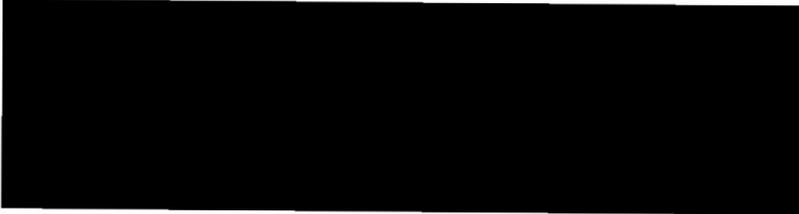


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

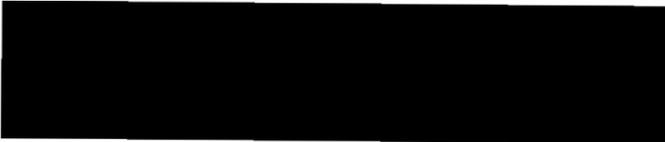
FILE: LIN 03 174 51651 Office: NEBRASKA SERVICE CENTER Date: **SEP 13 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition. 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 and solutions company. The petitioner seeks to employ the beneficiary as a mechanical engineer. Accordingly, 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's May 28, 2004 request for further evidence (RFE); (3) counsel's August 17, 2004 response to the director's RFE; (4) the director's October 19, 2004 denial decision; (5) the untimely Form I-290B (November 29, 2004); (6) counsel's December 14, 2004 brief and supporting documentation filed in support of the untimely appeal; (7) the director's March 16, 2005 denial decision, treating the late-filed appeal as a motion to reopen; and (8) a timely filed Form I-290B, brief, and documents in support of the appeal from the director's motion decision. The AAO reviewed the record in its entirety before issuing its decision.

On October 19, 2004, the director denied the petition determining that as the petitioner is an employment agency providing contract employees to other places of business, Citizenship and Immigration Services (CIS) must examine the beneficiary's ultimate employment and determine whether the position qualifies as a specialty occupation. The director determined that the record did not demonstrate that the beneficiary would be performing the duties of a "computer hardware engineer" or any of the duties claimed.

In the December 14, 2004 brief submitted on appeal or as a motion to reopen, counsel for the petitioner asserts that a "computer hardware engineer" is a specialty occupation; that the petitioner has 55 service locations throughout the United States; that it provides field services, the area pertaining to the instant petition; that its certified field services engineers have the background necessary to service most computers and peripherals; and that its contract with QualxServ is attached to demonstrate that the petitioner will employ personnel who have the requisite experience to perform the services detailed in the contract.

On March 16, 2005, the director denied the petition observing that CIS does not question that computer engineers and computer hardware engineers normally qualify as specialty occupations; but that the petitioner had not established that the duties of the proffered position are those of a computer engineer or computer hardware engineer. The director also noted that the petitioner had initially stated that its proffered position would be for a mechanical engineer. The director, once again observed that the petitioner is an employment agency providing contract employees to other places of business and that CIS must examine the beneficiary's ultimate employment. Upon review of the contract submitted on motion, the director determined that the duties described in the contract were the duties of an electrical and electronic installer, an occupation that did not require a baccalaureate or higher degree. The director also determined that the record indicated the beneficiary had been working in Ohio and Michigan, not in Springfield, Missouri, as listed on the labor condition application (LCA) and that the petitioner had not submitted an amended LCA.

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:

- (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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

When filing the Form I-129 petition, the petitioner averred that it employed 68 persons and required the services of a mechanical engineer. In an April 2, 2003 letter appended to the Form I-129, the petitioner stated: "[t]he job description of a Mechanical Engineer is to do researching, planning and designing of mechanical & electromechanical products and systems." The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Springfield, Missouri as a mechanical engineer.

On May 28, 2004, the director requested additional evidence from the petitioner. The director requested among other things: copies of contracts and work orders for the H-1B-level services performed by the beneficiary; detailed descriptions of specific projects that require the beneficiary's services; and evidence of the petitioner's computer system and evidence that the beneficiary will be able to perform all the duties of the position. The director observed that the petitioner's previous petition indicated that the beneficiary would be employed only in Jackson, Mississippi, but that now the beneficiary's location would be in Springfield, Missouri; the director requested that the petitioner explain why the beneficiary would not be working in an authorized location.

On August 17, 2004, the petitioner stated: "[t]he beneficiary was hired because of his exceptional ability on area of systems design, analysis and development. As such, the beneficiary is primarily tasked to perform maintenance and revisions [of] the following internal and external projects undertaken in-house for the past six months: . . . " The petitioner then listed: 18 "external" projects located in several different areas in Missouri, Arkansas, and Kentucky; two "internal" projects located in Springfield, Missouri; and its server hardware.

On October 19, 2004, the director denied the petition determining that as the petitioner is an employment agency providing contract employees to other places of business, Citizenship and Immigration Services (CIS) must examine the beneficiary's ultimate employment and determine whether the position qualifies as a

specialty occupation. The director determined that the petitioner had failed to submit contracts or work orders for any of the projects listed in the response to the director's RFE and that the projects listed consisted of the names of the companies and not the actual project. The director also determined that the record did not demonstrate that the beneficiary would be performing the duties of a "computer hardware engineer" or any of the duties claimed. The director noted that the petitioner had submitted 226 petitions for nonimmigrant workers and four petitions for immigrant workers in 2003; 45 petitions for nonimmigrant workers and one petition for an immigrant worker in 2004; and that the photographs of the petitioner's in-house workstations were clearly insufficient to support the work of these employees. The director further noted the beneficiary's previous H-1B approval, but observed that CIS was not required to approve petitions where eligibility had not been demonstrated merely because of past approvals.

