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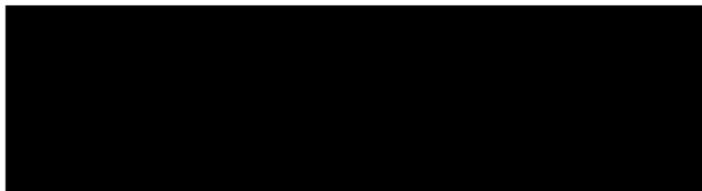
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U.S. Citizenship  
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FILE: WAC 07 063 51393 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

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:

SELF-REPRESENTED

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 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 a software development and consulting company that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 on the basis of her determination that the petitioner had failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Specifically, the director found that the petitioner had failed to establish that a position in fact exists for the beneficiary and that it would employ the beneficiary in a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further 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.

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 proposed position.

The term "employer" is defined at 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 evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). The petition may not be approved, however, as the record does not establish that the beneficiary will be employed in a specialty occupation, or that the employer has submitted an itinerary of employment.

The AAO agrees with the director that, although the petitioner will act as the beneficiary's employer, the evidence of record, including the December 11, 2006 employment agreement between the petitioner and the beneficiary, establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. The employment agreement specifically states that the beneficiary "will render services to THIRD PARTY Clients [emphasis in original]."

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.

While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed indicated that the beneficiary would be placed at various work locations to perform services established by contractual agreements for third-party companies, and did not establish that the petitioner had three years of work for the beneficiary

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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).

to perform, the director properly exercised her discretion to require an itinerary of employment for the three-year period of requested employment in her March 27, 2007 request for additional evidence.<sup>2</sup>

In its June 15, 2007 response to the director's request for additional evidence, the petitioner stated that the beneficiary would be working at its place of business on a loan origination platform (LOP) project at its place of business. The petitioner stated that the project was for a mortgage client.

On appeal, the petitioner submits a "Contractor Agreement" between the petitioner and Vector Consulting, Inc. (Vector), dated April 3, 2007. It also submits copies of several invoices, in which the petitioner bills Vector for the beneficiary's services, as well as checks from Vector, payable to the petitioner. According to the petitioner, these items are:

[C]lear proof that, we have valid a valid contracts [sic] between the petitioner and Vector Consulting, Inc., involved with the beneficiary[']s computer related duties, the evidence establish[es] that this is a computer programmer analyst, position, and thus a specialty occupation position, available for the beneficiary [sic]. [The beneficiary] is going to work on this project till 12/31/2009.

The petitioner's submissions on appeal are deficient. First, the AAO notes that the contractor agreement between the petitioner and Vector is was executed on April 3, 2007, nearly four months after the petition was filed on December 22, 2006. The petitioner therefore, cannot use this document to establish that a specialty occupation existed at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Mater of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, the contractor agreement itself does not obligate the petitioner or beneficiary to do anything. The contractor agreement specifically states the following:

Nothing in this Agreement obligates [the petitioner] to accept any offer to provide services. . . .

Prior to the commencement of any services, VECTOR CONSULTING and [the petitioner] will execute a Purchase Order on the form attached . . . [The petitioner's] services under this Agreement will terminate at the end of the minimum time requirement covered by the Purchase Order and any renewals or extensions thereof. . . .

The record contains no purchase orders. Absent such information, the petitioner has not established that it had three years' worth of H-1B-level work for the beneficiary to perform at the time the petition was filed. There is no evidence in the record to support the petitioner's assertion that the beneficiary will work on this project through 2009. The evidence contained in the record does not comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition was properly denied.

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<sup>2</sup> As noted by Assistant Commissioner Ayles 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 record also does not establish that the proposed 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 proposed 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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. In this particular case, the "more relevant employer" would be the client of Vector for whom the beneficiary would be performing services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for Vector'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 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).

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) or that the employer has submitted an itinerary of employment. The petition, therefore, may not be approved.

Beyond the decision of the director, the AAO finds that the decision may not be approved for another reason, as the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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 petitioner submits copies of diplomas and transcripts, reflecting that the beneficiary earned degrees in science and computer applications in India. However, the record does not contain a credentials evaluation

of the beneficiary's foreign education. Accordingly, the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

Regarding the previous approvals in the record—which were not granted to this petitioner, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(i). If the previous petitions were approved based upon the same evidence contained in this record, their approval would constitute gross and material 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).

Finally, the AAO notes that it does not appear as though the beneficiary was maintaining valid nonimmigrant status between December 2006, the time the petition was filed, and April 2007. From the invoices submitted on appeal, it appears as though the beneficiary did not begin performing services for Vector's client until April 16, 2007. However, the AAO will not address this issue, as issues surrounding the beneficiary's maintenance of valid nonimmigrant status are within the sole discretion of the director and beyond the scope of the AAO's jurisdiction.

The record fails to establish that the beneficiary would be performing services in a specialty occupation or that the employer has submitted an itinerary of employment. Beyond the decision of the director, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

For all of these reasons, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.