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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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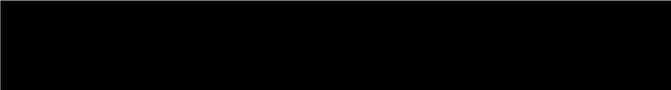
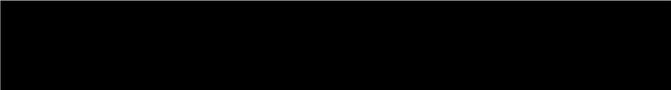


U.S. Citizenship
and Immigration
Services



D2

FILE: WAC 08 204 50798 Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2010**

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the service center 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 an information technology/software business that seeks to employ the beneficiary as a project manager. The petitioner, therefore, endeavors to classify the beneficiary 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, determining that the petitioner failed to demonstrate that it will employ the beneficiary in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

In a July 15, 2008 letter submitted in support of the petition and request for extension, the petitioner described the proposed duties of the proffered project manager position as follows:

- Lead a team of system design engineers;
- Oversee the team's analysis of business processes and system requirement analysis;
- Work as a leader with other architects on Web 2.0 and Enterprise Application Integration development projects in distributed development environments;
- Perform system design, development, and testing; and
- Architect software systems and evaluate performance of software systems.

The record also includes a Labor Condition Application (LCA) submitted at the time of filing, listing the beneficiary's work locations in Milpitas, CA and Walnut Creek, CA.

The petitioner also submitted copies of the beneficiary's education documents and employment letters, which includes a copy of the beneficiary's Master of Science degree in Information Technology from the University of Texas at San Antonio.

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The director also requested evidence pertaining to the beneficiary's status.

In response to the RFE, counsel for the petitioner stated that the petitioner is a public company with 65 employees in its Milpitas, CA office and 14,800 employees worldwide. Counsel included a copy of an Employment Agreement between the petitioner and the beneficiary dated October 24, 2004. The Employment Agreement states, in part:

The company is engaged in the business of providing *computer consulting services*, software development and e-commerce activities to clients and customers in the United

States and other countries around the world.

* * *

[T]he employment will be performed either at the Company's offices in Fremont, California or at any of the Company's offices in the United States. Employee may be required to relocate to other sites in the U.S. from time to time and Employee agrees to comply with such relocation requirements as instructed by Company.

(Emphasis added.)

The copies of the Form W-2 provided by counsel indicate that the beneficiary lived in San Antonio, TX from 2002 through 2004. The Form W-2 for 2005 indicates the beneficiary lived in Union City, CA for that year, while the Forms W-2 for 2006 and 2007 indicate he lives in Fremont, CA, as does the Form G-28. The Employment Agreement and the Forms W-2 also indicate that the beneficiary has performed work at more than one location in the past and is likely to do so again, as is also indicated by the LCA, which lists two locations of employment. Moreover, as it is stated in the Employment Agreement that the petitioner's business is to provide computer consulting services and other software development and e-commerce activities to clients and customers, it appears that the substantive nature and the consequent educational requirements of the job duties to be performed by the beneficiary are determined by work generated through contracts with clients, whether or not such duties are actually performed in the petitioner's offices in Milpitas, CA or at the other location listed in the LCA in Walnut Creek, CA.

The director denied the petition on the basis that the petitioner had not provided valid contracts or other documentation between itself and its clients demonstrating a need for the beneficiary to perform duties in a specialty occupation. In part, the director's decision noted that the petitioner declined to provide documentary evidence in response to the RFE's request for

[documents] such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. . . .

On appeal, counsel reiterates the beneficiary's generic duties as provided in the petitioner's support letter, but does not provide any details with respect to the project(s) on which the beneficiary will work or the duties that the beneficiary will perform. Counsel asserts that this position is closest to that of an Engineering Manager in the Department of Labor's *Occupational Outlook Handbook (Handbook)*; but counsel does not provide sufficient detail with respect to the duties the beneficiary will perform or information about the people the beneficiary will manage, including their degrees, in order to make a comparison to the *Handbook's* section on Engineering Managers.

On appeal, counsel also states, "Lastly, the petitioner has complete control over the work or projects assigned to the beneficiary whether they are being done in-house at the petitioner's place of business *or at the customer's site.*" (Emphasis added.) In other words, the beneficiary may work at locations, including client

sites, other than the petitioner's offices in Milpitas, CA, which seems clear given that the LCA lists the location of Walnut Creek, CA in addition to the petitioner's offices in Milpitas, CA. This assertion by counsel that the beneficiary may be assigned to work at different locations, as well as the sections of the Employment Agreement quoted earlier in this decision, conflict with the information that the petitioner indicated in the Form I-129, namely, that the petitioner would employ the beneficiary at its offices in Milpitas, CA for the duration of the petition.

Further, the AAO notes that, on appeal, counsel does not dispute the following characterization of the petitioner's business:

The petitioner is in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained persons to complete their projects. The petitioner negotiates contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. The petitioner then pays the worker, in this case the alien, directly from an account under its own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The AAO will first consider whether the proffered position is a specialty occupation. 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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, a proposed position must also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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 proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing services, “the work to be completed,” and its duration. Accordingly, the AAO affirms the director’s determination that the petitioner failed to establish that the beneficiary would be performing specialty occupation work as a project manager, as asserted in the petition. Therefore, the appeal will be dismissed, and the petition will be denied.

