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U.S. Citizenship
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Services

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FILE: WAC 07 110 50234 Office: CALIFORNIA SERVICE CENTER Date **NOV 10 2008**

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

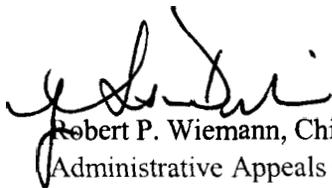
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides software development, consulting, import and export services. It was established in 1998 and claims to employ ten personnel. It seeks to extend the employment of the beneficiary as a programmer analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 4, 2007, the director denied the petition, determining that the petitioner: had not established that it was an employer or an agent; had not established the proffered position as a specialty occupation; and had provided inconsistent and deficient information for the record. On appeal, counsel for the petitioner submits a letter and documents in support of the appeal.

The record of proceeding before the AAO includes: (1) the Form I-129 filed March 8, 2007 and supporting documents; (2) the director's May 14, 2007 request for evidence (RFE); (3) counsel for the petitioner's July 20, 2007 response to the RFE; (4) the director's September 4, 2007 denial decision; and (5) the Form I-290B, counsel's letter, and documents in support of the appeal.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

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

The petitioner seeks the beneficiary's services as a programmer analyst. In support of the petition, the petitioner appended a document titled "Itinerary of Definite employment for". The document listed the location of work as Brandon, Florida, the project term "February 28, 2010," and the job title as programmer analyst with the following duties:

- Create project requirements, macro, and micro design documents. Documented and maintainable applications. Test plan and result documentation.
- Create weekly status reports on tasks assigned and completed.
- Create database tables design and prepare the estimation of target tables size, hard disk space requirements for the project.
- Manage communication with client and study and analyze client requirements.
- Prepare issue reports for management and technical presentations.
- Analyze client needs and develop software solutions.

- Identify the data collection required, resulting in production of management information systems.
- Design software or customize software for client use with the aim of optimizing operational efficiency.
- Prepare workflow charts and diagrams to specify in detail operations to be performed by equipment and programs to integrate various legacy systems within existing system.
- Build and develop the applications and interfaces according to defined hardware to include appropriate and relative databases, interfaces, hardware and software modifications, and technical programming modifications.
- Identify common transformation logic across the project and develop common modules.

The itinerary did not identify the beneficiary as the consultant, employee, or assigned personnel. The petitioner provided a copy of a Form ETA 9035E, Labor Condition Application (LCA) showing work locations in Buena Park, California and Brandon, DC as a programmer analyst. The record also includes a copy of a bachelor of engineering degree issued to [REDACTED], in the Winter of 1995 and certificates and letters from prior employers identifying the beneficiary as [REDACTED], not Shrinand Bakshi.

On May 14, 2007 the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties; an itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; and clarification of the beneficiary's name.

In a July 20, 2007 response, counsel for the petitioner asserted that the proffered position satisfied all the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the petitioner is an employer and not an agent. Counsel attached a copy of a May 1, 2007 contract between the petitioner and a third party, KFORCE, wherein the petitioner agreed to provide programming, systems analysis, engineering, technical writing or other specialized services as an independent contractor directly to a third party client who had requested KFORCE to locate temporary staffing. The record also included a work order attached as exhibit "A" to the May 1, 2007 contract indicating that the petitioner is contracted to perform work for Verizon, beginning May 7, 2007 and ending March 31, 2008 and then to be extended on a month-to-month basis unless otherwise notified. The work order identified the beneficiary as the individual starting work on May 7, 2007 but did not identify a location, a specific project, or otherwise describe the services to be rendered. The petitioner also included its February 12, 2007 offer of employment to the beneficiary. The petitioner further submitted a revised LCA showing work locations in Buena Park, California and Brandon, Florida. Counsel noted that the incorrect state name had been erroneously placed on the previously submitted LCA. The record also contains the beneficiary's notarized statement that his last name is spelled Bakshi but because this name sounds like [REDACTED], the spelling of his name sometime appears as Baxi.

