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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office:

CALIFORNIA SERVICE CENTER
[Redacted]

Date:

MAY 17 2005

IN RE:

Petitioner:

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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center 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 an employee leasing service company that seeks to employ the beneficiary as a health service administrator. The petitioner 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 because the petitioner did not establish that a purchase order existed for the occupation with any client of the petitioner, and thus, did not establish that a specialty occupation existed for the beneficiary. The director also determined that the petitioner did not establish that an employer-employee relationship existed. On appeal, the petitioner submits a letter.

The AAO will first address whether the proffered position is a specialty occupation.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for additional evidence; (3) the petitioner's responses to the director's requests; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a health service administrator. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 12, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing, implementing and maintaining policies and procedures related to health services; planning, directing, coordinating and supervising the delivery of health services to patients at clinics; preparing a health service management report; providing assistance to the controller in the preparation of the company's annual budget; supervising the company's accountant and marketing director; and evaluating and providing orientation to new employees. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in any medical, dental or healthcare-related field.

The director found that the duties of the proffered position describe a specialty occupation because they require a theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. The director then states, "However, it is not the petitioning entity that will be providing these duties to the beneficiary. The petitioner is in the business of locating aliens with varied skills and education and placing these aliens in positions with firms that use these skills to complete their projects." The director went on to find that because no purchase order was submitted for the petition, that the petitioner had not established that a specialty occupation existed. The AAO does not concur with the director that the petitioner established that the proffered position was a specialty occupation, precisely because, as the director noted, the beneficiary will not be performing the work at the petitioner's worksite and the petitioner did not establish that both the petitioner and its client meet the terms of the regulations.

On appeal, the petitioner states that the director acknowledged that the position is a specialty occupation. The petitioner also states that the size of the organization does not determine whether a degree is required for a position; instead it is the nature of its business and the need of the company. The petitioner asserts that the director's decision is inconsistent with his previous decision approving an identical petition. The petitioner also states that its employment contract with the beneficiary establishes an employer-employee relationship, and that it meets the other criteria to establish itself as an employer.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While the *Handbook* states that the general requirement for a health services manager is a master's degree, and a bachelor's degree is adequate for some entry-level positions in smaller organizations, it also states, "Physician's offices and some other facilities may substitute on-the-job experience for formal education." The petitioner provided no information about its client's business or worksite, so there is no evidence in the record to establish that it is a type of business that would require a baccalaureate degree rather than experience to fill the proffered position. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for this type of health services manager.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. There is no evidence in the record regarding the petitioner's client's past hiring practices. In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

Although the record contains a staffing agreement between the petitioner and its client, the site where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. The description is essentially identical to the general one provided in the letter of support; therefore, the petitioner has not demonstrated that the work that the beneficiary will perform for the client is a health services manager or that it will qualify as a specialty occupation.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The director found that the petitioner did not establish that an employer-employee relationship existed and that the petitioner, which does not provide direct healthcare services, is an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F). The AAO finds that an employer-employee relationship between the petitioner and the beneficiary exists. The staffing agreement states that the petitioner is the employer for "all purposes," and that the petitioner would pay the beneficiary's salary. The employment agreement between the petitioner and the beneficiary states that the petitioner shall direct and control the work of the beneficiary, including hiring, retaining, and terminating her services. The petitioner has established that it is the actual employer of the beneficiary. The AAO concurs with the director's determination that the petitioner is also an agent as defined in the regulation. The director found that the petitioner did not submit an itinerary of services the beneficiary would be providing; however, the staffing agreement submitted in response to the director's request for evidence meets the requirements of an itinerary. It provides the name and address of the actual employer, the name and address of the company where the beneficiary would be placed, and the duration of the position, as required by 8 C.F.R. § 214.2(h)(2)(i)(F)(2).

Regarding the petitioner's assertion that the director's decision is inconsistent because an identical petition was previously approved, the record of proceeding does not contain a copy of the visa petition that the petitioner claims was approved. If the previous nonimmigrant petition were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the 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).

An H-1B alien is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case, the petitioner did not establish that the beneficiary would be coming to the United States to perform services in a specialty occupation.

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.