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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 08 162 51313 Office: VERMONT SERVICE CENTER Date: AUG 05 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software design and development, IT consulting company. It seeks to employ the beneficiary as a systems analyst and to classify him 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 on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to submit a credible itinerary; and (3) the petitioner failed to establish that the U.S. Department of Labor's Form ETA 9035E Labor Condition Application (LCA) corresponds to the petition.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B with the petitioner's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on May 20, 2008, the petitioner stated it has 125 employees and a gross annual income of $13.5 million. The petitioner indicated that it wished to employ the beneficiary as a systems analyst from July 25, 2008 to July 24, 2011 at an annual salary of $60,000.[1]

The support letter states that the person in the proffered position will be responsible for performing the following duties:

- Analyze user requirements, design, develop and implement software applications and e-commerce, Internet and Intranet based business applications;
- Prepare workflow charts and diagrams to specify in detail operations to be performed by equipment and computer programs and operations to be performed by personnel in system; and

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[1] According to the information provided in the petition, the beneficiary has been in the U.S. in H-1B status since July 25, 2000. The AAO notes that in general section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] may not exceed 6 years." However, the "American Competitiveness in the Twenty-First Century Act" (AC21) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. The petitioner requested that the beneficiary's period of stay be extended by three years under AC21; however, under section 11030A(b) of the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21), which amended § 106(b) of AC21, such extensions are only permitted in one-year increments. Therefore, under AC21, the petitioner may only request that the beneficiary's H-1B status be extended for one year, until July 24, 2009.

- Conduct studies pertaining to development of new information systems to meet current and projected needs.

The petitioner states that the proffered position requires someone with at least a bachelor's degree in computer science, math, electronics, engineering, MIS or a related field.

The Form I-129 states that the beneficiary will work at the petitioner's offices in Jersey City, NJ. The submitted Labor Condition Application (LCA) was filed for a systems analyst to work either in Jersey City, NJ or Warren, NJ from July 25, 2008 to July 24, 2011. The LCA lists a prevailing wage of $56,014 for Jersey City, NJ and $42,286 for Warren, NJ.

The petitioner submitted the beneficiary's credentials, indicating that his foreign education is equivalent to a U.S. Bachelor of Science degree in Electronic Engineering.

On October 16, 2008, the director issued an RFE. The petitioner was instructed to submit a more detailed job description, copies of any written contracts or summary of oral contracts between the petitioner and beneficiary, as well as other evidence that the proffered position is a specialty occupation, such as job postings. Additionally, the RFE stated that if the beneficiary will work on in-house projects, the petitioner should submit evidence regarding those projects, the length of time the beneficiary will work on the project, and letters and invoices from customers. The RFE also requested that the petitioner provide evidence regarding its business and other workers.

In response to the RFE, counsel wrote as follows: "[The petitioner] offers its H-1B beneficiaries professional IT employment positions at offsite placements with "End Users" and also provides some internal professional placements for in-house projects. . . ."

Counsel did not submit an itinerary or copies of any contracts pertaining to the proposed work to be performed by the beneficiary, writing, "[w]hile [the petitioner] clearly offers its H-1B beneficiaries *bona fide* jobs in the U.S., it is not generally possible within its business structure or the IT consulting industry to provide itineraries with specific dates and locations six months in advance of a start date. . . ." and "[the petitioner], an IT consulting contracting firm, should not be faulted for not merely providing such contracts for the Beneficiary. . . . While arguably there may be a reason to request contracts with End-Users, a thorough review of the enclosed documentation with regard to its credible business and contracts give no reason for USCIS to suspect H-1B fraud or other unscrupulous business behavior." Counsel submitted copies of the petitioner's contracts with clients, however none of these pertain to the project(s) on which the beneficiary would allegedly be assigned.

