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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

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 quality assurance and technology company. It seeks to employ the beneficiary as a software quality assurance 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 because the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

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 counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on November 10, 2008, the petitioner stated it has 112 employees and a gross annual income of over $9 million. The petitioner indicated that it wished to employ the beneficiary as a software quality assurance analyst in either Phoenix, AZ or Milwaukee, WI from December 6, 2008 to December 6, 2009 at an annual salary of $44,429.

The proffered position's duties are broken down by the petitioner as follows:

- Support in the creation and execution of various testing including Black Box, White Box, Functional, Load, Regression, Compatibility, Integration, Security, Wireless and Automated Testing (30% of the beneficiary's time);
- Building and preparing Test Plans, Test Scripts and Test Cases with the understanding of the customer requirements in the various Modules (30%);
- Support in understanding the customer's needs both technologically and domain knowledge wise (10%);
- Writing Database Scripts, setting up the quality assurance environment and preparing flow charts and diagrams (10%);
- Assist business users in executing the User Acceptance Testing and preparing the training material for new applications (10%); and
- Create and maintain Knowledge Management Systems as well as train new SQA Analysts in the use of Knowledge Management Systems (10%).

The petitioner describes the above-listed duties as a combination of the duties of a Software Engineer and a Quality Assurance Analyst and states, "[t]he job duties are clearly highly specialized and require the services of an individual with the minimum of a Bachelor's or equivalent degree in a related field."

The submitted Labor Condition Application (LCA) was filed for a software quality assurance analyst to work in Phoenix, AZ or Milwaukee, WI from December 6, 2008 to December 6, 2009. The LCA lists a prevailing

wage of $31,533 for Phoenix, AZ and $32,053 for Milwaukee, WI.

The petitioner submitted the beneficiary's credentials, indicating that he has a foreign degree. The education evaluation submitted states that the beneficiary's education is equivalent to a U.S. bachelor's degree in electrical engineering.

Additionally, the petitioner provided a document summarizing the terms of an oral agreement between the petitioner and beneficiary that was made on April 9, 2008. The agreement states that "[the beneficiary] shall work out of Employer's office located in Phoenix, AZ and on-site location in Milwaukee, WI. *Employee recognizes and accepts that he may be required to work anywhere in the United States for extended periods of time.*" (Emphasis added.)

On November 21, 2008, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a bona fide job offer exists. The petitioner was advised to submit a detailed technical description of the project on which the beneficiary would work (including the timeline, current status, number of employees assigned, worksite location, and marketing analysis for the final project), an itinerary of where the beneficiary will work, and copies of contracts between the petitioner and the end client(s) that demonstrate specialty occupation work for the beneficiary with the actual end-client company. The RFE also requested that the petitioner provide evidence regarding its business.

The petitioner provided copies of an I/T Change Authorization, one Statement of Work (SOW), and two contractor agreements. The first contractor agreement, dated January 20, 2006, is between the petitioner and a company called [redacted] The SOW provided as Exhibit A to this contract provides that the beneficiary will be assigned to a company called [redacted] in Milwaukee, WI. This SOW states that the petitioner will arrange with Assurant the hours and location where the services will be performed.

The second contract is a Professional Services Agreement, dated January 28, 2008, between [redacted] and [redacted], with a validity period of three years. The I/T Change Authorization provides that the beneficiary will work as a "Manual Tester on the IM Growth Release Program as needed by Assurant Health." The I/T Change Authorization is from Assurant and is signed by [redacted] and a company called [redacted] on December 15, 2008 and December 3, 2008, respectively. The term of the work to be performed under I/T Change Authorization document is from January 1, 2009 to June 30, 2009 and states that [redacted] has the right to offer a permanent position to [the beneficiary] after July 31, 2006." Moreover, the I/T Change Authorization states that the beneficiary will report directly to [redacted], not the petitioner.

Additionally, the petitioner provided a job description for the beneficiary from Assurant. The job description states that the beneficiary will work as a Quality Analyst for an unspecified salary and that the position requires three to five years of progressive testing experience. However, Assurant does not indicate that a degree of any type is required.

