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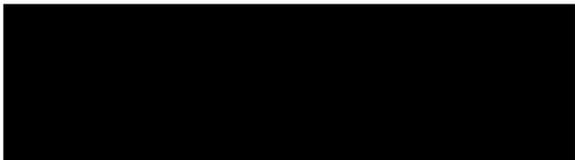
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 255 51090 Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2006

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:

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 P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 software development and consulting firm that seeks to employ the beneficiary as a programmer-analyst. 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 on two grounds, namely (1) that the petitioner had failed to establish that it meets the statutory definition of a “United States employer,” and (2) that the petitioner had failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation.

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) the petitioner’s RFE response and supporting documentation; (4) the director’s denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing 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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

In its September 1, 2004 letter of support, the petitioner stated that the duties of the proposed position would include conducting requirement-gathering sessions to capture business requirements and creating functional specifications for business process mapping into SAP; configuring the SAP system to map business processes with SAP’s content; and creating programming requirements. Specifically, she would spend thirty percent of her time gathering requirements, thirty percent of her time on functional specifications, and forty percent of her time configuring and programming.

In his September 25, 2004 request for additional evidence, the director requested, among other items, an itinerary of employment, which was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary’s services would be performed. If services were to be performed at the petitioner’s worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment—October 1, 2004 through October 1, 2007.

In response, counsel submitted an unsigned copy of a “Consulting Services Agreement,” dated June 1, 2004 between the petitioner and Novellus, Inc;¹ a work order, dated April 1, 2003, between the petitioner and Sony Electronics, Inc. for work to be performed between September 1, 2004 and December 31, 2004; and a letter from Oxford & Associates (“Oxford”), dated October 21, 2004, stating that Oxford had been working with the petitioner since October 2003 and that it intended to continue using the petitioner’s services in order to provide candidates to Oxford’s clients.

The AAO will first consider the issue of whether the petitioner meets the definition of a United States employer. The term “employer” is defined at 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.

¹ The AAO notes that a copy of this agreement had also been submitted at the time of filing.

The evidence of record establishes 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.² See 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

As noted previously, the director asked for the beneficiary's employment itinerary in his request for evidence. The itinerary was to include the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or location where the beneficiary's services would be performed. If services were to be performed at the petitioner's worksite, the petitioner was to indicate as such on the itinerary. The itinerary was to include all service planned for the entire requested period of employment—October 1, 2004 through October 1, 2007.

Pursuant to the Aytes memorandum cited at footnote 2, the director has the discretion to request that an employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request this information. The information submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner.

The "Consulting Services Agreement" between the petitioner and Novellus is of little probative value, as its terms only enter into force upon issuance of a work order. Moreover, this document is unsigned and undated. The "Statement of Work" between the petitioner and Sony does not mention the beneficiary's name, nor does it cover the entire period of requested employment; it covers the period from September 1, 2004 through December 31, 2004. Nor does the letter from Oxford establish an itinerary of employment for the beneficiary; there is no evidence to support the author of the letter's assertion that Oxford currently utilizes the petitioner's services, and intends to use them in the future. Simply 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)). As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.³

Nor do the documents submitted on appeal establish an itinerary of work to be performed. Specifically, counsel has submitted three agreements between the petitioner and Deloitte Consulting LLP. The first document, a letter dated October 12, 2004, is a letter from Deloitte notifying the petitioner that it has been added to Deloitte's "certified list of subcontractors." It does not establish any actual work to be performed. The second document, a letter dated October 28, 2004, notified the petitioner that Deloitte had an immediate need for a consultant for a period of "2/3 years." However, specific dates are not given,

² 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).

³ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

nor is the beneficiary mentioned. The third document is a work order, signed on December 4, 2004. Although the work order does mention the beneficiary by name, it does not discuss her job duties. The AAO also notes that the period of intended employment is January 15, 2005 through December 31, 2005 (the end of the petitioner's requested period of employment is October 1, 2007).

Thus, these documents do not establish an itinerary of employment.