On September 4, 2007, the director denied the petition. The director determined that the petitioner had not established that it is an employer or an agent, thus the petitioner had not established that it is qualified to file petitions for alien H-1B workers. The director also determined that the petitioner is in the business of placing workers at third party companies and would not be the beneficiary's ultimate employer and had not provided a description of the beneficiary's actual duties at the end client company. Accordingly, the director found that the petitioner had not established that the proffered position qualified as a specialty occupation. The director further determined that the contract and the work order submitted were dated after the filing date of the petition, did not identify the work location, and covered the period from May 1, 2007¹ to March 2008. The director found that these documents could not be accepted as evidence and did not establish that there was a *bona fide* offer or work in a specialty occupation for the beneficiary and for the validity periods requested.

On appeal, counsel for the petitioner asserts that the petitioner is an employer. Counsel notes that this petition is a request for an extension and that the petitioner, in response to the RFE, had submitted the latest contract showing where the beneficiary would be working, not the "old" contract. The petitioner submits a document on the letterhead of KFORCE that indicates pursuant to the service agreement between the petitioner and KFORCE, the work order is for the beneficiary, the title of the position is programmer analyst, the start date is January 1, 2007, and the project duration is one year with the possibility of an extension. The record also includes a document titled "Itinerary of Definite employment for", that indicates the project term is "through May 2010, on completion of project will work on [i]n-house projects at Buena [P]ark office," and the location of work is in Brandon, Florida and Buena Park, California. The itinerary document provides a slightly different version of the duties of the programmer analyst as follows:

Responsible for custom program design, development and implementation of business applications and systems. Analyze user requirements, procedures, and problems to automate processing or to improve existing computer systems. Confer with personnel involved to analyze current operational procedures, identify problems. Write detailed description of user needs, program functions, and steps required to develop or modify computer programs. Further, [r]eview computer systems capabilities, Workflow. Study existing information processing system to evaluate effectiveness and develop new systems to improve productivity. Combine system support skills to analyze and assist in developing customized software for industries. Responsible for development, analysis, implementation and maintenance of software applications to meet client's needs and specifications. Programmer Analyst is an independent technical staff member requiring little or no supervision. The position involves extensive use of modern computer languages such as C/C++, Visual basic, and high-end databases. The incumbent creates new solutions and algorithms to manage and implement those solutions. The job duties also include Software Testing and Debugging. Approximate percentage of time: Analyze and design software 40-60%, Coding 20-30%, Miscellaneous approx. 10%.

¹ The work order indicates the start date is May 7, 2007 and includes an automatic month-to-month extension unless the parties provide other notification.

Counsel concludes that the petitioner is a viable company, needs the services of the beneficiary, and that the beneficiary is qualified for the position.

The AAO concurs with counsel's assertion that the petitioner is 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.² 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. The record establishes that the beneficiary would perform his duties at the petitioner's client's place of business or the petitioner's client's client's place of business. Accordingly, the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment in such situations. While the Aytes memorandum cited at footnote 2 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment.

In this matter, the petitioner has submitted inconsistent and incomplete information regarding the beneficiary's start date, end date, and the nature of the work to be performed. The petitioner initially provided a document titled "Itinerary of Definite employment for", but did not include the beneficiary's name and indicated the project term as "February 28, 2010." The "itinerary" set out an overview of the occupation of a programmer analyst but did not provide any specific details regarding a project or the particular services the beneficiary would perform for any end client company. In response to the director's RFE, the petitioner provided a work order as an exhibit to a contract entered into between the petitioner and a third party, KFORCE, indicating that the petitioner has been contracted to perform work for Verizon, beginning May 7, 2007 and ending March 31, 2008 and then to be extended on a month-to-month basis unless otherwise notified. The work order did not identify a location, a specific project, or otherwise describe the services to be rendered. On appeal, counsel for the petitioner submits a revised "Itinerary of Definite employment for", that indicates the project term is "through May 2010, on completion of project will work on [i]n-house projects at Buena [P]ark office," and includes an overview of the occupation of a programmer analyst without the specific day-to-day actual tasks that the beneficiary would perform in the proffered position. The record on appeal also includes a document on the letterhead of KFORCE that indicates pursuant to the service agreement between the petitioner and KFORCE, the work order is for the beneficiary, the title is programmer analyst, the start date is January 1, 2007, and the project duration is one year with the possibility of an extension.