The petitioner also submitted a copy of an Employment Agreement between the petitioner and beneficiary dated April 1, 2005. This Employment Agreement states the following in pertinent part:

> [The beneficiary] shall perform the duties of a **Software Quality Assurance Analyst**. [The beneficiary] *may be required to work at clients' locations anywhere in the United States for extended periods*.
>
> [The petitioner], in its discretion, shall have the right, at any time during the term of this Agreement, to assign [the beneficiary] *to perform duties different in any manner whatsoever from the duties originally assigned and specified.*

(Emphasis added in italics.) Therefore, not only can the petitioner assign the beneficiary to any location in the United States, but also the petitioner may have the beneficiary perform duties that are completely different from those proffered in the petition. Given this plus the fact that the I/T Change Authorization document was dated after the petition was filed, covers a period of only six months, and states the beneficiary will report to a company that is not the petitioner, it is apparent that the petitioner, at the time of filing the petition, did not know to which project(s) the beneficiary will be assigned for the duration of the petition, the work the beneficiary would perform, or the location(s) where the beneficiary will actually work.

Additionally, the petitioner provided an itinerary that states the beneficiary will work at the offices of [redacted] in Milwaukee, WI for the duration of the petition. However, this itinerary contradicts the I/T Change Authorization document, which states that the beneficiary will work at [redacted] in Milwaukee, WI for only six months. 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).

The director denied the petition on January 7, 2009.

On appeal, counsel argues that the petitioner has had H-1B petitions approved for the beneficiary in the past and that therefore, according to an Interoffice Memorandum from [redacted][1] the present petition, which counsel argues does not entail a material error, changed circumstances, or new material information affecting the petition, should be approved. However, counsel's assumption that the present petition does not contain changed circumstances or new material information is incorrect. It is clear that the minimum requirements for a quality assurance analyst as described in the documentation from Assurant are quite different from those required by the petitioner in that the documentation from Assurant does not state that at least a bachelor's degree or the equivalent in a specific specialty is required for the proffered position. Moreover, the I/T Change Authorization states that the beneficiary will be employed as a Manual Tester on the IM Growth Release Program, which appears to be different from the proffered position. Again, 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. at 591-92. Therefore, contrary to

[1] Interoffice Memorandum HQOPRD 72/11.3 from [redacted] for Operations, USCIS (April 23, 2004).

counsel's arguments, the present petition clearly contains changed circumstances or new material information that changes the nature of the position as described by the petitioner.

The AAO further notes that the director's decision does not indicate whether she 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. 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 U.S. Citizenship & Immigration Services (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).

Additionally, the I/T Change Authorization from [redacted] which was dated after the petition was filed, together with the petitioner's statements in the employment agreement that the petitioner can change the job duties and location at any time, does not demonstrate that the petitioner knew where the beneficiary would be assigned or the duties the beneficiary would perform for the duration of the petition at the time the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 384, 387 (5th Cir. 2000). 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.

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 in place at the time the petition was filed and that covers the petition's duration, even though it is apparent from the I/T Change Authorization as well as the other contracts provided that it is the end-user entities' business needs that 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 submitted in response to the RFE, including the Employment Agreement, the I/T Change Authorization, the SOW, and the contracts, indicated that at the time the petition was filed, the petitioner intended to contract the beneficiary to other entities to work in various positions at various worksites in other locations. Therefore, under *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts that were in place at the time the petition was filed and that cover the petition's duration 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, existing at the time the petition was filed and covering the petition's validity, of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a software quality assurance analyst.[2] Moreover, some of the evidence submitted by the petitioner demonstrates that the beneficiary will report directly to Assurant, and not the

[2] Even if the AAO could find that the proffered position would indeed be that of a software quality assurance analyst, such a position does not generally qualify as a specialty occupation. According to the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) section on computer systems analysts, which includes software quality assurance analysts, while many employers "prefer" to hire individuals with a bachelor's degree, the *Handbook* does not state that at least a bachelor's degree or the equivalent in a *specific specialty* is a normal, minimum entry requirement for a software quality assurance analyst position.

petitioner, to work in a position that does not require at least a bachelor's degree or the equivalent in a specific specialty. 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 require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it made a bona fide offer of employment to the beneficiary. Even though the petitioner has an employment agreement with the beneficiary, the I/T Change Authorization document submitted by the petitioner establishes that it is Assurant, and not the petitioner, that will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Therefore, the petition must be denied for this additional reason.

Also beyond the decision of the director, the AAO finds 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. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

> 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 . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor

> 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, therefore, 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, this material 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.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being in Phoenix, AZ or Milwaukee, WI, do not correspond with the employment agreement, which states that the employee may be required to work at clients' locations anywhere in the United States for extended periods to perform duties different from those proffered, or with the I/T Change Authorization document, which was not in existence at the time the petition was filed and does not cover the full period of employment requested in the petition. 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 the H-1B petition. 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 (Reg. Comm. 1978). Therefore, for this additional reason, the petition cannot be approved.

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.