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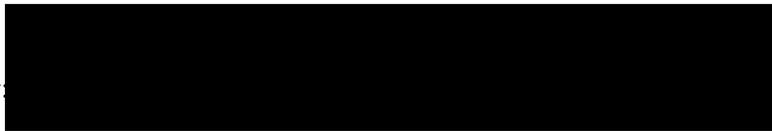
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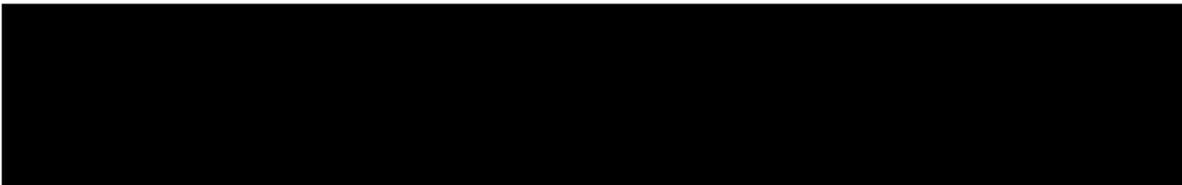
FILE: WAC 07 079 53595 Office: CALIFORNIA SERVICE CENTER Date: **AUG 07 2007**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 and consulting development company that seeks to employ the beneficiary as a software engineer. 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 director denied the petition finding that the petitioner did not meet the statutory definition of a "United States employer" or an agent, and had not demonstrated the existence of a specialty occupation.

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.

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 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). The petition may not be approved, however, as the record does not establish that the beneficiary will be employed in a specialty occupation, that the employer has submitted an itinerary of employment for the entire period of employment requested by the petitioner on the Form I-129, or that the employer timely submitted a Labor Condition Application (LCA) valid for the location of employment.

The evidence of record, including the September 14, 2004 employment agreement between the petitioner and the beneficiary, established 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. At item 3, the employment agreement states that the petitioner will provide the beneficiary with a copy of the service agreements between the petitioner and its clients related to the

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).

projects that involve the beneficiary. The petitioner also submitted a subcontractor agreement between the petitioner and Vital Resources, Inc., and stated that Vital Resources, Inc. is “engaged in the business of information technology and computer software consulting and services to client of the corporation [Vital Resources, Inc.]” Moreover, the petitioner submitted an agreement between the petitioner and Vital Resources, Inc., dated February 12, 2007, indicating that the beneficiary will begin a new assignment for Vital Resources, Inc.’s client, KeyBank. The service agreement described the proposed duties the beneficiary will perform for KeyBank, and also indicated the period of employment from February 6, 2007 until December 31, 2007, with the option to renew the contract.

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 a service agreement that provided a job description for the duties the beneficiary will perform for KeyBank, the agreement was signed by Vital Resources, Inc. and not by KeyBank. Thus, petitioner failed to submit a proper description of the work duties to be performed at KeyBank’s place of business. 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 (KeyBank, 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.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform under contract for KeyBank, 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.

Beyond the decision of the director, the petitioner has not submitted an itinerary of employment. 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 if the beneficiary’s duties will be performed in more than one location. The record is clear that the beneficiary would not perform his duties at the petitioner’s place of business in Salem, New Hampshire. Rather, the beneficiary would provide services for KeyBank at a site in Cleveland, Ohio. The petitioner has an agreement with Vital Resources, Inc., which calls for the petitioner to offer the beneficiary’s services to Vital Resources, Inc., which will in turn place the beneficiary at the KeyBank client site.

While the Aytes memorandum cited at footnote 1 broadly interprets the term “itinerary,” it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had one year of work for the beneficiary to perform, the director properly exercised his discretion to require an itinerary of employment.²

As discussed above, the petitioner submitted a service agreement between the petitioner and Vital Resources, Inc., dated February 12, 2007. According to the service agreement, the beneficiary would be placed to work for Vital Resources, Inc.’s client, KeyBank. The agreement stated that this project would begin on February 6, 2007 and end on December 31, 2007, and may be extended should the client desire more time.

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as the service agreement does not cover the entire period of requested employment, and there are no additional contracts, work orders, or statements of work establishing the dates and locations of the proposed employment through March 29, 2008. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition was properly denied. The information submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary’s employment by the petitioner; the evidence of record only demonstrates that the petitioner had work for the beneficiary through December 31, 2007. The petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). For this additional reason, the petition must be denied.

The AAO also notes that the record contains no evidence to demonstrate that an itinerary for the position existed at the time the petition was filed. The service agreement for the beneficiary to provide services to KeyBank was signed on February 12, 2007, twenty days after the petition was filed on January 23, 2007. The petitioner stated in its response to the director’s request for evidence that the beneficiary was working on an assignment in New Hampshire and was recently reassigned to the assignment for KeyBank located in Ohio. As the service agreement was signed after the instant petition was filed, the petitioner cannot use this service agreement in order to demonstrate that an itinerary for the position existed at the time the petition was filed.

CIS regulations 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)(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. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, 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 record fails to establish that the petitioner had an itinerary of definite employment for the beneficiary at the time the instant petition was filed.

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, “[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment.”

Beyond the decision of the director, the petitioner failed to submit an LCA certified for the location of intended employment at the time of filing the instant petition. The petitioner stated on the Form I-129 that the beneficiary would be working in a "client site" in Waltham, Massachusetts, and it submitted an LCA certified for employment in Waltham, Massachusetts. In response to the director's request for evidence, counsel for the petitioner stated in its letter dated April 25, 2007, that the beneficiary was recently assigned to a new client site at KeyBank in Cleveland, Ohio, subsequent to filing the instant petition. The petitioner submitted a new LCA for employment in this location, certified on January 31, 2007, eleven days after the instant petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The petitioner's submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, Citizenship and Immigration Services (CIS) 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)(12).

The petition may not be approved without an LCA certified prior to the date the petition was filed. The certified LCA for the Cleveland, Ohio employment was obtained subsequent to the filing of the petition on January 23, 2007, and the regulations contain no provision for discretionary relief from the LCA requirements. The petitioner failed to procure a certified LCA for the location of intended employment prior to filing the H-1B petition. For this additional reason, the petition may not be approved.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), that the employer has submitted an itinerary of employment, or that the petitioner submitted a certified LCA for the location of intended employment in a timely manner. Accordingly, the petitioner has failed to overcome the grounds of the director's denial of the petition.

The AAO acknowledges counsel's assertion that the director abused its discretion when it denied the instant extension of status since the beneficiary was twice previously granted H-1B classification for the same employer and position. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute 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 did approve a nonimmigrant petition similar to the one at issue here, 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).

Finally, the AAO turns to counsel's assertion that the director's discussion constituted an abuse of direction. However, as related in the previous discussion, the AAO finds that the petitioner has failed to satisfy the applicable regulations. The AAO therefore finds no evidence of abuse of discretion on the director's part.

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.