The record thus, contains ambiguities regarding when the beneficiary will begin his work for a third party, where the work will take place, the end date of the work, and the actual duties involved in the services rendered to the third party(ies). It is incumbent upon the petitioner to resolve any inconsistencies in the

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).

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 petitioner has not supplied a consistent itinerary of employment for the beneficiary for the work to be performed for the duration of the requested time period. As the petitioner has submitted deficient and inconsistent versions of an itinerary, the petition may not be approved.

The petitioner has also failed to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, although the petitioner is an employment contractor and will be the beneficiary's employer, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner has provided a broad statement of the beneficiary's potential duties as a "programmer analyst." The record contains information that the beneficiary will ultimately perform work for Verizon but the record does not include a detailed description of the duties from Verizon describing the beneficiary's duties in this position. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that 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." 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 proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. In this matter, neither the petitioner nor the ultimate end user of the beneficiary's services has provided a detailed description of the beneficiary's duties; thus CIS is precluded from determining 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.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)*, reports that there are a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner or the petitioner's clients, or the petitioner's client's clients for the duration of the H-1B classification, the AAO is unable to analyze whether the duties of the proposed position would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for

classification as a specialty occupation or whether the position could be performed by individuals proficient in computer languages learned through certification courses and at the associate degree level.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests or its clients' interests. General descriptions of the duties and responsibilities of the occupation of a programmer analyst without providing evidence of how the beneficiary will perform the tasks in relation to the petitioner's specific business or its clients' specific business or project are insufficient. Upon close review of the description provided, the petitioner has opted to describe aspects of an occupation without providing a description of the specific duties that are directly related to the petitioner's business or its clients' projects. Stated a different way, the generic description provided by the petitioner can apply and be used interchangeably to describe the duties of any general information technician whose duties may normally require a bachelor's degree in a specific discipline or may require a two-year certificate in a specific computer discipline or may require a two-year associate's degree, or may only require experience. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and actual clients' projects and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. Neither the petitioner in the submitted itinerary nor the third-party in its contract and work orders describes the project(s) the beneficiary will work on in detail.

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner or the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. For this additional reason, the petition may not be approved.

The AAO also observes that the contract submitted in response to the director's RFE as a basis for the need of the beneficiary's services is dated subsequent to the date of the filing of the petition. As the director noted, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978) and further, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The AAO acknowledges counsel's claim that the beneficiary had been working under an "old" contract and that the petitioner wanted to provide evidence of the continuity

of the beneficiary's work by providing current contracts. However, the record does not contain the contracts dated prior to the filing of the petition or evidence that the beneficiary performed services pursuant to those contracts. When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO further acknowledges that this petition is a request for an extension of the beneficiary's H-1B classification. However, prior approvals do not preclude CIS from denying an extension of the original visa 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). The AAO again notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS 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).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO questions the fact that the beneficiary's last name on all his education documents is spelled [REDACTED], but that on all his identification documents, including his passport, his last name is spelled [REDACTED]. The AAO acknowledges the beneficiary's notarized statement that the pronunciation of his name causes the misspelling; however, without documentation from the educational institutions identifying [REDACTED] and [REDACTED] as the same individual, the AAO finds the record unclear as to the identify of the beneficiary, including whether he possesses a foreign degree. 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)). As the petition is dismissed on other grounds, the AAO will not discuss this issue further.

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.