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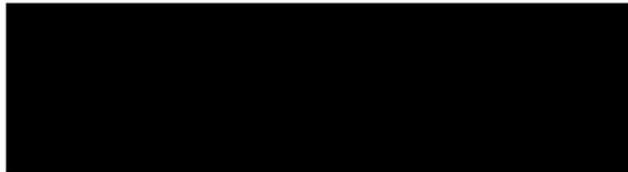
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FILE: WAC 06 200 50225 Office: CALIFORNIA SERVICE CENTER Date: NOV 04 2008

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

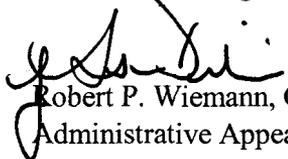
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is as an information technology (IT) consulting company that provides application-consulting services to businesses throughout the United States. Citizenship and Immigration Services (CIS) approved the petitioner's two previous petitions to employ the beneficiary as an H-1B 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).¹ In order to continue this employment beyond the period approved in the previous petition (June 20, 2003 to June 10, 2006), the petitioner filed the present petition to continue the beneficiary's H-1B classification and extend his stay for the period June 10, 2006 to June 9, 2009. The petitioner identifies the proffered position as that of a programmer analyst.

The director specified two grounds for denying the present petition, namely, the petitioner's failures to establish (1) that the petitioner is a proper filer of the H-1B petition – that is, a United States employer or agent of the beneficiary as defined at 8 C.F.R. § 214.2(h)(4)(ii); and (2) that the petitioner “will be actually employing the beneficiary in the described position and pursuant to the terms and conditions stated in the [Form] I-129 petition.” The director based the second ground on her “combined” determinations that the petitioner (a) appears not to have been paying the beneficiary in accordance with the representations as to wages and hours made with regard to the approved prior petitions, and (b) has engaged in “aberrant filing practices.” In her discussion of the failure to comply with wage and hours requirements, the director also stated that the petitioner had failed to provide material information requested in the director's RFE, namely, copies of IRS Forms 941 (Quarterly Wage Reports) for the last eight quarters preceding the RFE that included “the names, social security numbers, and total wages earned by every employee for each quarter.”

As discussed below, the director's decision will be withdrawn, because the record does not support the grounds that the director articulated for denying the petition. However, the petition shall be remanded for the entry of a new decision, because the record as presently constituted does not establish the substantive work required of the beneficiary by the business entity that will determine it, and because the record of proceedings contains material discrepancies that had not been earlier identified.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) requires that an H-1B petition be filed by a “United States employer.” The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a “United States agent” to file an H-1B petition in certain circumstances there described. The regulation at 8 C.F.R. § 214.2(h)(4)(ii) includes this definition of “United States employer” within the context of H-1B petitions:

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;

¹ The two approved H-1B petitions were filed under Form I-129 receipt numbers EAC0025050823 and LN0319152391.

- (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 finds that the petitioner is a United States employer within the meaning of the definition at 8 C.F.R. § 214.2(h)(4)(ii), as the evidence of record establishes that the petitioner will hire, pay, fire, or otherwise control the work of the beneficiary. Accordingly, the petitioner is a proper filer of the petition. The director's determination to the contrary is therefore withdrawn.

The AAO's also finds that the evidence of record does not support the director's second, "combined" ground for denial, that is, the appearance that the petitioner had not been paying the beneficiary in accordance with the representations as to wages and hours made with regard to the most recent H-1B petitions approved for the beneficiary. The director noted three elements to this ground for denial. Each of the elements will be addressed separately below.

The first element of the adverse finding about the petitioner's wage and hours compliance under the most recently approved petition is the differences for the years 2003-2006 that the record of proceedings showed between (1) the annual compensation that the petitioner represented that it would pay (\$45,000 for 2003 and 2004; and \$48,000 for 2005 and 2006) and (2) the actual wages reflected on the W-2 Forms submitted by the petitioner for those years (\$11,458.30 for 2003; \$36,750.12 for 2004; \$45,000.00 for 2005; and \$47,500 for 2006). The AAO finds that the information presented on appeal adequately explains the differences between the wages specified in the previous petitions and the wages reflected on the W-2 Forms.

