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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
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FILE: WAC 07 201 50237 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2009

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: SELF-REPRESENTED

INSTRUCTIONS: This is the decision 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 global software consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the record failed to establish that the petitioner has made a bona fide offer of employment to the beneficiary.

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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition, the petitioner described itself as a global software systems services company with clients throughout the United States. The petitioner stated that it had 2006 revenue of over \$270 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 25, 2007 through March 8, 2009, at an annual salary of \$77,750.

The scope of the position was described as follows in the support letter the petitioner submitted with the H-1B extension petition on behalf of the beneficiary:

[The petitioner] employs Programmer Analysts to analyze our client's information technology requirements and computer hardware to design a system, which will best process the client's data in the most timely and inexpensive manner. [The petitioner's] Programmer Analysts then implement this design by overseeing the installation of the necessary software and its customization to the client's unique requirements. Our clients have an ongoing need for Programmer Analysts qualified in specific skill sets. After a client's business requirements are analyzed and their systems are designed, developed and implemented, **the Programmer Analyst is then subject to immediate reassignment to another client.** Occasionally the Programmer Analyst will continue maintaining a system after the system is implemented...[The petitioner] currently requires [REDACTED] temporary professional services in the capacity of a Programmer Analyst. In this capacity, he will develop, implement and enhance customized applications; modify existing applications to meet user's changing need, and train users in the application as necessary.

(Emphasis added.)

The Labor Condition Application (LCA) was filed for multiple beneficiaries working as Computer Programmer/Analysts in Phoenix, Arizona and lists a prevailing wage of \$38,334. The LCA submitted by the petitioner covers the validity dates requested by the petitioner in the Form I-129 request for H-1B extension on behalf of the beneficiary.

With respect to the proposed worksite where the beneficiary will be assigned, in the support letter submitted by the petitioner with the H-1B extension request on behalf of the beneficiary, the petitioner states:

[The beneficiary's] work site is to be in Phoenix, AZ. The work site listed on the petition is the only known work site at this point in time. However, if for some unforeseen reason his services should no longer be required at the initial work site, [the petitioner] has a need for Programmer Analysts with the beneficiary's qualifications at many other [of the petitioner's] work sites where we currently have job openings.

On the Form I-129, the petitioner indicates that the address where the beneficiary will work is at American Express in Phoenix, AZ. As part of the supporting documents provided with the petition, the petitioner submitted a contract between the petitioner and American Express Travel Related Services Company, Inc. (Amexco) titled "Master Agreement for Consulting Services" that became effective in 2002 and is valid until terminated. As noted by the director in her denial, section 2 of this agreement provides for schedule and work order agreements to be made between the petitioner and Amexco and, despite the specific request of a current contract and work order to confirm continuous employment at the location specified on the LCA, no work order or schedule was provided by the petitioner in response to the RFE. This agreement lists the petitioner's address in Troy, Michigan and Amexco's address in New York, NY. It does not list any address in Phoenix, AZ, nor does it list any work to be performed in Phoenix, AZ. The non-disclosure agreement as well as the rate card, both of which are attached to the master agreement between the petitioner and Amexco, are not completed. Nowhere is the beneficiary's name, the work to be performed, or Amexco's location in Phoenix, AZ mentioned in these agreements between the petitioner and Amexco initially submitted by the petitioner.

In her RFE, the director stated that the evidence of record appeared to indicate that the petitioner would utilize the beneficiary to perform services for clients outside the petitioner's worksite. The petitioner was advised to submit an itinerary of definite employment, listing the organization(s) and location(s) where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that "documentation should specify duties, dates of services requested, work schedule and pay schedule."

In response to the RFE, the petitioner stated that the beneficiary would be working for the petitioner in Phoenix, AZ.¹ The petitioner resubmitted the master agreement for consulting services between the petitioner

¹ The AAO notes that the beneficiary's resume submitted in support of the petition indicates that he is currently employed with American Express in Phoenix (and has been employed there since November 2004) and not with IBM Global Services IGS India PVT LTD, the company that has an approved H-1B petition on the beneficiary's behalf. No H-1B approval notice was submitted for American Express, raising the question of whether the beneficiary was employed in valid H-1B status at the time the petitioner's H-1B petition and request for extension was filed. Moreover, the beneficiary's resume raises doubts about the petitioner's assertions that the petitioner, and not Amexco, will be the beneficiary's employer. The petitioner incorrectly checked box "b" in Part 2 of the Form I-129, indicating that this petition is a request for continuation of

and Amexco that was previously provided in support of the petitioner. The petitioner did not submit any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition. In justifying why it was not required to provide this additional evidence, the petitioner cited to a U.S. Citizenship and Immigration Services (USCIS) memorandum dated November 13, 1995 (HQ 214h-C) as well as to *Matter of X* (AAO, May 23, 2000), a non-precedent decision.

As the director noted in her denial, unpublished opinions can not be cited as legal authority and they are not precedent or binding on USCIS. In the unpublished decision referred to by the petitioner, the AAO determined that the director conceded that the petitioner is an employer, not a contractor. The director has made no such concession in this case. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, 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. By not submitting any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition, the petitioner precluded the director from determining the beneficiary's proposed work schedule, dates of service, pay schedule, and work location. In other words, the director could not establish whether the petitioner has made a bona fide offer of employment to the beneficiary based on the evidence. Clearly, this is a material line of inquiry.

The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed. However, the AAO notes that, in any event, the statement of work between the petitioner and Amexco that

previously approved employment without change with the same employer. However, as the director noted in her denial, "this request is not for an extension of a current employee, rather for a new employee." 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 petitioner submitted on appeal does not reconcile any inconsistencies as the dates of performance are between October 29, 2007 to September 7, 2008, which does not cover the entire period of time requested in the petition, and as the beneficiary is not mentioned by name. Moreover, this document is dated December 4, 2007, which is after the date the petition was originally submitted (indeed, it is dated only one day before the director denied the petition). 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).

Beyond the decision of the director, the AAO determines that the evidence provided by the petitioner is not sufficient to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content. On appeal, the petitioner claims that the beneficiary will be working at Amexco in Phoenix, AZ, but provides no work orders, no statements of work, no work itinerary, and no current contract that names the beneficiary or specifies the duties to be performed by the beneficiary at Amexco. Without documentary evidence to support the claim, the assertions of the petitioner 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).

In this respect, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), 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. 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. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish 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.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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 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. For this reason also, the appeal will be denied.

With respect to the beneficiary's qualifications, the AAO notes that the petitioner asserts that "the beneficiary is well qualified for this specialty occupation position as he holds a Bachelor of Engineering degree in Civil Engineering from Jai Narain Vyas University, in Jodhpur, India, in 1998 and a Diploma in Advanced Computing from Advanced Computing Training School, in Pune, India, in 1999 as well as several years of experience." Copies of the beneficiary's resume, degree, transcripts, and a certificate for training as well as some experience letters were submitted with the petition. The AAO notes that no credential evaluation was submitted for the beneficiary as required under 8 C.F.R. § 214.2(h)(4)(iii)(C), so it cannot be found that the beneficiary is qualified for the proffered position. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.