

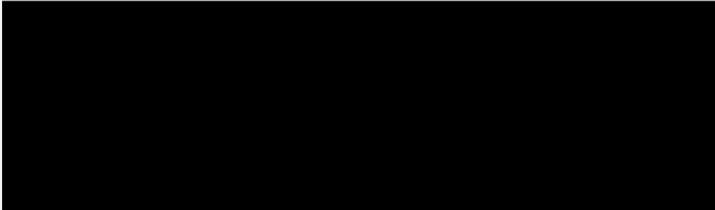


U.S. Citizenship
and Immigration
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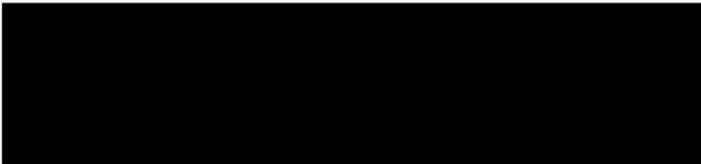


FILE: WAC 07 048 50862 Office: CALIFORNIA SERVICE CENTER Date: **JUL 22 2008**

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 P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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. It seeks to extend the employment of the beneficiary as a software developer. Accordingly, the petitioner 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 record includes: (1) the Form I-129 filed December 5, 2006 and supporting documents; (2) the director's March 2, 2007 request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's June 7, 2007 denial decision; (5) counsel for the petitioner's July 6, 2007 motion to reopen and reconsider; (6) the director's July 24, 2007 dismissal of the motion; and (7) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On June 7, 2007 the director denied the petition. The director determined that the petitioner had not established that it was a United States employer or an agent. The director also determined that the petitioner had not established that the proffered position is a specialty occupation as the record did not include evidence from the end-user of the beneficiary's services describing the proposed duties of the position. The director observed that the petitioner had not completed page 3 of the Form I-129 and had not provided it in response to the director's RFE, thus Citizenship and Immigration Services (CIS) was precluded from making determinations material to the proceedings.

On motion, counsel for the petitioner submits a brief and other documentation including the completed page 3 of the Form I-129. The director dismissed the motion.

On appeal, counsel for the petitioner submits a Form I-290B, brief, and a copy of an AAO non-precedential decision.

Preliminarily the AAO finds that the petitioner's completion of page 3 of the Form I-129 and submission of the page on motion, as well as the petitioner and counsel's explanation for the petitioner's failure to submit the page previously, sufficiently satisfies the filing requirements and is not a basis for denial on appeal.

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)(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

The AAO finds that the petitioner has established that it is the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation. The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor as the petitioner enters into contracts with third-party companies to place individuals the petitioner has hired. 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 in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. The petitioner in this matter has provided a subcontract agreement entered into with Ajilon Consulting (Ajilon) that is dated January 13, 2006. The record also includes a purchase order dated September 22, 2006 identifying the beneficiary as the consultant, indicating the projected end date as December 31, 2006, and the work location as in Baltimore, Maryland at Ajilon's client's site – Verizon – Communication Systems. The record further includes two statements of work for Verizon:

- (1) An unsigned statement of work amending the original statement of work to conclude March 31, 2007 and listing the project activities as:

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).

- Morning status reports are issued by Ajilon project manager
- Client requires no formal project plan
- Requirements and deliverables to be provided on a case-by-case basis by client manager, environment is extreme programming using rapid application development.
- Technology is Microsoft Visual Studio.NET and the .NET Framework, Windows Server 2003, and SQL Server 2000.

- (2) an unsigned statement of work amending the original statement of work to conclude December 31, 2007 that provided a list of the same job activities as described above.

The record also includes a June 18, 2007 letter signed by the district manager, Baltimore district, for Ajilon confirming that Ajilon and the petitioner have an agreement: that the beneficiary is working with Ajilon's client, Verizon as a software developer; that the beneficiary has been on this project since October 2006; that the current end date is December 31, 2007; and a statement of belief that the project will be extended beyond the December 31, 2007 date. The record however, does not include a detailed description of the beneficiary's past or proposed duties from Verizon. Moreover, the broadly stated activities listed by Ajilon, do not provide a sufficient description of the beneficiary's proposed duties for Verizon. The record does not contain a description of the beneficiary's ultimate duties for Verizon sufficient to enable CIS to determine that the proffered position is a specialty occupation rather than a technical or junior position that does not require a bachelor's degree in a specific specialty. 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 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. 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. 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). 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)).

Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, 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 offers no

description of the duties the beneficiary would perform for the petitioner's client, 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 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.

The AAO acknowledges counsel's inclusion of a May 23, 2000 unpublished decision in which the AAO found that the director's request for a contract between the petitioner and the beneficiary's work site did not fall within CIS guidelines. However, it is not the failure of the petitioner to produce a contract in this matter that requires dismissal of the appeal; rather it is the failure of the petitioner to provide the clearly defined duties of the proffered position by the ultimate end-user of the beneficiary's services. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO also takes note that the beneficiary has been working for the petitioner for over five years in an H-1B classification. However, the AAO observes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decisions. However, if those records contained the same evidence as submitted with this petition, CIS would have erred in approving the previously filed petition. CIS is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Beyond the decision of the director, the AAO has also considered the petitioner's acknowledgement that its request to extend the beneficiary's H-1B employment will place the beneficiary's years in H-1B classification beyond the six-year limitation. The AAO observes that the petitioner has requested that the beneficiary's employment be extended to April 2, 2008. The record reflects that the beneficiary's six years in H-1B classification will expire November 26, 2007. The record contains a February 23, 2006 Center Receipt Notification Letter from the Department of Labor (DOL) noting that the petitioner's Application for Alien Employment Certification (ETA 750) submitted on October 24, 2003 had been forwarded to the Backlog Elimination Center. The letter informed the petitioner that to continue processing the application it must

return the Selection of Continuation Option Letter to the Department of Labor by April 10, 2006. DOL records indicate the labor certification application has been certified. However, as the petitioner has not established that the proffered position is a specialty occupation, the petitioner may not request a seventh year extension.

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).

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.