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U.S. Citizenship
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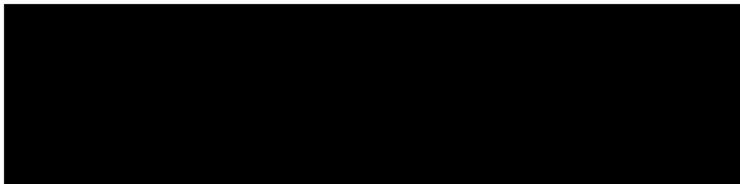
FILE: WAC 06 114 52773 Office: CALIFORNIA SERVICE CENTER Date: SEP 17 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. 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 a software development, consulting and training business¹ that seeks to employ the beneficiary as a computer specialist/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 because the proffered position is not a specialty occupation and the petitioner has not complied with the terms of the labor condition application (LCA).

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 response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's brief. The AAO reviewed the record in its entirety before reaching its decision.

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of 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:

An 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.

¹ A review on August 24, 2007 of the California Business Portal website at: <http://kepler.ss.ca.gov/corpdata> finds the "status" of Wintec Software Corporation, located at [REDACTED] "dissolved."

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) consistently 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary's services as a computer specialist/programmer analyst. Evidence of the beneficiary's duties includes: the petitioner's February 27, 2006 letter in support of the petition and the petitioner's May 19, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

Designing, developing, testing, and implementing computer software applications using state-of-the-art technologies.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work locations in Santa Clara, California and Arlington, Virginia as a computer specialist/programmer analyst.

On March 13, 2006, the director requested additional evidence from the petitioner, including copies of contracts

between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or an itinerary for the beneficiary. The director specifically requested contracts from authorized officials of the client businesses where the beneficiary would ultimately perform the proposed duties.

In a May 19, 2006 response, the petitioner stated that the beneficiary would be working for its client Pingho Associates Corp. (PAC) in McLean, Virginia, at the location of Fannie Mae. The petitioner submitted an agreement, effective November 18, 2005, between PAC, located at [REDACTED] and the petitioner indicating that the petitioner would provide specialized services to PAC's client identified in Appendix A – Fannie Mae – with the “scope of work” described as “Java Development.”

The director denied the petition on June 7, 2006 finding that the petitioner failed to provide a valid client contract between PAC and the actual business where the beneficiary would perform the duties of a programmer analyst. The director also concluded that the petitioner had not established that it had a specialty occupation position available for the beneficiary in the location identified on the LCA.

On appeal, the petitioner asserts that CIS has approved prior petitions in which the contractor remains the employer and the place of employment is listed on the petition. The petitioner also asserts that: the beneficiary has been providing services to Fannie Mae for several years through subcontracting with his previous employer Cybersoftech; the evidence of record shows that the beneficiary has a bona fide job offer; and that PAC and Fannie Mae are in the same metropolitan statistical area as defined by the Department of Labor (DOL). As supporting evidence, the petitioner submits purchase orders and a letter from the manager of Fannie Mae who states that the beneficiary has been working as a software development contractor on Fannie Mae's “Deal Factory” project since March 2001.

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 employment agreement, dated November 10, 2005, between the beneficiary and the petitioner.² 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 his discretion to request additional information regarding the beneficiary's ultimate employment as the LCA submitted showed that the beneficiary would be working in two locations. 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.

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).

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, a 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.

When a petitioner is acting as an employment contractor, the entity ultimately 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. 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 in its February 27, 2006 letter provided a general description of the proposed computer specialist/programmer analyst duties. The petitioner, however, must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.³

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 degree 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). While the petitioner submitted a letter from Fannie Mae, indicating that the beneficiary has been contracted to the company continuously from March 2001 through June 2006, to work on the Deal

³ 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.

Factory project, the letter does not describe the beneficiary's duties for the project. 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)).

The petitioner asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

In this matter, without a comprehensive description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, in this case, Fannie Mae, 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).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner's clients, 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 meaningful job description, 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 detailed listing of the 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.

Finally, the AAO will address the director's conclusion that the petitioner did not establish that it has complied with the terms of the LCA.

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. . . .

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 locations as Santa Clara, California and Arlington, Virginia. The record establishes that the beneficiary will work in Washington, D.C., which is within the same standard metropolitan statistical area (SMSA) as Arlington, Virginia 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 petition will be denied and the appeal dismissed for the above stated reasons. 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.