On motion, counsel for the petitioner asserted that a "computer hardware engineer" is a specialty occupation and references the Department of Labor's *Occupational Outlook Handbook (Handbook)* noting that the petitioner had tracked the language of the *Handbook* in its description of the beneficiary's duties. Counsel noted that most computer engineers have a bachelor's degree and provided copies of job announcements advertising for various types of computer engineers. Counsel acknowledged that the petitioner offered field support services, on-site, data communications services, networking services, structured cabling services, software development services, and contract services. Counsel noted that the petitioner employed many "professionals" to service its 55 service locations throughout the United States and that the petitioner had provided its contract with QualxServ in support of its needs and practices as they pertain to the instant position. The petitioner provided a copy of the QualxServ contract for installation services dated January 5, 2004.

As noted above, on March 16, 2005, the director dismissed the motion and denied the petition observing that CIS does not question that computer engineers and computer hardware engineers normally qualify as specialty occupations; but that the petitioner had not established that the duties of the proffered position are those of a computer engineer or computer hardware engineer. The director also noted that the petitioner had initially stated that its proffered position would be for a mechanical engineer. The director, once again observed that the petitioner is an employment agency providing contract employees to other places of business and that CIS must examine the beneficiary's ultimate employment. Upon review of the contract submitted on motion, the director determined that the duties described in the contract were the duties of an electrical and electronics installer, an occupation that did not require a baccalaureate or higher degree. The director also determined that the record indicated the beneficiary had been working in Ohio and Michigan, not in Springfield, Missouri, as listed on the labor condition application (LCA) and that the petitioner had not submitted an amended LCA.

On appeal, counsel for the petitioner asserts that the director made a fundamental error when determining on October 19, 2004 that the proffered position was for a computer hardware engineer and not a mechanical engineer and that only a remand of the matter can rectify the error. Counsel acknowledges that the contract the petitioner submitted (the QualxServ contract submitted with counsel's December 14, 2004) does not describe duties that are the duties of a mechanical engineer, but explains that to itemize the tasks of a mechanical engineer in the contract could form the basis for litigation and thus would be bad business practice on the part of the petitioner. Counsel once again acknowledges that it provides contract employees

and asserts that an LCA can cover more than one position or location. Counsel also acknowledges that the petitioner "may not have itemized all possible locations of employment," but made it clear that it required the beneficiary to work at one or more locations.

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 AAO finds that the evidence of record is sufficient to 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 See 8 C.F.R. § 214.2(h)(4)(ii). 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 May 28, 2004 RFE, the director requested copies of contracts and work orders for the H-1B-level services performed by the beneficiary and detailed descriptions of specific projects that require the beneficiary's services. The Aytes memorandum cited at footnote 1, states that 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. The petitioner failed to provide such evidence. In addition, the contract submitted by the petitioner on motion fails to satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. The contract begins January 5, 2004, more than six months after the petition was filed. As such, the contract did not exist when the petition was filed and, therefore, cannot demonstrate that the petitioner was offering a specialty occupation to the beneficiary when it filed the petition. See 8 C.F.R. § 103.2(b)(12). Moreover, as counsel seems to acknowledge on appeal, the contract does not include the beneficiary's proposed employment as a mechanical engineer. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

The AAO acknowledges the director's error in the October 19, 2004 decision in referring to the proffered position as the position of a computer hardware engineer, instead of the actual proffered position as a mechanical engineer. The director however, gave the petitioner and counsel the opportunity to address this error when considering the late-filed appeal as a motion. Instead, counsel further compounded the error, by referring to the proffered position as a computer hardware engineer, referencing the *Handbook's* report

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).

regarding computer hardware engineers, and providing job announcements for various computer engineers. As counsel had the opportunity to respond to the director's incorrect reference to the title of the proffered position, both on motion and again on appeal, there is no necessity to remand the matter for further discussion of the nature of the position.

Moreover, the issue in this matter relates to the petitioner's failure to provide evidence of the beneficiary's ultimate employment, whether the beneficiary was to be employed as a computer hardware engineer or a mechanical engineer. The director requested evidence of contracts in the RFE, citing the necessity of a description of the beneficiary's ultimate employment. The petitioner failed to provide evidence of the beneficiary's ultimate duties, the location the beneficiary where the beneficiary would be employed, the actual project or projects the beneficiary would be working on, or the dates the beneficiary would be employed on specific projects. 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's indication on appeal that to provide the beneficiary's specific duties in the contract would be bad business practice is specious. CIS cannot determine the nature of the proffered position unless the beneficiary's ultimate employment is described. The failure to provide this necessary evidence requires a denial of the petition.

As the director referenced, 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, a 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.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. It is from this evidence that CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.²

In this matter, the record contains only a generic description of the types of duties the beneficiary would perform upon his employment with the company. The initial submission indicates: "[t]he job description of a Mechanical Engineer is to do researching, planning and designing of mechanical & electromechanical products and systems." There is a total lack of evidence, other than this vague reference, to the beneficiary's

² The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

ultimate employment. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for 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)). Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO cannot determine whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, or clients, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The AAO notes that the record contains evidence that the beneficiary was previously approved for H-1B status. However, prior approvals do 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 AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When 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). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS 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).

Beyond the decision of the director, the petitioner has not established that the beneficiary will work only in the location specified on the LCA. The LCA submitted when the petition was filed did not list all locations of the beneficiary's proposed employment. Accordingly, the petitioner has not complied with the regulatory filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition must be denied.

LIN 03 174 51651

Page 8

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **Here, that burden has not been met.**

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