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FILE: WAC 04 145 51132 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2005

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, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 provides information technology services, creating, implementing and integrating software applications for its clients. It seeks to employ the beneficiary, most recently granted H-1B status from October 13, 2003 to October 12, 2006, as a programmer analyst 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 he determined the petitioner had not established that, as of the time of filing, it had a specialty occupation for which it sought the beneficiary's services or that it was a U.S. employer/agent eligible to file an H-1B petition on behalf of the beneficiary.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

The initial issue before the AAO is whether the petitioner has established that it had a specialty occupation for which it was seeking the beneficiary's services at the time it filed the Form I-129. To meet its burden of proof in this regard, the petitioner must establish that the job offered 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 one 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a petitioner must establish that its position meets one of four 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.

The petitioner states that it seeks the beneficiary’s services as a programmer analyst. Evidence regarding the proffered position and the duties associated with that position include: the Form I-129; the petitioner’s April 20, 2004 letter of support accompanying the Form I-129; and counsel’s May 3, 2004 response to the director’s request for evidence. As stated by counsel in his May 3, 2004 response to the director, the proffered position would require the beneficiary to:

- Be responsible for custom program development, and analyze and develop new software programs and applications;
- Be responsible for system analysis and design of the software applications using software tools;
- Perform object oriented analysis, design and development of software server platforms using computer skills;
- Analyze users’ data, general modes of operations, existing operation procedures and problem devising methods and approaches to meet the users’ needs based upon knowledge of data processing techniques, management information, and statistical audit and control systems, requiring the extensive use of computer languages;
- Provide software support to clients, which includes testing, debugging and modifying software; and
- Improve and optimize performance of the software programs.

At the time of filing, the petitioner’s labor condition application (LCA) indicated that it would employ the beneficiary in multiple locations – Santa Fe Springs, California and Tampa, Florida. Therefore, the director in his request for additional evidence asked the petitioner to submit an itinerary of definite employment, listing the locations and organizations where the beneficiary would be providing services for the period of H-1B employment requested, as required by regulation. 8 C.F.R. § 214.2(h)(2)(i)(B). The director also requested copies of contractual agreements between the petitioner and the beneficiary, as well as copies of contractual agreements between the petitioner and the companies for which the beneficiary would be providing services.

In response to the director’s request, counsel provided a copy of the petitioner’s letter of agreement with the beneficiary, indicating that he would initially be employed at its corporate head office in Santa Fe Springs, California to work on an in-house project, and a copy of a contract with Princeton Information, another provider of technology services in Tampa, Florida. This second contract indicated that the beneficiary would work as a quality assurance tester for JPMorgan Chase in Tampa, with his specific duties to be specified by

the client in the form of a purchase order. Counsel's letter did not indicate other employment for the beneficiary during the period for which the petitioner stated it required his services.

The director's subsequent denial of the petitioner's Form I-129 found the above information insufficient to establish that, at the time of filing, the petitioner had a specialty occupation for which it sought the beneficiary's services. The director specifically noted that the documentation submitted by the petitioner did not include the client contracts related to the in-house project on which the beneficiary would be employed. He also found the petitioner's documentation of the beneficiary's Tampa assignment to lack the evidence necessary to establish either the ultimate entity for which the beneficiary would work or the duties he would perform. Accordingly, the director found that the record did not establish that the petitioner had an existing programmer analyst position at the time of filing. Simply going on record without supporting documentary evidence is not sufficient for the 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 AAO, as discussed below, agrees.

To determine whether a particular job qualifies as a specialty occupation, 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 specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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.

On appeal, counsel asserts that the description of the proffered position provided at the time of filing and in response to the director's request for evidence establishes it as a specialty occupation. The AAO does not agree. Instead, it finds the petitioner to have provided a list of generic duties that outline the type of work generally performed by programmer analysts rather than the work that would be performed by the beneficiary in completing its in-house project in California or the client project that would take the beneficiary to Tampa, Florida. As these generic duties do not indicate what tasks the beneficiary would perform for the petitioner or the client on a daily basis, they cannot establish the proffered position as a specialty occupation. *See Defensor v. Meissner*. In *Defensor v. Meissner*, the court found that the degree requirement should not originate with the employment agency that brought the prospective workers to the United States, but with the entity ultimately employing such workers.

