a comprehensive description of the beneficiary’s proposed duties from an authorized representative of the ultimate work site. Although the staff vice president of Verizon Wireless specifies the name of the project, she does not include a comprehensive description of the beneficiary’s proposed duties to demonstrate that the proffered position qualifies as a specialty occupation. 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. at 165. The record does not contain a detailed description of the work to be performed by the beneficiary for Verizon Wireless, the end user of the beneficiary’s services. Thus, as the nature of the proposed duties is unclear, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).²

In that the record does not provide a sufficient job description from the end user of the beneficiary’s services, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a job description entailing programmer duties, 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 duties the beneficiary would perform under contract, 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.

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.

² 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 record is insufficient to determine whether the duties of the proffered position would be performed by an individual with a two-year degree or certificate or would only be performed by an individual with a four-year degree in a specific discipline.

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 where the beneficiary will perform his services, the location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the LCA.

Upon review of the record in its entirety, the AAO finds that the LCA filed by the petitioner is valid. The LCA submitted at the time of filing lists the work location as Piscataway (Middlesex County), New Jersey. The record establishes that the beneficiary will work in Warren (Somerset County), New Jersey, which is within the same standard metropolitan statistical area (SMSA) as Piscataway (Middlesex County), New Jersey and is subject to the same prevailing wage for the occupation in both locations. Thus the LCA is valid for the work location. The petition may not be approved, however, as the petitioner has not demonstrated that the position is a specialty occupation.

The director also found that the beneficiary's three earnings statements, which were submitted in response to the director's RFE, contain significant fluctuations in pay and in the number of hours worked. As the petition will be denied because the position is not a specialty occupation, these issues will not be addressed.

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 beneficiary does not appear to be qualified to perform the duties of a specialty occupation. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, 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.