The petitioner successfully rebutted the second element of the wage-and-hours ground for denial, that is, the director's determination to the effect that the petitioner had submitted incomplete IRS Forms 941 (Quarterly Wage Reports). The matters submitted on appeal demonstrate that the complete forms were submitted in response to the RFE, and that the director erred in thinking that "the names, social security numbers, and total wages earned by every employee for each quarter" are components of the IRS Form 941.

The AAO finds as follows with regard to the third element of the wage-and-hours ground for denial, that is, the determination that the petitioner engaged in a practice of "aberrant" filings. The evidence of record does not establish any regulatory standard by which the director determined that the petitioner's filing practices have been "aberrant." Moreover, the evidence submitted by the petitioner in response the RFE and on appeal adequately addresses the aspects that the director specified about the petitioner's filing history.

For the reasons stated above, the AAO finds that the evidence of record does not substantiate any of the findings that served as the bases of the director's second ground for denying the petition, which was that the petitioner had failed to establish that it "will be actually employing the beneficiary in the described position and pursuant to the terms and conditions stated in the [Form] I-129 petition." Accordingly, these findings and the ground for denial based upon them are withdrawn.

As it was based solely upon findings that have been withdrawn, the director's decision is also withdrawn. However, the petition may not be approved at this time. As discussed below, the evidence of record does not establish the specific duties that the beneficiary would be performing during the period of extended employment, as determined by Ashland, Inc., the business entity determining the substantive nature of the beneficiary's work; and there are material discrepancies in the documentary evidence related to the beneficiary's employment during the H-1B employment period of the most recently approved petition. As the director did not address these issues, the petition will be remanded for entry of a new decision, based upon consideration of the entire record of proceedings as supplemented by any additional matters that the director may request.

ABSENCE OF SUBSTANTIVE EVIDENCE FROM ASHLAND, INC. ABOUT THE BENEFICIARY'S WORK

Statutory and Regulatory Framework for H-1B Specialty Occupation Determinations

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Insufficient Evidence of the Beneficiary's Work

As will be evident in the following review of the evidence about the proffered position, the record of proceedings contains minimal information from Ashland, Inc., the entity that determines the beneficiary's actual day-to-day work. Absent concrete evidence from Ashland, Inc. that identifies the specific components of the beneficiary's work for it, and the particular knowledge required to perform those components, the AAO cannot reasonably determine that the proffered position satisfies any of the specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) for the period of requested employment.

The record indicates that, under its most recently approved petition for H-1B employment of the beneficiary, the petitioner assigned the beneficiary to its client Technology Resources Management (TRM). TRM, in turn, assigned the beneficiary to perform his work for, and at the facilities of, the TRM client Ashland, Inc., of Dublin, Ohio. The present petition seeks to continue this arrangement.

The Form I-129 (Petition for Nonimmigrant Worker) that is the subject of this appeal contains this Nontechnical Job Description of the beneficiary's work: "Analyze, develop, and implement programs for complex software applications."

Supplement H of the present Form I-129 of the extension petition that is the subject of this appeal describes the beneficiary's duties during the extension period as follows:

Analyze, modify, and implement complex software applications to meet customer standards; analyze existing applications to determine integration problems; code, test, maintain, & troubleshoot computer programs and applications; & evaluate user requests for new or modified programs to determine project feasibility. Analyze, modify, and implement complex software applications to meet customer standards; analyze existing applications to determine integration problems; code, test, maintain, & troubleshoot computer programs and applications; & evaluate user requests for new or modified programs to determine project feasibility.

A March 1, 2000 letter to the beneficiary, from the petitioner's HR Coordinator, that confirmed the petitioner's offer of employment, refers to the offered position as having the "position description" of "Programmer/Analyst." However, the letter contains no information about the beneficiary's specific duties, and no information as to where they would be performed.

The organizational table at page 10 of the petitioner's Employee General Informational Manual identifies the beneficiary as one of eight "IT Consultants/Developers."

The AAO finds that none of the position and duty descriptions provided by the petitioner are probative, as the petitioner is not the business entity that determines the actual work that the beneficiary is to provide during the extension period sought in this petition. That entity is Ashland, Inc. – a client of the petitioner's client TRM.

