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U.S. Citizenship
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FILE: WAC 07 043 51456 Office: CALIFORNIA SERVICE CENTER Date: **FEB 21 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:

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, California 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 provides software development and consulting services. It states that it employs 250 personnel and had gross annual revenue of \$20 million when the petition was filed. It seeks to employ the beneficiary as a programmer analyst. 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 filed November 29, 2006 and supporting documents; (2) the director's February 20, 2007 request for further evidence (RFE); (3) the petitioner's March 6, 2007 response to the director's RFE; (4) the director's March 27, 2007 denial decision; and (5) the Form I-290B and counsel's brief and documents submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On March 27, 2007, the director denied the petition. The director noted that the documentation submitted in response to the RFE showed that the beneficiary's work location would be in Hartford, Connecticut, a location inconsistent with the petitioner's claim that the beneficiary would be working at its in-house location in East Moline, Illinois and the submitted, certified Labor Condition Application (LCA). The director also noted that the petitioner had failed to submit requested documentation, including a contract between the petitioner and the end-client and copies of the petitioner's Internal Revenue Service (IRS) tax documentation for 2005. The director concluded that the petition should be denied pursuant to 8 C.F.R. § 103.2(b)(13) for failure to respond to the RFE.

Preliminarily, the AAO finds that the director referenced the incorrect regulation when denying the petition. The correct regulation for denial in this instance is 8 C.F.R. § 103.2(b)(14) which is failure to submit requested evidence that precludes a material line of inquiry. Thus, the director's decision is not properly based on an abandonment determination (8 C.F.R. § 103.2(b)(13)) and the AAO may accept the appeal. The director's ultimate determination that the petitioner had not provided sufficient evidence in response to the RFE to establish eligibility for the H-1B nonimmigrant classification provides the basis for the appeal.

On appeal, the petitioner asserts that the petitioner has a specialty occupation position immediately available for the beneficiary and that the underlying LCA is valid.

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.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

In a November 27, 2006 letter appended to the petition, the petitioner provided the following information regarding the proffered position:

[The beneficiary] will be based at the [petitioner's] office located in East Moline, IL. [The beneficiary] will be engaged in a number of long-term projects for [the petitioner]. [The beneficiary] will apply the principles, and practices and theory of management information systems and be responsible for:

As a Programmer-Analyst, the beneficiary will plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers. The beneficiary may also write manuals and document operating procedures and assist users to solve problems. The beneficiary will also replace, delete and modify codes to correct errors, analyze, review, and oversee the installation of software and provide technical assistance to clients. Furthermore, the beneficiary will be assigned to various projects, which will require him to maintain client networks and software builds. He will also coordinate with various locations during transitioning, oversee, network administration and create test scripts and applications to manage and test the various functionalities of builds and network administration.

The petitioner noted that the beneficiary would apply his academic training in Human Resource Management to provide professional consulting services to clients in the area of human resource processes like recruitment, new hires, data maintenance, payroll, time, collection, benefits administrations, training compensation, and performance management. The petitioner noted further that the beneficiary would be: "responsible for utilizing his knowledge of SAP HR business processes including payroll, time, personnel administration, and organizational management to support delivery of the HR operations and Technology practice;" and that the beneficiary would "analyze Business Processes, re-engineering, and mapping to SAP HR process;" and that the beneficiary would "also be involved in the design and testing strategy for custom SAP HR applications and [would] also play a key role in interfacing developments with existing applications." The petitioner noted in addition that the beneficiary would "assist in the establishment of business and configuration in SAP and [would] advise on best practices related to accounting." The petitioner provided a copy of an LCA certified on November 27, 2006 for the East Moline, Illinois area.