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 *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, counsel claims that the beneficiary will be working at the petitioner's offices in Milpitas, CA, unless he is required to work at a client work location. However, in its response to the RFE and in support of the appeal, the petitioner does not provide any information about specific projects upon which the beneficiary will work, the substantive nature of actual project work the beneficiary will perform at headquarters or any other location, or contracts with client orders for work to be done that cover the period of employment requested in the petition. There are no work orders, no statements of work, and no work itinerary with respect to the proposed employment of the beneficiary. 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).

The court in *Defensor*, 201 F.3d 384, 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.

Counsel's brief in support of the appeal seeks to distinguish *Defensor*, by arguing that the petitioner is not a contractor. However, as mentioned above, the record does not contain a detailed description of the beneficiary's actual daily duties, and in the absence of the type of contractual documents requested in the RFE, but not provided in response, the petitioner has not presented evidence distinguishing itself from the type of employment-contractor petitioner in *Defensor*. Further, the *Defensor* result did not hinge on the categorical status of the petitioner, [REDACTED], as an employment contractor, but rather on the fact that, as here, the substantive nature of the beneficiary's duties and the related degree requirement were dependent on the client hospital generating the work that the beneficiary would perform. This is evident in the following statement of the court:

[W]e need not decide whether [REDACTED] is or is not the employer under the Act. For even if [REDACTED] is an employer, the hospital is also an employer of the nurses [, the beneficiaries,] and a more relevant employer at that. The nurses provide services to the hospitals; they do not provide services to [REDACTED]. Even if [REDACTED] mails the nurses' paycheck, the nurses are paid, in the end, by the hospital and not by [REDACTED]. The hospitals are the true employers of the nurses, since at root level the hospitals "hire, pay, fire, supervise, or otherwise control the work" of the nurses.¹

In this matter, the petitioner has not provided consistent evidence demonstrating that the beneficiary would work in-house or on a project for a particular client. The record does not contain evidence of the actual duties comprising the beneficiary's services for the petitioner or an end-user client or clients. Thus, USCIS is unable

¹ Of course, the petitioner's status as a United States employer entitled to file an H-1B petition in accordance with the regulation at 8 C.F.R. § 214.2(h)(4)(ii) is not an issue on appeal.

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.

The petitioner in this matter has failed to provide a definitive description of the substantive duties the beneficiary would perform for the ultimate end-user of the beneficiary's services. Consequently, the record lacks a sufficient basis for the AAO to find that actual performance of the particular position proffered here would require the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific discipline, so as to qualify the position as a specialty occupation under the Act and at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As evidenced by the above listing of proposed duties from the record of proceeding, the petitioner describes the position and the duties that the beneficiary would perform in exclusively generalized and generic terms (such as “[l]eading a team of system design engineers,” and “[w]ork as a leader with other architects on Web 2.0 and Enterprise Application Integration development projects in distributed development environments.”) As such, the duty descriptions do not relate any concrete information about either the specific work that the beneficiary would do for the petitioner's clients, or the content and educational level of highly specialized knowledge that the beneficiary would apply in that work.

Upon review of the totality of the record, the AAO finds that the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline.

With respect to the Memorandum from Louis D. Crocetti, Jr., Associate Commissioner to Service Center Directors (November 13, 1995) and the Michael L. Aytes Internal Memorandum (Dec. 29, 1995) mentioned by counsel on appeal as justification for not submitting copies of contracts or an itinerary, unpublished and internal opinions cannot be cited as legal authority and they are not precedent or binding on USCIS. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Service (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely”); *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be “general statements of policy”); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an “internal agency memorandum,” “doubtful” of conferring substantive legal benefits upon aliens or binding the INS); and *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an “internal directive not having the force and effect of law”). Further, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met “[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment,” and that “[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien.”

In addition, the memoranda must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. Under 8 C.F.R. § 103.2(b)(8)(ii), “if all required initial evidence is not submitted with the application or petition *or does not demonstrate eligibility*, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS.” (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, “The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication.”

Moreover, while the Aytes memorandum broadly interprets the term “itinerary,” it provides USCIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. The petitioner in this matter initially indicated that the beneficiary would work at its offices in Milpitas, CA, but the key Employment Agreement provided in response to the RFE as well as additional documentation submitted and statements made by counsel indicate that the beneficiary may work at other offices of the petitioner or at client sites. 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). More importantly, submission of an itinerary specifying dates and places of employment is a regulatory requirement, to be met at the time of petition filing, for all H-1B positions which may be performed at multiple locations. As such, the itinerary requirement is not subject to discretionary enforcement by virtue of an agency memorandum.

The Aytes memo was drafted to provide internal guidance to legacy INS officers regarding the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B), which expressly requires an itinerary when, as here, a record of proceeding indicates that the beneficiary’s services will likely be performed in more than one location. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, with its use of the mandatory “must” and its location in the subsection “Filing of petitions,” indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted at least the employment dates and locations. An agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation.

Counsel also argues on appeal, without supportive documentation, that the position of project manager is always a specialty occupation. However, as it is not supported by persuasive documentation, this contention has no weight. As noted earlier, the unsupported assertions of counsel do not constitute evidence. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506.

Further, as the record does not contain sufficient evidence of the specific duties the beneficiary would perform or the project(s) on which the beneficiary would work, the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a project manager, or any other position, at a specialty occupation level. As discussed earlier, the petitioner did not provide any copies of contracts with clients or an itinerary for the beneficiary, even though the evidence submitted indicates that the beneficiary will work on projects at either the petitioner's offices or client sites pursuant to client contracts. Without this information, the AAO cannot analyze whether the vague and generic duties provided by the petitioner would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, 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. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material 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 USCIS 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The appeal will be dismissed and the petition denied for the above stated reason. 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.