The record contains a copy of a Master Agreement for Contractor Services between TRM and the petitioner, signed by both parties in September 2004 [hereinafter referred to as the Petitioner/TRM MACS.] Its Scope of Services section states:

Contractor [the petitioner] agrees to provide technical services to TRM, which services shall be subcontracted to one or more of TRM's customers. Such technical services may include, but not be limited to, contract programming, software analysis, project analysis, project management, facilities management, documentation and/or any other services, all as described at on one or more Schedules ("Schedules") substantially in the form of Exhibit 1 attached hereto.

Aside from the fact that the Petitioner/TRM MACS does not include Ashland, Inc. – the generator of the beneficiary's work - the AAO notes that the open-ended nature of the technical services that the petitioner agrees to provide under this document suggests that the scope of those services includes assignments that would not necessarily require at least a bachelor's degree level of knowledge in a specific discipline. In this regard, the AAO also notes that the many contract samples that the petitioner submitted into the record as evidence of its ability to assign the beneficiary to other consulting projects are not probative: these submissions are materially incomplete, in that they were submitted without the work orders, statements of work, and otherwise described follow-on documents that they reference as defining the particular work to be performed.²

The record also contains a copy of a document entitled "EXHIBIT 1/FORM OF SCHEDULE/Schedule No. 1," on TRM letterhead, that is signed by the TRM Sales Director, on March 27, 2007. This document, which appears to serve as the "Exhibit 1" type of document cited in the September 2004 Master Agreement quoted above, specifies (1) the beneficiary as a Contactor Employee; (2) Ashland Chemical, Inc. as the TRM client for whom the beneficiary will perform his work; (3) 4/16/07 through 9/20/07 as the "Start Date" of intended employment; (4) "Open" as the "End Date" of intended employment; and (5) "J2EE Development" as the "Description of Services" to be performed by the beneficiary. The record also contains a copy of an earlier "EXHIBIT 1/FORM OF SCHEDULE/Schedule No. 1" document that bears a September 17, 2004 signature of the TRM Sales Director and what appears to be a September 17, 2004 signature of the petitioner's Accounts Administrator. The information on this document is the same as in the EXHIBIT 1 document signed on March 27, 2007 except for the cited pay rate (\$55.00 rather than the \$60.00 per hour rate cited in the later exhibit), and the Start Date, which reads "09/22/2004." So, pursuant to TRM's authority to

² See the copies of petitioner/vendor agreements accompanying the May 2, 2007 affidavit of the petitioner's Director of Staff Development (referenced therein as Exhibit F).

“subcontract” the petitioner’s employees that are assigned to it under the MACS of Petitioner/TRM and its supplementary Exhibit-1 documents, TRM assigned the beneficiary to perform his work directly for, and at the premises of, Performance Materials division of Ashland Chemical, Inc. The only information that this document provides about the scope of the beneficiary’s work is that it is will consist of “J2EE Development,” and the AAO notes that this generalized term conveys neither the specific work that the beneficiary would actually perform nor the nature and educational level of any highly specialized knowledge that he would apply to perform that work.

The record also contains a copy of a document, entitled “Revised Statement of Work (“SOW”) H to Loaned Employee Information Technology Services Agreement dated January 1, 2003” [hereinafter referred to as Revised SOW-H], signed by representatives of Ashland, Inc. and TRM. This document contains some terms under which TRM assigned (or “loaned”) the beneficiary to perform Ashland Inc.’s work as a loaned employee. Signed March 2007, it specifies that the beneficiary is to work at Ashland, Inc., in Dublin Ohio, for the period March 21, 2007–September 20, 2007. The document’s Description of Services section states: “The Loaned Employee will design and develop web-based J2EE applications with integration into backend systems.” The AAO notes that this generalized description does not provide concrete information about the actual tasks that the beneficiary would perform, and neither this description nor any other information in the Revised SOW-H establishes the nature and educational level of specialized knowledge required to perform those tasks. The AAO further notes that the petitioner has not provided a copy of the Loaned Employee Information Technology Services Agreement dated January 1, 2003 that the Revised SOW-H supplements. Because the Revised SOW-H is only a supplementary portion of that document and because the its execution is controlled by whatever terms and conditions appear in the Loaned Employee Information Technology Services Agreement, the Revised SOW-H amounts to an incomplete document. As such, it has no probative value, and will be accorded no evidentiary weight, without the Loaned Employee Information Technology Services Agreement of which it is a part.