The AAO turns, instead, to the record for documentation of the beneficiary's duties. It finds, however, that the petitioner has not provided a description of its in-house project or the duties the beneficiary would perform for this project. Nor does the record contain the documentation necessary to establish the beneficiary's duties with JPMorgan Chase in Tampa. Counsel, in response to the director's request for evidence, provided a copy of the petitioner's contract with Princeton Information in Tampa indicating that Princeton intended to use the beneficiary's services as a quality assurance tester at JPMorgan Chase. However, there is no copy of a corresponding contract between Princeton and the JPMorgan Chase covering the beneficiary's employment or the purchase order that Princeton's contract with the petitioner states will outline the specific duties to be performed by the beneficiary as a quality assurance tester. Without a

comprehensive job description from the client company, or of the in-house project to be performed, the petitioner cannot qualify the proffered position as a specialty occupation under any of the four alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

It cannot establish that the tasks to be performed by the beneficiary on a daily basis are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent on the beneficiary, as required by the first criterion. It cannot satisfy either prong of the second criterion – the degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can only be performed by a degreed individual – as it cannot, without a job description, establish either that the proffered position is parallel to other degreed employment or that its tasks make it particularly complex or unique. Further, without a listing of the beneficiary's actual duties, the petitioner cannot prove that it has a history of employing degreed individuals to perform such duties, as required by the third criterion, or establish these duties as being so specialized and complex that the knowledge required to perform them is usually associated with a degree, the requirement set forth in the fourth criterion.

The AAO further notes that the record contains inconsistent information as to the beneficiary's initial work assignment. The petitioner's letter of agreement with the beneficiary states that the beneficiary would begin his employment at its headquarters offices. On appeal, however, counsel states that the beneficiary would initially work under a subcontract with JPMorgan Chase and then begin work on the petitioner's in-house project. He states that the beneficiary's employment with JPMorgan Chase would continue work he is already performing under a previously approved H-1B petition. Accordingly, the record fails to provide a definite itinerary of employment for the beneficiary, as required by regulation when a beneficiary's services will be performed at more than one location. 8 C.F.R. § 214.2(h)(2)(i)(B). Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For these reasons as well, the proffered position cannot be established as a specialty occupation.

The director also denied the instant petition because he found the record to lack the evidence necessary to establish the petitioner as either a U.S. employer or agent, the entities eligible to file a Form I-129 to classify an alien as an H-1B worker.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a petitioner qualifies as a U.S. employer, if it:

- (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.

H-1B filing requirements for agents are found at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as it[s] agent. A petition filed by a United States agent is subject to the following conditions;

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed

The director concluded that the petitioner had failed to provide the contractual evidence necessary to establish that it would control the work being performed by the beneficiary, as required by the definition of U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii)(2). Instead, he found the petitioner's business to be more closely aligned to that of an agent, described at 8 C.F.R. § 214.2(h)(2)(i)(F)(2), providing workers to numerous employers on a short-term basis. However, the director determined that the record failed to include the contracts necessary to document the petitioner as a U.S. agent, i.e., representing the employer as well as the beneficiary. The director also found this same lack of evidence to undermine the petitioner's ability to establish its intention to comply with the terms of the LCA submitted at the time of filing.

