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U.S. Citizenship and Immigration Services

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FILE: WAC 05 083 50548 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2006

IN RE: Petitioner:
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:

[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 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 project services and software consulting firm that seeks to employ the beneficiary as a 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 demonstrate that it had H-1B caliber work available for the beneficiary during the one year time period sought by the petitioner in the Form I-129 petition, and the petition was not, therefore, approvable. The director also determined that the petitioner did not qualify as a United States employer in this instance, and that without contracts, it could not be determined that the petitioner had filed an LCA valid for all locations of employment. On appeal the petitioner submits a brief and additional information indicating that the proffered position qualifies as a specialty occupation, and that the petitioner will be the employer of the beneficiary with H-1B caliber employment available for him in the United States.

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 record establishes that the petitioner will be the employer of the beneficiary, and the director's finding to the contrary shall be withdrawn. The petitioner submitted an independent contractor agreement which it entered into with Global Software Resources (GSR). Under the terms of this agreement the petitioner will act as an independent contractor in providing services. The performance of the services to be provided to GSR clients will be 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 the 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 finding 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 includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to the evidence provided by the petitioner the beneficiary would:

- Be responsible for custom program design, development and implementation of software applications and systems to meet clients' needs and specifications;
- Analyze user requirements, procedures, and problems to automate processing or to improve existing computer systems;
- Confer with personnel to analyze current operational procedures and identify problems;

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

- Review computer system capabilities, workflow, and study existing information processing systems to evaluate effectiveness, and develop new systems to improve productivity; and

- Provide software support, which includes testing, debugging and modifying software per client needs.

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

The director determined that the petitioner had not provided contracts for the period of time requested on the petition. The AAO agrees that the petitioner has not provided an itinerary[1] for the beneficiary's work to be performed from March 1, 2005 through March 25, 2006.

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 his request for evidence, the director asked for copies of contracts between the petitioner and its clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. 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. Upon review, the director properly exercised his discretion to request the contracts described above.[2] In response to the director's request for evidence, the petitioner provided an independent contractor agreement entered into between it and GSR with an accompanying purchase order which indicates that the petitioner will provide the beneficiary's services to work on a project for one of GSR's clients (Robert Half International – Pleasanton, CA) from February 1, 2005 through March 31, 2006. The petitioner states on appeal that Robert Half International is a staffing company. The purchase order does not state where the beneficiary will perform services or for whom. The work order states "Contractor and Client will discuss and determine the hours and location(s) for performance by Contractor or its personnel." The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that the itinerary shall establish the dates and locations of employment. The work order submitted by the petitioner establishes neither the duties nor the locations of proposed employment and does not satisfy the cited regulation requiring an itinerary of employment.

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

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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).

[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."

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 associate's degree or some other form of certification.

The petitioner, however, has provided no contracts, work orders or statements of work from the party for whom the beneficiary will actually perform services (Robert Half International) specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. The petitioner did provide a letter from GSR which identified the "scope of work" to be performed by the beneficiary on an unidentified project in Pleasanton, CA from September of 2004, until October of 2005. It is not clear, however, for what entity the beneficiary would perform services within the "scope of work" set forth in this letter. The dates of service provided on that letter do not coincide with the dates of service requested for the beneficiary's employment. The "scope of work" to be performed, is not described in specific detail and does not specifically describe the nature and/or complexity of the precise duties the beneficiary would perform on a daily basis.

The petitioner is an employment contractor in that it will place the beneficiary in multiple work locations to provide services for a third party. 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 documentation from the end user of the beneficiary's services that establishes 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)*. The petition must, therefore, be denied.

The director also determined that without contracts, it could not be determined that the petitioner had provided a valid LCA for the locations of employment. The LCA states that the work locations include

Cerritos and Los Angeles, CA. However, the work order with [redacted] does not indicate where the beneficiary will be placed. The AAO agrees that the record does not establish the LCA is valid for the location of employment. For this additional reason, the petition may not be approved.

The AAO notes that the petition seeks an extension of previously approved employment. 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (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).

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 failed to sustain that burden.

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