The AAO notes the petitioner’s assertion to the effect that it cannot provide contracts between TRM and the Ashland, Inc. because they contain proprietary information.³ For several reasons, the AAO finds no merit to this assertion as justification to withhold evidence material to this petition. The assertion is not accompanied by any documentary evidence from Ashland, Inc. regarding objection to releasing relevant contracts to CIS on the grounds of the presence of proprietary information. The petitioner cites no legal authority for the

³ On appeal, counsel states:

[The petitioner] is now providing a copy of the Current Statement of Work (SOW) between TRM and Ashland for [the beneficiary’s] services. (A copy is attached. . . .) [The petitioner] is unable to obtain any other contractual agreements between TRM and Ashland due to the fact that it is proprietary information. However, the SOW documents that [the beneficiary] is providing specialty occupation services to Ashland as a J2EE contractor.

(Brief, at page 6)

[A]t this time, [the petitioner] is providing part of the agreement between TRM and Ashland, Inc. for the beneficiary’s services. . . . The entire agreement is between TRM and Ashland, Inc. is proprietary information and, therefore, is not available to [the petitioner].

(Brief, at page 13)

proposition that the presence of proprietary information excludes CIS from requesting and reviewing relevant documents in which such material appears. Further, the petitioner's failure to provide Ashland, Inc. contract documents governing its use of the beneficiary may prove so material as to merit denial of the petition for failure to carry the burden of proof.

In an April 24, 2007 letter to the California Service Center, TRM's Senior Recruiter addressed the beneficiary's work at Ashland, Inc. The letter "confirm[s] that [the beneficiary] began working fulltime as a consultant at Ashland, Inc., in Columbus, Ohio on September 22, 2004." The letter also states that the beneficiary is employed by the petitioner "and is placed at Ashland, Inc. through our company, Technology Resource Management ("TRM") which is an authorized primary vendor of Ashland, Inc." The letter states that Ashland, Inc. is "a Fortune 500 diversified chemical company that provides products, services, and solutions to customers around the globe," and that Ashland, Inc.'s "operations include four wholly owned divisions: Ashland Distribution, Ashland Performance Materials, Valvoline, and Ashland Water Technologies." The letter further states that the beneficiary "began working as a Programmer Analyst at Ashland's Performance Materials office in September 2004." The letter specifies an address for this office that is the same as the one provided on the Form I-129. Also, the letter states that the beneficiary has performed the following tasks at his assignment at Ashland:

1. Responsible for designing and implementing web-based applications using Java/J2EE technologies and J2EE design patterns (35% time)

- Analyze use-cases and develop technical specifications;
- Develop use-case realizations, analysis and object models;
- Prepare activity diagrams, collaboration and sequence diagrams for analysis;
- Develop J2EE applications using STRUTS framework based on Model 2 architecture, SPRING, JSF, Ashland Specific Frameworks, TILES for Presentation Tier, EJB (Stateless Session Beans and Message Driven Beans) Business Tier and Dao's for interaction with database using Hibernate;
- Create various XML configurations for Struts and Weblogic using Xdoclets;
- Develop common utilities for J2EE application, including Utils for reading documents, XML parsers using DOM/SAX parsers, sending e-mails using Java mail, String Utils and Date Utils; and
- Maintain and support all J2EE application incidents.

2. Responsible for database design and creation (25% time)

- Analyze data models and prepare entity relationship diagrams, following an object-oriented approach;
- Identify and analyze the related objects and classes for object relational mapping; and
- Create XML mappings for Hibernate using MiddleGen tool.

3. Responsible for integrating J2EE applications with ERP and non-RDBMS Database (A-to-A integration) (15% time)

- Integrate J2EE Applications with SAP/R3 using Tibco/Webmethods (application to application integration) and other non-RDBMS databases, including Lotus Notes.

