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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 05 186 51969 Office: CALIFORNIA SERVICE CENTER Date: JUL 30 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Michael T. Kelly
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 a computer software consulting company that seeks to employ the beneficiary as a computer 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 did not establish that: the proffered position qualified as a specialty occupation; the petitioner would be the beneficiary's employer; and that the petitioner had not a valid Labor Condition Application (LCA) for the place of intended employment. On appeal the petitioner submits a brief and additional information contending that: the proffered position qualifies as a specialty occupation; it would be the employer of the beneficiary; and the LCA submitted with the filing of the Form I-129 petition was valid for the intended place of employment.

The first issue to be determined is whether the petitioner qualifies as a United States employer.

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 petitioner provided copies of several contracts that it maintains with various companies which enables the petitioner to provide its employees for completion of various work projects on behalf of the contracting company's clients. Under the terms of these contracts, the petitioner acts as an independent contractor in providing services. The performance of the services to be provided are performed by employees of the petitioner. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility 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 decision to the contrary is withdrawn.

The next issue to be determined is whether the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of 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:

> An 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 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.

The petitioner seeks the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Assist in designing, evaluating, programming, and implementing computer applications;
- Maintain computer systems, write program specifications and undertake technical documentation;
- Design, write and develop custom-made software applications per specific requirements;
- Identify problems, study existing systems to evaluate effectiveness and develop new systems to improve production or workflow;

- Write a detailed description of user needs, program functions, and steps required to develop or modify computer programs;

- Review computer system capabilities, workflow and scheduling limitations to determine whether the program can be changed within the existing system;

- Assist in developing application software based on specific needs;

- Provide technical evaluation of new products, assess time estimation and provide technical support within the organization;

- Be responsible for trouble shooting, installation and design and development of software applications;

- Maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards;

- Prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and describe logical operations involved by making use of his knowledge of computer science; and

- Prepare manuals to describe installation and operating procedures.

The petitioner requires a minimum of a bachelor's degree in computer science or an engineering field for entry into the proffered position.

In the director's decision, he noted that the petitioner had not provided contracts or other documentary evidence to establish the duties to be performed by the beneficiary for the ultimate user of his services, and that the petitioner had not provided an itinerary[1] for the beneficiary's services during the course of his intended stay in the United States (from 10/1/05 – 10/1/08). 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.

The petitioner provided sample copies of contracts between it and various clients for whom the beneficiary would perform services. The petitioner indicated that the beneficiary would perform some work at the petitioner's business location, but would also be available for work on various client projects at multiple, but unspecified, locations. 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. The documentation contained in the record does not establish a complete itinerary for the beneficiary from October 1, 2005 through October 1, 2008. From the evidence submitted, the beneficiary would work for a period of time in California, at the petitioner's Arizona offices, and at other unspecified locations as client

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[1] *See* 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).

needs dictated. 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.[2]

The beneficiary's position has been identified by the petitioner as a programmer analyst. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associates degree or some other form of certification.

The petitioner provided a copy of a subcontract and work order whereby it would provide the beneficiary's services to the Covansys Corp. (a subcontractor of IT services), who would in turn use the beneficiary's services on a contract with one of its clients. The work order attached to the subcontract indicates that the petitioner would begin work on November 14, 2005 at Southern California Edison's (Covansys Corp. client) work facility in Irwindale, CA. The work order states that the beneficiary would perform: "Data Analysis using Datawarehousing/data modeling tools." The work order did not state the length of intended employment. The petitioner did not provide a detailed description of the duties to be performed by the beneficiary prepared by the end user of the beneficiary's services (Southern California Edison), and, therefore, has not established the proffered position as a specialty occupation. The petitioner states that the beneficiary will also perform labor at its Arizona offices on in-house projects, but has failed to provide evidence of any such in-house projects so it is impossible to determine the nature or complexity of the duties to be performed. Simply going on the 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 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. As the record does not contain any

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[2] 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."

documentation from the end users of the beneficiary's services (the petitioner's clients) that establish the specific duties the beneficiary would perform under contract, 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)*(1)*. As such, the petition must be denied.

The director also denied the petition because the petitioner had not filed an LCA valid for all locations of employment. The AAO agrees. The petitioner filed an LCA valid for Phoenix, AZ. The petitioner stated that the beneficiary will be working at the location of Southern California Edison (in Irwindale, CA). That location is not within the standard metropolitan statistical area for Phoenix, AZ, and the LCA is not valid for that location. Without an itinerary of employment covering the entire period of employment requested, the record does not establish that the petitioner has filed an LCA valid for all locations of employment. It should be noted that the petitioner states that the beneficiary would work in California on the Southern California Edison project, then later states on appeal that the beneficiary is no longer scheduled to work on the project but would work at a different location that is in compliance with the LCA. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Finally, the petitioner states that the petitioner is not required to file a new LCA when the beneficiary will be sent to a different work location for only a brief period of time. The record does not establish the duration of the California project where the beneficiary was scheduled to be employed. Thus, the record does not establish that an LCA is not required for that place employment due to the brief period of employment as contended by the petitioner on appeal. For these additional reasons, the petition may not be approved.

Finally, counsel asserts that the present petition should be approved because similar petitions were approved for other programmer analysts in unrelated cases. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute 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).

The burden of proof in this proceeding 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.