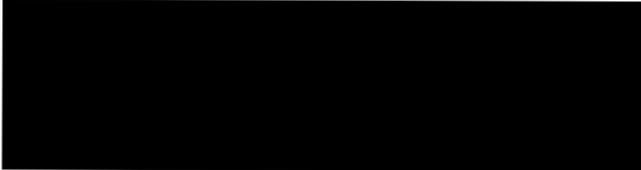


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FILE: EAC 04 267 50764 Office: VERMONT SERVICE CENTER Date: DEC 19 2006

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 nonimmigrant visa petition was denied by the Vermont Service Center. 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 company that provides IT consulting and computer software development services. The petitioner seeks to employ the beneficiary as a Software Engineer, and endeavors to classify him 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 determined that the petitioner had failed to establish that the beneficiary met the educational requirements to perform the duties of the proffered position. The director determined further that the petitioner had failed to establish that the proffered position qualified as a specialty occupation.

Section 214(i)(1) of the Act 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 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.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer software engineer. Evidence of the beneficiary's duties was included with the I-129 petition, in the petitioner's response to the director's request for evidence, and on appeal. According to this evidence the beneficiary would:

Analyze application issues, make software programming changes and drive the evolution of software application as a process of optimization;
Participate in software design efforts and keep up to date on the latest relevant technologies to develop new software.

Specifically the petitioner would:

Design, test, document and develop software, computer systems and perform programming to meet project and business requirements (25% of daily work time);

Apply techniques and principles of computer application, engineering and mathematical analysis to resolve technical issues related with computer aided engineering (15% of daily work time);

Work with users to formulate best software plans for computer aided engineering systems (15% of daily work time);

Develop, maintain and implement database applications using PL/SQL (15% of daily work time);

Formulate and design software systems using mathematical and scientific analysis to predict and measure outcome of computer aided design and drafting (10% of daily work time);

Use necessary software tools, languages, databases and operating systems, including Oracle 7.2/8.0, C, C++, MS SQL Server, UNIX, AutoCAD, ProE, and other tools (10% of daily work time).

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The *Handbook* (2006-2007 Edition) provides on page 111 that:

Computer software engineers apply the principles and techniques of computer science, engineering, and mathematical analysis to the design, development, testing, and evaluation of the software and systems that enable computers to perform their many applications.

The *Handbook* discusses two types of software engineer positions: (1) computer applications software engineers; and (2) computer systems software engineers. While the duties described in the present case are essentially those of a computer applications software engineer, the AAO cannot determine from the record what the beneficiary will be doing for the proposed end user.

The record reflects that the petitioner provides IT consulting and computer software development to off-site clients, and the Labor Condition Application (LCA) contained in the record indicates that the petitioner will place the beneficiary at a work site in Reston, Virginia. The evidence of record thus establishes that the petitioner is an employment contractor, in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients. Accordingly, the petitioner has not established the proffered position as a specialty occupation.

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).

The AAO notes that it is unpersuaded by the petitioner's assertion that CIS has previously determined that the proffered position is a specialty occupation because CIS approved similar petitions filed by the petitioner in the past. The present record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior cases, and in the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted in the present matter are 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. Moreover, 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition 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).

The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the services of a software engineer.

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

The record contains a copy of the beneficiary's bachelor's degree in Mechanical Engineering, with an emphasis in Production Mechanics, from Osmania University in India. The record also contains a copy of the beneficiary's

master's degree in Mechanical Engineering, and transcripts from Northern Illinois University, in the United States.

The *Handbook* states that, for computer software engineers, most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual degree concentration for applications software engineers is computer science or software engineering. The usual degree concentration for systems software engineers is computer science or computer information systems. Mathematics and systems design knowledge are increasingly important, and persons interested in jobs as computer software engineers must have strong problem-solving analytical skills.

The beneficiary's academic record indicates a concentration in design, mathematics, and computer coursework at the master's degree level at Northern Illinois University. Thus the beneficiary is qualified to perform the services of a software engineer.

The petition may not be approved, however, as the record does not establish that the position is a specialty occupation.

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 failed to sustain its burden in the present matter. The appeal shall be dismissed accordingly.

ORDER: The appeal is dismissed. The petition is denied.