4. Responsible for testing (unit/integration) of J2EE application (15% time)

- Responsible for developing unit testing using Junit test cases; and
- Responsible for testing J2EE application in various environments (Dev/QA environments).

5. Responsible for generating documents (10% time)

- Responsible for generating design documents;
- Create UML diagrams;
- Generate Java documents from J2EE applications; and
- Responsible for J2EE turnover documents for deployments and application error profile documents.

6. Responsible for configuration of services and deployment of applications into Weblogic 7.0/8.1 (10% time)

- Configure the JDBC connection pools, data sources, JMS connections, environment variables, JAVA mail configuration in Weblogic application server; and
- Responsible for creating change request for deployment into various environments.

7. Additional Tasks (5% time)

- Responsible for using Java profiling tools for measuring the performance of applications; and
- Resolve application incidents and functional issues.

Without explanation or supporting documentation, the letter states that the beneficiary's "job responsibilities require someone who has attained an IT or engineering-related bachelor's degree and previous work experience." 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)).

While the letter from TRM's Senior Recruiter is relevant, its evidentiary weight is insignificant. The letter is not accompanied by evidence from Ashland, Inc. that establishes that the TRM Senior Recruiter's statements accurately reflect the beneficiary's work for Ashland, Inc., the entity that defines the content and timing of that work. Concrete evidence from an appropriate official of the entity that generates and determines the elements of the beneficiary's work is necessary for a fair and reasonable determination by CIS as to whether

the actual work that comprises the proffered position satisfies any of the specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The letter from TRM's Senior Recruiter is not an acceptable substitute.

Aside from the fact that the letter was issued by someone other than a knowledgeable official of Ashland, Inc., the AAO notes that it is replete with technical acronyms and computer terms that the author has left undefined and unexplained. Such abstract terminology does not indicate an associated educational level. Also, the letter's generalized and generic work descriptions (such as "designing and implementing web-based applications;" "database design and creation;" and "integrating . . . applications with . . . Database") do not establish computer-programming work requiring at least a bachelor's degree level of highly specialized knowledge in a specific discipline.

Aside from the critical absence of comprehensive evidence from an appropriately knowledgeable official of Ashland, Inc. about the beneficiary's specific duties and the educational requirements for their performance, the AAO notes that the record does not establish the extent of the TRM's Senior Recruiter's knowledge about the substantive work that the beneficiary would be required to perform at the Ashland, Inc. worksite during the present petition's period of intended employment. The Senior Recruiter describes himself as "the Project Manager of TRM, who oversees [the beneficiary] on this [Ashland, Inc.] project." However, neither the letter nor any other evidence of record establishes what that oversight entails in terms of the frequency and nature of observation of the beneficiary's work; degree and continuity of supervision over the particular work assigned to the beneficiary; time present at the beneficiary's Ashland, Inc. worksite; and personal knowledge of the particular tasks assigned to the beneficiary by Ashland, Inc. during the course of his assignment there. Further, the Project Manager of TRM speaks in past-tense only, not addressing the work to be performed for the full period of the beneficiary's assignment to Ashland, Inc.

Although the petitioner qualifies as a U.S. employer as defined by 8 C.F.R. § 214.2(h)(4)(ii), the evidence of record establishes that it is an employment contractor, and that the actual work to be performed by the beneficiary is generated and determined by another entity - Ashland, Inc. - who is a client of the petitioner's client TRM. The record reflects that the petitioner's relationship with the beneficiary is that of an employment contractor who assigned the beneficiary to another employment contractor (the petitioner's client TRM), which, in turn, assigned the beneficiary to perform work at and for another entity (TRM's client Ashland Industries, Inc.).

As recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." As Ashland, Inc. determines the actual content of the beneficiary's work, and as that content in turn is critical to the evaluation of the proffered position under each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide sufficient evidence from Ashland, Inc. to establish the specific work that the beneficiary will actually perform for it, and to do so in sufficiently specific detail to enable CIS to reasonably determine whether the actual performance of the beneficiary's work would require the application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has not yet done.

