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U.S. Citizenship
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Services

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FILE: WAC 07 028 52388 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

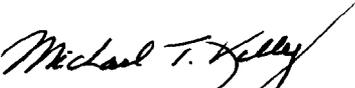
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 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 software development and consulting company that seeks to continue to employ the beneficiary as a computer systems analyst. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on four grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; (2) that the petitioner had failed to demonstrate the existence of a specialty occupation, as it had not submitted an itinerary of services to be performed; (3) that the petitioner had not established that it would comply with the terms and conditions of the labor condition application (LCA) certified for the location of intended employment; and, (4) that the evidence submitted with the petition is not credible and sufficient to establish that the petitioner has complied with the terms and conditions of employment.

On appeal, counsel contends that the director erred in denying the petition.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The AAO disagrees with the director’s finding that the petitioner would not act as the beneficiary’s employer. The evidence of record establishes that the petitioner will act as the beneficiary’s employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director’s decision to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation.

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).

As the petitioner notes in its response to the director's request for evidence, the beneficiary would not perform his duties at the petitioner's place of business. Rather, the "consultants work on projects at client locations performing technical services." Further, the AAO notes that, at page 2 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated the subsequent work location for the beneficiary was in Santa Clara, California, which is not the petitioner's work location in Duluth, Georgia.

The petitioner also submitted a "teaming agreement" between the petitioner and SACC, Inc. The contract states that SACC, Inc. wishes to have the petitioner "provide temporary contract personnel through SACC who possess skills required by SACC client(s) to fulfill temporary staffing needs on an as needed basis." The petitioner's agreement with SACC, Inc. calls for the petitioner to offer the beneficiary's services to SACC, Inc., which will in turn place the beneficiary at the end user client sites. Moreover, the petitioner submitted a work order between the petitioner and SACC, Inc., dated April 16, 2007, indicating that the beneficiary will begin a new assignment for SACC, Inc. on May 1, 2006 for one year "plus possible extensions or unless terminated by the client." The work order stated that the beneficiary will work for SACC, Inc.'s client, SCIP, in San Francisco, California, as an oracle developer.

The work order is for an assignment that started on May 1, 2006, however, the work order was not signed by SACC, Inc. until April 16, 2007, nearly one year after the assignment was due to start. In addition, the work order stated that the assignment ends one year after the starting date of May 1, 2006 "plus possible extensions." However, the itinerary submitted by the petitioner indicated that the work order for the beneficiary is for an assignment from May 1, 2006 until May 1, 2007 and "per contract, automatically extended on an annual basis for two additional one year terms." The work order does not indicate that the assignment will automatically be extended as noted in the petitioner's itinerary of the beneficiary's assignment. 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 AAO agrees with the director that the petition does not establish that the beneficiary will be employed in a specialty occupation. The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies.

Although the petitioner submitted an itinerary that provided a job description for the duties the beneficiary will perform for the third-party company, in this case, State Compensation Insurance Fund, the petitioner did not submit the contract between SACC, Inc. and State Compensation Insurance Fund. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity (the end user, in this case) 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 proposed

position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

The itinerary prepared by the petitioner describes the services to be performed to State Compensation Insurance Fund by the beneficiary. The record, does not, however, include a contract between SACC, Inc. and State Compensation Insurance Fund, or any other documents, such as memoranda of agreement or detailed specifications of the work to be performed by the beneficiary, that would establish the specific duties that the beneficiary would perform for the particular client(s) whose needs he would serve. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for SACC, Inc.'s clients, 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 for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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)(I). Thus, the petition may not be approved.

The prior approval of a nonimmigrant classification does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petition was approved based on the same unsupported and contradictory 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 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 director also found that the record does not establish that the LCA is valid for all work locations. The director noted that the LCA listed Santa Clara, California as the work location; however, the petitioner's work order and itinerary indicate the intended area of employment as San Francisco, California. On appeal, counsel for the petitioner cites to the regulations that state that the "area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed." Counsel contends that San Francisco is the work location and is within 50 minutes of Santa Clara and thus, is within normal commuting distance of the location indicated on the LCA and is within the area of intended employment, and the LCA is valid. The AAO agrees with counsel and withdraws the director's statements on this particular issue.

The director also found that the evidence submitted was not credible and sufficient to establish that the petitioner has complied with the terms and conditions of employment. The director noted that the petitioner did not follow the wage requirements for previously approved H-1B petitions filed by the petitioner. The AAO reviewed the company's wage reports, disagrees with the director's findings, and withdraws the director's statements on this particular issue.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform the duties of the proposed position. The petitioner indicated that the beneficiary has obtained a bachelor's degree in business administration, and "has more than 8 years of applicable System Analysis, Software development and implementation experience." The petitioner submitted a three-year degree awarded to the beneficiary for a Bachelor of Commerce from the University of Bombay. The petitioner also submitted a diploma in computer applications and programming awarded to the beneficiary from Nalanda Computer Education. Thus, the petitioner has completed three years of higher education and obtained a bachelor of commerce. It is not clear if the Diploma was for a one-year program and whether it is awarded upon completion of three years towards a bachelor's degree. Furthermore, the petitioner did not submit a credential evaluation for the beneficiary.

Moreover, CIS 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 proposed position. The beneficiary received a three-year degree in Commerce, however, the proffered position is for a computer systems analyst.

Thus, the petitioner did not establish that the beneficiary is qualified to perform a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C).

The petitioner has failed to establish that it has an itinerary of employment for the beneficiary, that it has three years of work for the beneficiary, that the proposed position qualifies for classification as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, or that the beneficiary is qualified to perform a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.