

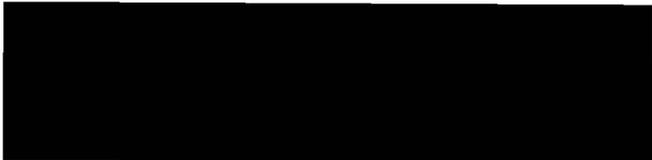
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FILE: WAC 05 083 50456 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006

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 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 company that seeks to employ the beneficiary as a programmer analyst. 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 director determined that the petitioner had not established that it qualified as a United States employer, or that it had available for the beneficiary a specialty occupation at the time the Form I-129 was filed, and accordingly denied the petition. The director also denied the petition because the petitioner did not submit an itinerary of employment, and because the LCA was not valid. On appeal, counsel submits a brief and additional information stating that the petitioner qualifies as an employer and that the proffered position is a specialty occupation.

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 record establishes that the petitioner will be the employer of the beneficiary,<sup>1</sup> and the director's decision to the contrary shall be withdrawn. Under the terms of a contract between the petitioner and [REDACTED] the petitioner shall provide software technical services for [REDACTED]. In providing those services, the petitioner will hire and retain all personnel necessary and sufficient to perform the services required. The petitioner will pay the beneficiary's salary and benefits, and maintain an employer/employee relationship with the beneficiary. The petitioner has the right to fire the beneficiary and is otherwise responsible for the work performed by the beneficiary on behalf of its client. The petitioner is responsible for all workers compensation premiums and for all state and federal tax liabilities of its employees who are assigned to work under its contract with MPower. The fact that the beneficiary will work at a third party location and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance and the director's determination to the contrary is withdrawn.

The director found that the petitioner had failed to submit contracts outlining the beneficiary's work for the period requested on the H1B visa petition. Pursuant to 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

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<sup>1</sup> 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).

more than one location.

In his request for evidence, the director asked for contracts of work to be performed. 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 contracts reflecting the dates and locations of employment. In response, the petitioner submitted a contract between itself and MPower Software Services and accompanying work order indicating that the beneficiary would be employed on the premises of MasterCard International for the period of the H-1B visa. The itinerary submitted by the petitioner satisfies 8 C.F.R. § 214.2(h)(2)(i)(B), and the director's determination that the contract was insufficient to establish an itinerary of employment is withdrawn.

The director stated that because the petitioner had not provided a description of the duties from the location where the beneficiary would perform services, the petitioner had not established that it would employ the beneficiary in a specialty occupation. The AAO agrees. The record does not establish that the proffered position qualifies as a specialty occupation. The evidence 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 from the ultimate client (in this instance, MasterCard International) where the beneficiary will perform services describing the duties the beneficiary would perform. The petitioner has not, therefore, established the proffered position is a specialty occupation.

The court in *Defensor v. Meissner*, 201 F.3d 384(5<sup>th</sup> 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.

The *Handbook* indicates that not all programmer analyst positions require a baccalaureate degree in a specialty. In order for CIS to determine whether the programmer analyst duties that the beneficiary will perform for Mastercard International fall within the range of duties requiring a baccalaureate degree, a job description from Mastercard is required. As the record does not contain any documentation from the client for whom the beneficiary would actually perform services, that establishes the specific duties the beneficiary would perform under contract for the petitioner's client, 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 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). Thus, the petition may not be approved.

The director also determined that the Labor Condition Application (LCA) was not valid. The petitioner submitted a Labor Condition Application (LCA) with the Form I-129 indicating that the beneficiary's work location would be in Cerritos, CA. In this instance, the petitioner is requesting that the petition be granted stating that the beneficiary would work as a programmer analyst for MasterCard International in St. Louis, MO. The record does not contain a properly certified LCA authorizing the beneficiary to work in that location. For this additional reason, the petition may not be approved.

The AAO notes that this is a petition for continuation of previously approved employment. 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. Citizenship and Immigration Services (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 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 and the appeal shall accordingly be dismissed.

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