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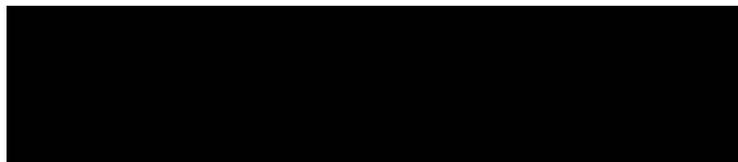
U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 145 50116 Office: CALIFORNIA SERVICE CENTER Date: **OCT 01 2008**

IN RE: Petitioner:
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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 consulting, training, and projects development business that seeks to employ the beneficiary as a programmer. 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, that its labor condition application (LCA) is valid, 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) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's statement and additional documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

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 an undated letter submitted in support of the petition, the petitioner described the proposed duties of the proffered programmer position as performing the following duties in Oracle applications and Oracle RDBMS technology:

1. Work with application architects to design/modify database based on technical/business requirements;
2. Participate in the design and implementation of application data model;
3. Design front-end screens and batch processes;
4. Write, code and unit test PL/SQL scripts for loading and transforming data;
5. Create, modify, test, and document stored procedures; and
6. Provide technical expertise on Oracle applications including installing and maintaining Oracle applications.

The record also includes a certified LCA submitted at the time of filing, listing the beneficiary's work location in "Metro Detroit," Michigan as a programmer.

In an RFE, the director requested additional information from the petitioner, including 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. The director also requested the petitioner's 2004, 2005 and 2006 federal income tax returns and quarterly wage reports for all the petitioner's employees for the last four quarters, and other business-related documentation.

In response to the RFE, the petitioner stated that the petitioner is the employing entity with control over the beneficiary's work. The petitioner also stated that the beneficiary would work at the petitioner's premises as a programmer. As supporting documentation, the petitioner submitted the following: the petitioner's profile and business licenses; a lease agreement, floor plan, and telephone listing; the petitioner's March 29, 2007 job offer to the beneficiary "to report to Business/Intelligence/Datawarehouse Development Team"; a sample employment agreement; a list of the petitioner's current and former employees; job announcements for the petitioner and other IT businesses; the CIS publication *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2005*; *O*Net* information on computer programmers; the petitioner's federal income tax returns for 2004, 2005, and 2006, quarterly wage reports, and W-2 forms; a Subcontractor Services Agreement, dated December 16, 2005, between the petitioner and Tau Solutions, Inc., located in Florida, for the petitioner's consulting services, and a corresponding statement of work and project reports; an incomplete master agreement between the petitioner and Blue Cross and Blue Shield of Michigan; and various other purchase orders, supplier agreements, and project proposals.

The director denied the petition on the basis of her determination that the petitioner had not submitted any contracts with the petitioner's end-clients, for whom the beneficiary would be performing services. The director concluded that, without such contracts, the petitioner had not established that it qualifies as a U.S. employer or agent, that its labor condition application (LCA) is valid, or that the proffered position is a specialty occupation.

On appeal, the petitioner states that the petitioner will be the beneficiary's employer and will control the beneficiary's work on its in-house project: *Elimination of Access/Excel System from Existing Business Process*, dated September 8, 2007. The petitioner also states that it has contracts with other companies but not for the beneficiary, and that the beneficiary will not work for any of the petitioner's clients or third parties. The petitioner also states that the proffered programmer qualifies as a specialty occupation and that CIS has approved several of its petitions for programmers. As supporting documentation, the petitioner submits a copy of the petitioner's in-house project: *Elimination of Access/Excel System from Existing Business Process*, dated September 8, 2007, and copies of previously submitted documentation.

Preliminarily, 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 undated letters and its March 29, 2007 employment offer.¹ See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO withdraws the director's contrary finding.

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).

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, according to the information on the petition, the nature of the petitioning entity includes software consulting. Moreover, 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.

The AAO acknowledges the petitioner's assertion on appeal that the beneficiary will work on the in-house project: *Elimination of Access/Excel System from Existing Business Process*. The evidence of record, however, does not contain any evidence that GENPACT has signed a contract with the petitioner for the completion of the same project. In addition, a review of the *Elimination of Access/Excel System from Existing Business Process* document finds no mention of the beneficiary and his specific duties in relation to the project. 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)). Moreover, as the record does not contain a dated contract with GENPACT, the AAO is unable to determine if a valid contract for the beneficiary's services was in existence when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The AAO agrees with the director that the record does not support a finding that the petitioner has provided evidence of the conditions and scope of the proposed duties and the proffered position, and that the petitioner will employ the beneficiary in a specialty occupation for the requested period. Again, 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)).

Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such

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."

descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business, and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

In this matter, 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. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The petitioner did not submit the evidence requested by the director pertaining to contracts, statements of work, work orders, and/or service agreements between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work, work orders, or service agreements for the beneficiary. The petitioner asserts on appeal that the beneficiary will work on the in-house project: *Elimination of Access/Excel System from Existing Business Process*. Again, the record does not contain a contract between the petitioner and GENPACT for the completion of the same project. As such, the petitioner has not established that it had three years' worth of H-1B level work for the beneficiary to perform when the petition was filed. Accordingly, the petitioner has not established that the beneficiary will be employed in a specialty occupation.

The AAO observes that the Department of Labor's *Occupational Outlook 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 general description of the beneficiary's duties provided in the petitioner's undated letters 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 computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In that the actual duties of the beneficiary remain unclear, the petitioner does not meet 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 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 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.

The petitioner noted that CIS approved other petitions that the petitioner had previously filed for programmer positions. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross 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 had approved the nonimmigrant petitions on behalf of the petitioner's other programmers, 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).

It is also noted that the record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing 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 that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The director also found that, without contracts and work orders from the ultimate end-client for whom the beneficiary will provide his services, the location of the beneficiary's employment site is unclear, and thus the petitioner has not demonstrated compliance with the certified LCA. As discussed above, the record does not contain specific details of the project to which the beneficiary will be assigned. As the beneficiary's specific duties and ultimate worksite are unclear, it has not been shown that the work would be covered by the location on the certified LCA. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, the petition may not be approved.

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.

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.