On appeal, counsel contends that the petitioner has an employer-employee relationship with the beneficiary as it can hire, pay, fire, supervise or otherwise control his work. He asserts that the employer-employee relationship between the petitioner and beneficiary would continue to exist even under Princeton Information's subcontract with JPMorgan and Chase. Moreover, he states that, in the past, CIS has accepted subcontracts and has never denied a petition because a subcontract does not establish an employer-employee relationship. Counsel's assertions regarding the continuing employer-employee relationship between the petitioner and beneficiary under the Princeton subcontract are not, however, supported by the evidence of record. The petitioner's contract with Princeton Information states in pertinent part:

3. WARRANTY OF SERVICES Princeton shall submit Supplier's technical personnel to Client according to the qualifications, experiences and project requirements of Client The work to be performed by the technical services personnel providing services under this Agreement shall be set forth by Client and stated in a Purchase Order (or similar form). The technical services personnel shall report on the result of their work, to the extent required by

Client, to Client's Project Manager or other designated official. However, in the event that Client chooses to terminate the services of Supplier's personnel for any reason, including unsatisfactory performance, Supplier will be compensated only for services approved and paid for by Client.

Based on the above language, the petitioner, with regard to the beneficiary's Tampa assignment, would not continue to control key factors related to the employer-employee relationship, as required to qualify as a U.S. employer. Although the petitioner has a tax identification number and would continue to pay the beneficiary's salary, the language of the Princeton Information contract indicates that its client, JPMorgan Chase, would assume supervision and evaluation of the beneficiary's employment, with the authority to terminate his services for any reason. As the petitioner would not "supervise, or otherwise control the work" to be performed by the beneficiary in Tampa, it does not qualify as a U.S. employer with regard to this aspect of the beneficiary's proposed employment. 8 C.F.R. § 214.2(h)(4)(ii)(2). However, the petitioner's failure to establish an employer-employee relationship related to the beneficiary's employment at JPMorgan Chase does not preclude it from qualifying as a U.S. employer. The record contains sufficient other evidence to establish it as a U.S. employer for the purposes of filing a Form I-129 on behalf of the beneficiary.

The petitioner has submitted a letter offering employment to the beneficiary as a quality assurance engineer at an annual salary of \$45,000, a letter signed by the beneficiary as proof of his acceptance of the terms of employment. The letter indicates that the petitioner would initially employ the beneficiary at its corporate headquarters in California on an in-house project, employment unrelated to the Princeton Information contract. Although the record offers conflicting information as to whether this project would precede or follow the beneficiary's Tampa assignment, the AAO, nevertheless, finds the petitioner's employment letter with its offer of in-house employment to establish the employer-employee relationship required by 8 C.F.R. § 214.2(h)(4)(ii)(A)(2). Accordingly, the AAO finds the petitioner to be a U.S. employer per the requirements of 8 C.F.R. § 214.2(h)(4)(ii) and withdraws the director's finding to the contrary.

With regard to the director's statements regarding the petitioner's failure to establish that it intends to comply with the terms of the LCA, the AAO disagrees. The petitioner has indicated it would employ the beneficiary at two locations – Santa Fe Springs, California and Tampa, Florida – both of which are covered by the LCA. Accordingly, the record does not raise issues as to the petitioner's LCA compliance.

On appeal, counsel also asserts that the beneficiary is qualified to perform the duties of the proffered position. However, the director did not address the beneficiary's qualifications in his denial, only the proffered position and the petitioner's eligibility to file the Form I-129. Accordingly, the AAO will not address this aspect of counsel's brief. As the AAO has found that the proffered position is not a specialty occupation, the beneficiary's qualifications are inconsequential to the outcome of the proceeding.

The AAO notes that the record indicates that CIS has approved other H-1B petitions previously filed on behalf of the beneficiary and that counsel states that the instant petition seeks, in part, to extend the beneficiary's current H-1B employment. The director's decision does not indicate whether he reviewed these prior approvals. However, if the previous nonimmigrant petitions, including that covering the beneficiary's current H-1B employment, were approved based on the same evidence of record as in the instant case, these

approvals would constitute material error on the part of the director. The AAO is not required to approve application 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). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.), *aff'd*, 248, F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

For reasons related in the preceding discussion, the petitioner has failed to establish that, at the time it filed the Form I-129, it had an existing specialty occupation for which it was seeking the beneficiary's services. Accordingly, the AAO will not disturb the director's denial of the petition.

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.