On February 20, 2007, the director noted from the evidence provided that it appeared that the petitioner is engaged in the business of software development and consulting. The director requested that the petitioner clarify whether it would be the beneficiary's actual employer or would be the beneficiary's agent and noted that CIS must examine the ultimate employment of the alien to determine whether the proffered position qualified as a specialty occupation. The director requested, among other things, that the petitioner submit: (1) an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services and indicated that the itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary; (2) contracts or letters from authorized officials of the ultimate client companies, a description of conditions of employment, and who will supervise

the beneficiary; and (3) contractual agreements, statements of work, work orders, service agreements, letters from the authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed work duties.

In a March 6, 2007 response, the petitioner stated:

Please note that we will employ [the beneficiary] and he will be engaged in planning, developing, testing and documenting various HR applications using SAP Enterprise Solution. Please find enclosed duly executed offer letter of [the beneficiary]. We have also enclosed SOW for [the beneficiary] with our client Terra Firma and a lease of our business premises.

In addition to the foregoing, [the beneficiary] may be selected to participate on other in-house projects temporarily. Upon completion of such in-house projects, the systems professional will be assigned to a new project, typically within the same labor market.

The statement of work provided by the petitioner shows that the petitioner and Terra Firms Consulting, Inc. executed the document on March 1, 2007. The statement of work: identified the beneficiary as the consultant; indicated that the project comprised a "TFC Consulting/SAP Upgrade" for a SAP HR Consultant; indicated that the start date was February 12, 2007 and the length of the assignment was 12+ weeks; and the location of the project was in Hartford, Connecticut. The employment agreement submitted shows that the beneficiary accepted employment with the petitioner on November 19, 2006. The petitioner also provided copies of payment advices from a company in Moline, Illinois, a company in Orange, California, and a company that did not provide its location.

As noted above, the director denied the petition on March 27, 2007, determining that the beneficiary's work location submitted in response to the RFE was inconsistent with the petitioner's indication that the beneficiary would work in-house at the East Moline, Illinois office and the LCA showing the beneficiary's work location in East Moline, Illinois. The director concluded, based on the general description of duties that the petitioner had provided, that the record did not contain sufficient evidence to establish the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that an employer-employee relationship exists between the petitioner and the beneficiary. Counsel notes that once the petitioner contracts with a third party company, it staffs the project with its employees. Counsel also notes that there is generally no agreement to supply a particular individual for a particular job and for the most part, the client does not know which professional will be assigned to a particular job site. Counsel further notes: "[d]epending on the project, the work may be done in-house," and that the petitioner "hires employees and assigns them to both in-house and off site assignments, as it deems fit." Counsel submits a copy of a purchase order for: "T M Development by [the petitioner] onsite and offshore resources for North American AG SAP 2007 – 80/HR for onsite and 25/Hr for offshore," as an example of an onsite project.

In an April 13, 2007 letter in support of the appeal, the petitioner indicates that when it hires employees, the employees first work in-house, and when appropriate the petitioner schedules the individuals to work on

clients' projects. The petitioner notes that when it decides to send the beneficiary to a client site, the petitioner will file a new LCA and amended H-1B petition.

Counsel asserts that the submitted LCA should suffice to meet the itinerary requirement. Counsel contends that the petitioner's past history of receiving countless H-1B approvals should be given significant weight in this determination. Counsel also references an unpublished decision and a November 13, 1995 memorandum issued by the Associate Commissioner for Examinations for the proposition that requests for contracts should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Counsel avers that the petitioner has met the requirements of being an employer, that the LCA requirement for the H-1B petition has been properly satisfied, and that the petition meets the requirements involving a specialty occupation.

Counsel's assertions are not persuasive. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO finds that the petitioner will be the beneficiary's employer. However, the petition may not be approved, as the petition does not establish that the beneficiary will be employed in a specialty occupation, that the LCA submitted is valid for all work locations, or that the employer has submitted an itinerary of employment.

