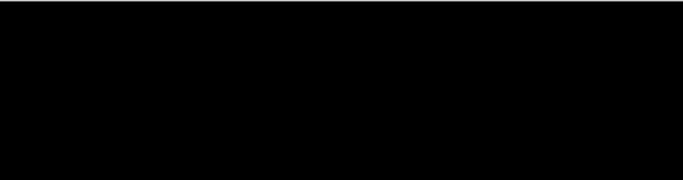




U.S. Citizenship
and Immigration
Services

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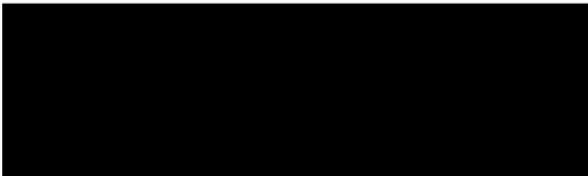
FILE: WAC 03 117 52567 Office: CALIFORNIA SERVICE CENTER Date: **APR 11 2006**

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, Director
Administrative Appeals Office

DISCUSSION: The service center 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 an information technology consulting business that seeks to extend its authorization to employ the beneficiary as a software engineer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 petitioner has not demonstrated that an employer-employee relationship exists or that it has a bona fide position for the beneficiary. On appeal, counsel submits a brief and additional evidence including an employment agreement, contracts, pay stubs, and tax documents.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

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 director found that a bona fide employer-employee relationship does not exist because the petitioner has not provided sufficient evidence that it has engaged the beneficiary to work in the United States. The director found further that, according to public records, the petitioner's IRS tax identification number does not exist. On appeal, counsel states, in part, that the director incorrectly interpreted the petitioner's DE-6 forms with regard to the beneficiary's compensation. Counsel also submits an IRS notice reflecting the petitioner's Employer Identification Number (EIN) as 33-0821081.

The evidence of record reflects that the petitioner has filed a work petition on behalf of the beneficiary, the record contains a copy of the employment agreement between the petitioner and the beneficiary, the petitioner has employed the beneficiary, and the petitioner has a legitimate IRS tax identification number. In view of the foregoing, the petitioner has established an employer-employee relationship with the beneficiary. The petitioner, therefore, has overcome this portion of the director's objections.

The AAO will now address the director's conclusion that the proffered position is not a specialty occupation.

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.

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 proffered position.

The petitioner is seeking the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 13, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing, designing, developing, implementing, and modifying SAP R/3 Integrated Systems for use by large multidivisional companies; providing on-site technical consultation and development services to the petitioner; helping the petitioner's clients analyze, identify, and resolve system-specific issues; designing and modifying clients' computer software systems; identifying user requirements; developing technical specification; designing testing methodology; performing systems testing; and providing technical advice and training to on-site systems analysts, programmers, and professional computer staff. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in a computer-related field for the proffered position.

The director found that the proffered position was not a specialty occupation because the petitioner had not submitted evidence such as contracts to show that a software engineer position exists for the beneficiary. The director found further that the petitioner's DE-6 forms reflect only occasional work by the beneficiary and

that the petitioner had not submitted the requested evidence, such as the petitioner's telephone directory listing or publications.

On appeal, counsel states, in part, that the director incorrectly interpreted the petitioner's DE-6 forms with regard to the beneficiary's compensation. Counsel states further that, although the director bases his denial on the fact that the petitioner failed to submit contracts, the director never requested the evidence of contracts. Counsel also states that the beneficiary was previously accorded H-1B status to work for the petitioner and, therefore, the director's finding is contradictory. Counsel submits an employment agreement, contracts, pay stubs, and tax documents as supporting documentation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. Although a review of the Computer Software Engineers training requirements in the *Handbook* reflects that a computer software engineer may qualify as a specialty occupation, the evidence of record contains unexplained inconsistencies. Information on the petition that was signed by the petitioner's president on February 13, 2003, reflects that the petitioner has three employees. The petitioner's quarterly tax return for the quarter ended on March 31, 2003, however, reflects that the petitioner had only one employee in February 2003. Further, although counsel's December 19, 2003 letter indicates that at least a part of the proposed duties would be performed "in house," the photos of the petitioner's premises reflect one chair and one computer. As the petitioner claims three employees, the exact nature of the petitioner's business is unclear. The record contains no explanation for these discrepancies.¹ It is incumbent upon the petitioner to resolve any inconsistencies 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, in response to the director's request for a copy of the petitioner's lease, counsel replied that a lease agreement does not

¹ It is also noted that an Internet search at <http://www.reversephonedirectory.com/> finds no listing for the petitioner's telephone number: (714)308-0660.

pertain to “this type of business. . .” Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel noted that CIS approved another petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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).

The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As the record does not contain sufficient evidence of the petitioner's past hiring practices, the petitioner has not met its burden of proof in this regard. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the Labor Condition Application (LCA) filed by the petitioner is not valid. The LCA lists the work location as Daly City, California. The letter of support filed with petition indicates that the beneficiary will work both on-site and off-site. When the beneficiary is on site at the petitioner's premises in Long Beach, California, he will not be working within the geographical area covered by the LCA. The petitioner also submitted a contract with Microsoft in Redmond, Washington. To the extent that beneficiary will provide services to Microsoft at its site in Redmond, Washington, the work would not be covered by the Daly City location on the LCA. For this additional reason, 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.