Ashland, Inc. has not provided evidence that delineates the specific components of the work that the beneficiary would perform for it and that demonstrates the nature and educational level of highly specialized knowledge that is required to perform that work. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. In the absence of such substantive evidence from the end user entity, whose business needs directly determine what the beneficiary would actually do on a day-to-day basis, the AAO is unable to determine whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

EVIDENTIARY DISCREPANCIES

The May 2, 2007 affidavit from the petitioner's Director of Staff Development addresses the beneficiary's employment by the petitioner. Paragraph 19 of the affidavit states, in part:

[The beneficiary] was assigned to work as a Programmer Analyst on the Ashland Performance Materials Assignment in September 2004. We anticipate [that] this project will continue past the duration of [the beneficiary's] extension. . . .

The implication is that since September 2004 the beneficiary has been working continuously at Ashland, Inc., per the contractual arrangements between the petitioner and TRM and between TRM and Ashland, Inc. Further, in his May 12, 2007 letter responding to the RFE, counsel stated (at page 12) that:

[The beneficiary] has been working in the same assignment at Ashland Performance Materials since September 22, 2004, getting paid. [The petitioner] and Ashland, Inc.'s preferred vendor, TRM, reasonably expect that [the beneficiary] will continue in this assignment for the duration of his three-year H-1B extension.

However, as discussed below, there are material discrepancies between these statements and some of the evidence that the petitioner has submitted into the record.

The record includes copies of the weekly timesheets that TRM provided to the petitioner for the work that the beneficiary performed at Ashland, Inc. during the year 2005. The record also includes copies of the invoices that the petitioner, in turn, transmitted to TRM for the work hours stated on those timesheets. The AAO notes that the timesheets in the record of proceedings do not comport with the petitioner's assertions that since September 2004 the beneficiary has been working continuously and exclusively at Ashland, Inc., pursuant to an ongoing contract between TRM and Ashland. The time-sheet record for 2005 includes no timesheets from TRM for these six months of 2005: February, March, June, July, November, and December. Further, there is only a single, one-week TRM timesheet for September 2005, and there is no timesheet for the first week of October 2005. Thus, the TRM invoices that the petitioner submitted for the year 2005 conflict with the petitioner's assertions in the May 2, 2007 affidavit of the petitioner's Director of Staff Development, in counsel's letter of rely to the RFE, and elsewhere in the record, to the effect that the beneficiary has been continuously working at Ashland, Inc. since September of 2004.

The AAO further notes that the above-noted May 27, 2007 affidavit from the petitioner's Director of Staff Development conflicts with the May 26, 2006 letter that she submitted, in that same capacity, to CIS. In pertinent part, the letter states (at page 2):

Over the past two years, [the beneficiary] has been responsible for performing the duties [as a Programmer Analyst] for customers in the health care, insurance, and retail industries.

This statement appears to contradict the Director of Staff Development's affidavit, on the material issue of the entities for whom the petitioner had been working for the two-year period ending in May 2006.

The next material discrepancy noted by the AAO is between (a) the fact that the petitioner submitted into the record a copy of an IRS Form W-2 showing that the petitioner paid the beneficiary, at a Tallahassee, Florida address, \$11,458.30 in wages in 2003, and (b) these conflicting statements in the record: (1) counsel's statement (at page 7 of the appellate brief) that the beneficiary was in India from December 22, 2002 until February 6, 2004 and "was not working for [the petitioner] while he was in India"; and (2) the statement from the petitioner's Director of Staff Development (at paragraph 10 of her affidavit of May 2, 2007) that, after working for the petitioner from September 2000 until December 2002, the beneficiary "departed the U.S. and remained in India until February 6, 2004, at which time he re-entered the U.S. again and began working for [the petitioner] again pursuant to a new H-1B petition."

The discrepancies noted above raise the issue of whether this petition for extension has fully and accurately identified the business entities for whom the beneficiary has been working and the actual periods of his work at Ashland, Inc. They also bear on the weight of credibility merited by the documents provided in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, a petition does not merit approval if it includes material statements that are not true and correct. *See* 8 C.F.R. § 214.2(h)(11)(iii)(2) (Approval of an H petition is revocable if it is established that "[t]he statement of facts contained in the petition was not true and correct.")

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of May 18, 2007 is withdrawn. The petition is remanded to the director for action and consideration consistent with the above discussion, and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.