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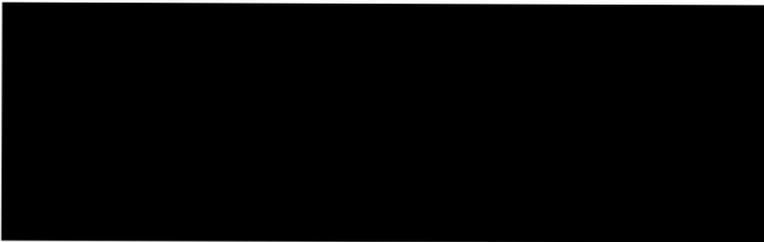


FILE: WAC 05 164 52910 Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2006

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.

A handwritten signature in blue 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 a software consulting firm that seeks to employ the beneficiary as a software engineer. 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 finding that the petitioner failed to establish that it met the definition of a U.S. employer or agent. The director also found that the position was not a specialty occupation, as there was no comprehensive description of duties from an authorized representative of the petitioner's client where the beneficiary will perform services. Counsel submitted a timely appeal.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the term "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 term "agent" is defined pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F).

The evidence of record, the statements of work, supplier agreements, contractor agreements, staffing service agreements, consulting agreements, managed services agreements, purchase orders, and other documents, 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.¹ The evidence of record also reveals that the petitioner has an Internal Revenue Service Tax identification number, and seeks to employ the beneficiary as a software engineer. Thus, the petitioner is the U.S. employer of the beneficiary as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now consider whether the offered position qualifies as a specialty occupation.

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:

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).

- (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 Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. The petitioner's May 20, 2005 letter that accompanied the H-1B petition describes the beneficiary's job duties as designing, developing, testing, and configuring management of operating system level and network software; providing source code management; setting up sites for configuration and release servers; documenting designs and creating external and internal specifications; formulating and analyzing software requirements; and using industry standard languages and networking protocols. The petitioner stated that the beneficiary will devise test strategies, create test plans, and execute test cases. The petitioner's July 22, 2005 letter, submitted in response to the request for evidence, stated that typically its software engineers spend 50 percent of their time at client sites and 50 percent at the petitioner's office, "developing products for clients or developing our proprietary tools and methodologies." The petitioner requires a bachelor's degree in computer systems/engineering for the proposed position.

The director denied the petition. He stated that the submitted contract between the petitioner and the beneficiary is not valid as it is unsigned. Citing *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the director stated that it indicates that with employment agencies as petitioners, CIS must examine the ultimate

employment of the alien and determine whether the position qualifies as a specialty occupation. According to the director, *Defensor* indicates that the critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. The director determined that the petitioner failed to establish the proposed position as a specialty occupation as it did not submit a comprehensive description of the beneficiary's duties from an authorized representative of the client where the beneficiary would perform duties. The director stated that although the record contains agreements for software development services that the petitioner entered into with software companies and other businesses, there is no written contract between the petitioner and the beneficiary as to the beneficiary's job duties and terms of employment.

On appeal, counsel states that the petitioner is the beneficiary's employer. Counsel submits into evidence a written contract entered into between the petitioner and the beneficiary; a comprehensive description of the beneficiary's duties; statement of work orders from client companies, which provide samples of duties performed at client sites; an excerpt from the Department of Labor's *Occupational Information Network (O*Net)*, which shows that the proposed duties are those of a software engineer. Counsel asserts that the petitioner has been in business for over 10 years, has over 25 employees, and has purchase orders from Hewlett-Packard and Cisco Systems that total over \$1.5 million. Counsel contends that the submitted evidence reflects that the contracts are for software engineering work, and that a software engineer is a specialty occupation. Counsel points out that the petitioner has previously received H-1B approval notices for similar positions. According to counsel, the petition must be adjudicated by the evidentiary standard of the preponderance of the evidence.

Based on the evidence in the record, the AAO finds that the petitioner failed to establish that the beneficiary will be employed in a specialty occupation.

Counsel 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 the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition.

Furthermore, 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 record in its 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).

The record also contains statements of work, supplier agreements, contractor agreements, staffing service agreements, consulting agreements, managed services agreements, purchase orders, and other documents that establish 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 from a representative of the client(s) for whom the beneficiary would perform consulting services, describing the duties the beneficiary would perform for that client, and specifically identifying the beneficiary as assigned to provide those services. As such, the petitioner has not established the position as a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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 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.

There is no evidence in the record from an authorized representative of the client for whom the beneficiary will provide consulting services describing the specific duties that the beneficiary would perform for the client. As *Defensor* indicates that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner, the petitioner needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by the clients for whom the beneficiary will provide consulting services, and the evidence needed to identify the beneficiary as assigned by the client to provide the software engineer consulting 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 director requested an itinerary of work in the request for evidence. 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 if the beneficiary's duties will be performed in more than one location.

In the Aytes memorandum cited at footnote 1, 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 an employment itinerary. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment. Accordingly, the petitioner has failed to **comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.** As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

The AAO notes that the petitioner indicated that its software engineers usually spend 50 percent of their time at client sites and 50 percent at the petitioner's office, "developing products for clients or developing our proprietary tools and methodologies." Although the record contains evidence supporting the assertion that the petitioner develops some proprietary tools, the petitioner did not submit evidence that specifically relates to the in-house project that the beneficiary would work on or the duties that he would perform with regard to that project. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). As *Defensor* indicates, CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation.

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 on this ground.

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.