Further, these documents came into existence after the Form I-129 was filed at the service center on September 20, 2004. CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), “[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition.” The record fails to establish that the petitioner had an itinerary of definite employment for the beneficiary at the time the instant petition was filed.

For the foregoing reasons, the petitioner has not demonstrated that, on the date the petition was submitted, it would employ the beneficiary in a specialty occupation for a period of three years.

The AAO next turns to the issue of whether the beneficiary is qualified to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above. The beneficiary did not earn a degree from a United States institution of higher education, so she does not qualify under the first criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or

higher degree required by the specialty occupation from an accredited college or university. Counsel submits an evaluation of education and experience from Universal Evaluations & Consulting, Inc. (UEC), dated October 18, 2004. While the UEC evaluator determined that the combination of the beneficiary's foreign education and experience are equivalent to a "bachelor's degree in arts with a course work in computer information systems," this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). In order to qualify under this criterion, the evaluation must be based solely upon the beneficiary's foreign degree; a credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

As such, the AAO may only consider the portion of this evaluation that pertains to the beneficiary's foreign education. Based upon his evaluation of the beneficiary's foreign education alone, the UEC evaluator determined that the beneficiary's bachelor's degree in English is equivalent to a bachelor's degree in "arts" from a regionally accredited college or university in the United States.

In order to qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary's degree must be in the field required by the specialty. The Department of Labor's *Occupational Outlook Handbook* does not indicate that "arts" is the field of study normally required for entry-level programmer-analyst positions.

Accordingly, the beneficiary is unqualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

The record does not demonstrate, nor has counsel contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is 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 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 beneficiary's combination of education and previous experience do not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Although the UEC evaluation does state that the combination of the beneficiary's education and experience is equivalent to a "bachelor's degree in arts with a course work in computer information systems," there has been no showing that the UEC evaluator has the authority to grant college-level credit for training and/or experience in this field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. As noted previously, a credentials evaluation service may evaluate educational credentials only. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Therefore, the UEC evaluation of education and work experience cannot be accepted for the purpose of establishing the beneficiary's educational credentials.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit 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).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because the UEC evaluation was based upon both education and experience. In order to qualify under this criterion, the UEC evaluation would have to have been based upon foreign educational credentials alone. The AAO may accept the portion of the evaluation based upon the beneficiary's foreign education alone, which indicates that it is equivalent to a bachelor's degree in arts. As discussed previously, this degree is insufficient under the *Handbook* for programmer-analysts.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit 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.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), 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 that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; 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 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 occupation⁴;
- (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.

The evidence of record traces the beneficiary's work history from February 1999 through March 2004. The AAO's next line of inquiry is therefore to determine whether at least six years⁵ of this work experience included the theoretical and practical application of specialized knowledge required by the specialty, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the specialty, and whether the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

As the record only traces the beneficiary's work history from June 2002 through the present, six years of employment cannot be shown. Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Moreover, the AAO notes that, even if the record did demonstrate six years of employment history, the employment affidavits contained in the record do not establish that the beneficiary's previous work experiences included the theoretical and practical application of specialty knowledge required by accountants, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that she achieved recognition of expertise in a computer-related field as described at section (v) of 8 C.F.R. § 214.2(h)(iv)(D)(5).

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

⁵ The AAO will recognize two years of university-level study in general coursework taken while the beneficiary earned her degree.

Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation.

Finally, the AAO turns to the two unpublished cases cited by counsel on appeal: (1) an unpublished AAO decision from 2000, and (2) an unpublished case from the U.S. District Court for the Central District of California from 2001.

While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district court judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as published decisions of the district courts are not binding on the AAO outside of that particular proceeding, an unpublished decision of a district court has even less persuasive value.

Further, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The record does not contain the factual foundation to determine whether the facts of the cited cases are similar to those of the instant proceeding.

The AAO finds neither unpublished case persuasive.

Beyond the decision of the director, the AAO notes that the court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition may not be approved.

The petitioner has not established that it will employ the beneficiary in a specialty occupation, it has not submitted an itinerary of employment establishing it has three years' worth of H-1B-level work for the beneficiary to perform, and it has not established that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition may not be approved.

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.