The record shows that the beneficiary will perform duties at the petitioner's worksite in East Moline, Illinois and that the beneficiary will work at a Hartford, Connecticut worksite. Placing the beneficiary at various work locations to perform services established by contractual agreements for third-party companies requires the submission of an itinerary.¹ While the Aytes memorandum cited at footnote 1 below broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires employers to submit an itinerary with the dates and locations of employment in situations where the employment will occur in more than one location. As the evidence contained in the record at the time the petition was filed provided only a general description of the beneficiary's proposed duties and the nature of the petitioner's business suggested that the petitioner was an employment contractor, the director properly exercised her discretion to require an itinerary of employment.² The submitted LCA does not suffice as an itinerary, as it does not list the Hartford, Connecticut work site or other proposed worksites. For this reason, the petition may not be approved.

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).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular

The director also noted that the record did not establish that the LCA was valid for all work locations. As the record does not contain an itinerary of employment, but contains information indicating that the beneficiary will work at various locations, the LCA in the record is not valid for all the locations of employment. For this additional reason, the petition may not be approved.

The petitioner in this matter presented a lengthy but general description of the proposed duties the beneficiary would perform. The description provides an overview of the duties of the position but does not provide the details necessary to enable CIS to determine that the petitioner's or the projects for third party companies requires the theoretical and practical application of specialized knowledge attained through a four-year course of study in a specific discipline. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience.

The petitioner's indication that the beneficiary will be engaged in planning, developing, testing and documenting various HR applications using SAP Enterprise Solution is insufficient to establish the proffered position as a specialty occupation. The information provided regarding two projects for other companies: (1) a project involving a "TFC Consulting/SAP Upgrade" for a SAP HR Consultant," in Hartford, Connecticut and (2) a project for: "T M Development by [the petitioner] onsite and offshore resources for North American AG SAP 2007 – 80/HR for onsite and 25/Hr for offshore," also fail to detail the duties associated with the projects. Neither project includes a description of the actual duties of the position nor otherwise provides the detail necessary to conclude that the project requires 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. Without a detailed job description from the entity that requires the alien's services, whether the entity is the petitioner or a third party client, the petitioner has not provided evidence sufficient 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)). 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)(1).

The AAO acknowledges the petitioner's desire to utilize the beneficiary's services on projects and at client work locations as it sees fit. However, when the record indicates that the petitioner is acting as an employment contractor and thus is merely a "token employer," 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.

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 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. Thus, the entity ultimately 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.

The AAO notes counsel's contention that the petitioner's past history of receiving numerous H-1B approvals should be given significant weight in this determination, as well as counsel's reference to an unpublished decision and a CIS memorandum. Regarding the petitioner's previous approvals, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the petitioner's previous petitions were approved based upon the same evidence contained in this record, their approval would constitute 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). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Regarding the previous unpublished decision referenced by counsel, such unpublished decisions are not binding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO also acknowledges counsel's reference to the memorandum that indicates requests for contracts should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. In this matter, however, the petitioner has not supplied a detailed description of the proffered position sufficient to establish the position as a specialty occupation. The director's request for copies of contracts to enable a consideration of the actual duties of the position provides the petitioner an opportunity to establish this necessary component of the H-1B classification. In addition, contracts are used to substantiate that the petitioner has the necessary ongoing, non-speculative work, to engage a beneficiary in work for the duration of the requested H-1B classification. A petitioner's failure to produce such documentary evidence limits thorough analysis of the proffered position.

In this matter, the AAO is unable to conclude that the proffered position will include duties that incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. 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. For this reason, the petition will be denied.

Beyond the decision of the director, the petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation in the computer field. The evaluation of the beneficiary's educational credentials and work experience is deficient. The AAO acknowledges the August 2, 2004 letter from the Chairperson, SCIS, Baruch College/City University of New York. Although the chairperson confirms that Baruch College/City University of New York has a program for granting college-level credit based on a candidate's foreign educational credentials, training, and/or employment experience, the chairperson does not specify that the university has a program to grant college-credit in the computer field based on an individual's training and experience. Thus, the record does not establish that the proffered evaluation is from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit based on an individual's training and/or work experience. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). For this additional reason, the petition will be denied.

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.