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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 07 138 53059 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center 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 business that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, 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 denied the petition, determining that the petitioner had not established that it qualifies as a U.S. employer or agent, or that the proffered position is 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 evidence (RFE); (3) counsel and the petitioner's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 its supplement to the Form I-129, the petitioner described the proposed duties of the proffered programmer analyst position as follows: plan, develop, test, and document computer programs; evaluate user requests for new or modified programs; formulate plans outlining steps required to develop programs using structured analysis and design; prepare flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers; write manuals and document operating procedures and assist users in solving problems; replace, delete, and modify codes to correct errors; analyze, review, and oversee the installation of software; provide technical assistance to clients; maintain clients' networks and software builds; coordinate with various locations during transitioning; and oversee network administration and create test scripts and applications to manage and test the various functionalities of builds and network administration.

The record also includes a labor condition application (LCA) submitted at the time of filing listing the beneficiary's work locations in Fremont, California and San Francisco, California as a programmer analyst.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary.

In response to the RFE, counsel stated, in part, that the petitioner is a direct employer and has total control over its employees, including the ones assigned to work off-site. Counsel also stated that the petitioner always has some consultants, including programmer analysts, working at its headquarters on in-house projects, and that although

the petitioner has contracts with various clients, no specific person is designated to do the work. Counsel submitted a letter from the petitioner's CEO who stated: "At present, it is our plan that the [beneficiary] will be required to work at our headquarters in Fremont, CA." As supporting documentation, counsel submitted: a copy of the 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); a Westlaw printout of the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995); an unpublished AAO decision; the petitioner's 2005 and 2006 tax returns; the petitioner's quarterly federal tax returns for the second, third, and fourth quarters of 2006; and printouts from the petitioner's website.

The director denied the petition on the basis of her determination that the petitioner failed to provide valid and dated contracts between itself and the client/s for whom the beneficiary would perform the proposed duties. The director also found that the petitioner failed to provide documentary evidence of its claimed in-house projects for the three years of intended employment and thus had not established that it qualifies as a U.S. employer or agent, or that the proffered position is a specialty occupation.

On appeal, counsel asserts that the proffered programmer analyst position qualifies as a specialty occupation, as it meets all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel cites the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*), the *O*Net*, and the *Education & Training Code*, stating that the programmer analyst position has an SVP rating between seven and eight, and an Education and Training Code 5, which indicate that this position requires the completion of a bachelor's degree. Counsel also states that the petitioner is a direct employer and has total control over its employees, including the ones assigned to work off-site, and that the director has approved countless petitions for applicants performing similar job duties. Counsel also states that the petitioner has a long history of developing its in-house projects, and that, although the petitioner has contracts with various clients, no specific person is designated to do the work. Counsel submits the following supporting documentation: a consulting agreement, signed on January 24, 2007, between the petitioner and [redacted]., located in Clayton, Missouri, which is engaged in the business of providing professional computer temporary staffing services and/or data processing services and/or products to its customers; a statement of work, signed by the petitioner and [redacted] naming the beneficiary to provide consulting services at Fremont, California, from October 10, 2007 through October 10, 2008; job advertisements; quarterly federal tax returns; 2006 tax returns; bank statements; printouts from the petitioner's website; and quarterly wage reports.

Preliminarily, counsel's interpretation of the *O*Net* and the *Education & Training Code* are not persuasive that the proffered position is a specialty occupation. The *O*Net* does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. The *O*Net* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *O*Net's* job zone rating, the SVP rating and the *Education & Training Code* do not describe how those years are to be divided among training, formal education, and experience, and do not specify the particular type of degree, if any, that a position would

require. In particular, the AAO notes that the *O*Net* Job Zone Seven and Eight designations do not specify a degree in a related specialty as a characteristic of occupations encompassed by this category. The *O*Net* OnLine Help site also states that an SVP rating indicates years of specific vocational training that may be attained in a variety of ways other than formal education.

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 as set out in the petitioner's July 19, 2007 letter submitted in response to the RFE.[1] *See* 8 C.F.R. § 214.2(h)(4)(ii). Therefore, that portion of the director's decision finding otherwise is withdrawn.

The Aytes memorandum cited at footnote 1 indicates 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 her discretion to request additional information regarding the beneficiary's ultimate employment, as the nature of the petitioner's business is information technology consulting and software development, and the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform.[2] The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor.

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 in such situations. 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.

At the outset, the record contains unexplained inconsistencies. First, counsel's assertion on appeal that the petitioner has contracts with various clients, but that no specific person is designated to do the work, conflicts with the statement of work submitted on appeal between the petitioner and [redacted], which specifically names the beneficiary to work as consultant in Fremont, California from October 10, 2007 to October 10, 2008. Second, on page 10 of counsel's brief, counsel states: "Work is immediately available and *Astron* needs the skills of the Beneficiary to complete the contracted work, as well as, to be able to contract for future work." (Emphasis added.) The record, however, contains no contract or work order with a business named "Astron." As such, it is not clear how "Astron" pertains to the instant petition. Third, on page 12 of counsel's brief, counsel states: "The contracts provided clearly establish *Yash* is an employer; and thus may

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[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 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."

sponsor the Beneficiary." (Emphasis added.) As the petitioner of the instant petition is not "Yash," it is not clear how the business "Yash" pertains to the instant petition. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Upon review of the record in its entirety, the petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. 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). Although counsel indicates on appeal that the petitioner has a long history of developing in-house projects, he does not provide the name of the specific project to which the beneficiary is assigned or provide a detailed description of that project. Counsel limits his description of the proposed duties to generic terms that do not convey either the content of the actual work that the beneficiary would perform or that the actual work performance would involve the critical and practical application of a bachelor's degree level of knowledge in a specific specialty, as required by statute and regulation to establish a specialty occupation. For example, counsel describes the proposed duties, in part, as follows: "Project Planning activities, such as defining scope of the project, deliverables and milestones. . . . Updating progress reports. Managing the scope to deliver the project on time." Again, counsel does not provide the name of the specific project to which the beneficiary is assigned or provide a detailed description of that project. Further, the AAO notes that the petitioner has provided a consulting agreement between the petitioner and [redacted]., located in Clayton, Missouri, and a statement of work naming the beneficiary to provide consulting services at Fremont, California, from October 10, 2007 through October 10, 2008. This statement of work, however, does not contain the end-client's name or a complete address for the beneficiary's work location. As such, the actual end-client and its actual location are unclear. Due to the inconsistencies and discrepancies discussed above, the nature of the proposed duties remains unclear. Thus, the AAO is precluded from determining 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)(*1*).[3]

[3] The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education. The record is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a specific discipline.

In that the record contains conflicting information regarding the nature of the beneficiary's services, 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 specific information pertaining to the beneficiary's actual work location and job duties, 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 specific information pertaining to the beneficiary's actual work location and job duties, 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.

Counsel asserts on appeal that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. 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).

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.

Beyond the decision of the director, the petition may not be approved for an additional reason. The statement of work between the petitioner and [redacted] only covers the period between October 10, 2007 and October 10, 2008. The petitioner, therefore, has not demonstrated that it will employ the beneficiary for the entire period of requested employment. For this additional reason, the petition may not be approved.
In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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