However, counsel submitted a copy of a Purchase Order between the petitioner and a company called TTI of USA, Inc., dated October 1, 2007. The Purchase Order states that it is pursuant to a Subcontractor Agreement between the parties, but a copy of the Subcontractor Agreement was not submitted. The Purchase Order states that the beneficiary will perform consulting services at Citigroup, however the Purchase Agreement does not state the location or details regarding the project. However, the Purchase Order states that the terms of the engagement is six months from October 1, 2007, which means the Purchase Order expired prior to the

requested term of employment as stated in the Form I-129. Therefore, the Purchase Order does not cover even one day of the requested period of time in the petition.

Additionally, counsel submitted a letter from Citi Investment Research, dated November 11, 2008, which provides a list of vague and generic duties the beneficiary has been performing there since December 2005. A description of the project is not provided and Citi Investment Research does not state the location where the work will be performed. Citi Investment Research does not even have an address or contact information listed on its letterhead.

Counsel also submitted a list of the petitioner's workers, which indicates that it has other Systems Analysts, in addition to the beneficiary. According to the petitioner, these workers have at least a bachelor's or master's degree in one or more of the following areas: CIS, Commerce, Electronics and Communications, Electronic Engineering, Computer Technology, Computer Engineering, Computer Science, MIS, Mechanical Engineering, and Industrial Engineering.

The director denied the petition on February 5, 2009.

On appeal, counsel states that the beneficiary has been performing services as a Systems Analyst for Citigroup since 2005. Counsel further states that the RFE did not request an LCA, as was cited as a request in the denial. While the AAO agrees with the petitioner that the RFE did not request this document, as the director did not base his finding that the petitioner failed to submit a valid LCA covering the location(s) where the services are to be performed by the beneficiary on the omission of an additional LCA, this specific finding by the director is deemed harmless.

The AAO will first consider whether the proffered position is a specialty occupation. 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means 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, a proposed position must also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On appeal, the petitioner argues that *Defensor v. Meissner*, 201 F.3d 384, is not applicable to this petition because the position at issue in *Defensor*, a nurse, is non-professional, whereas a systems analyst is a professional occupation. However, the application of *Defensor* is not determined by whether the proffered position is professional. Instead, an analysis of whether the proffered position is a specialty occupation under *Defensor* is appropriate whenever the petitioner intends to have the beneficiary perform work for another entity.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. As discussed above, the record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

As discussed above, the evidence indicates that, despite the petitioner's statement in the Form I-129 that the beneficiary would work at the petitioner's offices in Jersey City, NJ, the beneficiary will be assigned to third-party client sites. Although the petitioner provided a copy of its Purchase Order between the petitioner and TTI of USA, Inc., the petitioner failed to submit a copy of the relevant Subcontractor Agreement mentioned in the Purchase Order, the terms of the Purchase Order expired prior to the initial date requested for the beneficiary's H-1B employment, and the letter from Citi Investment Research failed to provide details regarding the project on which the beneficiary would allegedly work, the length of the project, the location where the work would allegedly be performed, or which entity retains ultimate control over the beneficiary's employment and work product.

Under *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts establishing the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a systems analyst. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain sufficient documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, 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.

> condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Emphasis added].

The Form I-129 in this matter, which indicates the proffered position's location as being in Jersey City, and the LCA, which covers locations in Jersey City and Warren, NJ, are not corroborated by the Purchase Order or letter from Citi Investment Research. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot ascertain that this LCA actually supports and corresponds to the H-1B petition. *See id.* As discussed above, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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.

Therefore, the director's conclusion that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period is affirmed.

Beyond the decision of the director, the AAO finds that the petitioner failed to submit requested evidence, thereby precluding a material line of inquiry. As discussed earlier, the petitioner did not provide additional documentation that was specifically requested by the director, such as an itinerary, copies of any agreements between the petitioner and beneficiary, and copies of end user contracts, to provide further information that clarifies whether the proffered position is a specialty occupation, even though the evidence indicates that the beneficiary is not likely to be employed at the petitioner's offices for the duration of the petition. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, 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. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it 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 USCIS 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a beneficiary, 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).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied 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.

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