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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 06 174 52582 Office: CALIFORNIA SERVICE CENTER Date: SEP 10 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.

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 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 denied the petition stating that: the record did not establish that the beneficiary was coming to the United States to perform work in a specialty occupation; the proffered position did not qualify as a specialty occupation; and that the petitioner's failure to provide contracts for the work to be performed by the beneficiary at various petitioner client locations precluded a determination of whether the petitioner had a valid Labor Condition Application (LCA) for the beneficiary's intended work locations. On appeal, the petitioner submits a brief and additional information stating that the proffered position qualifies as a specialty occupation.

The 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:

- Analyze communications, information and programming requirements of clients;
- Plan, develop and design computer systems;
- Design, program, and implement software applications and packages customized to meet specific client needs;
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs;
- Train clients on the use of software applications and provide trouble shooting and debugging support;
- Utilize C, C++, Visual C++, Java 2, J2EE, EJB, XML, Struts Test Case, J Unit, Cactus TestCase, Java Script, HTML, Ericsson TEMS, MatLab, VHDL, PSPICE, HP-ADS, TCP/IP, ATM, SNMP, SMTP, Windows, HP-UX v 10.4, MFC, JMS, Rational Rose, UML, Websphere, Weblogic, Tomcat, and IIS in performing his duties.

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

The director determined that the petitioner had not provided contracts for the period of intended stay 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 October 1, 2006 through October 1, 2009, the period of requested stay in the United States.

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

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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).

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 Sogeti USA, LLC (Sogeti), along with a work order indicating that the beneficiary would perform work for one of Sogeti's clients, Mercedes Benz as a Java, Struts Developer beginning April 1, 2006. The length of intended employment on this project was not specified on the work order. 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 documentation submitted by the petitioner from Sogeti does not provide that information. Nor does the record establish other locations where the beneficiary will be employed during the remainder of any authorized period of stay in the United States should the beneficiary's employment through Sogeti on the Mercedes Benz project end prior to the end of any authorized stay. The documentation submitted does not satisfy the cited regulation requiring an itinerary of employment.

The evidence of record establishes that the petitioner is an employment contractor, in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts (even though specifically requested by the director), work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation. 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.

The petitioner is seeking the beneficiary's services as a computer programmer analyst. Counsel's brief in support of the appeal seeks to distinguish *Defensor v. Meissner* by stating that the position of programmer analyst is always a specialty occupation. The AAO disagrees. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths available for programmer analysts 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.

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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."

As the record does not contain any documentation from the end user client (here, Mercedes Benz) for whom the beneficiary will provide services, that establishes the specific duties the beneficiary would perform, 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 director also found that he was unable to determine whether the LCA was valid for the work location. The petitioner's failure to provide contracts establishing the beneficiary's work locations during his entire period of intended stay in the United States precludes CIS from determining whether a valid LCA was certified by the Department of Labor prior to the filing of the Form I-129 petition. *See* 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petition must be denied for this reason as well.

Finally, the petitioner asserts that previous agency decisions have classified the offered position as a specialty occupation. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). 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). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. In the present matter, the petitioner has offered the beneficiary a position as a programmer analyst. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h).

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.