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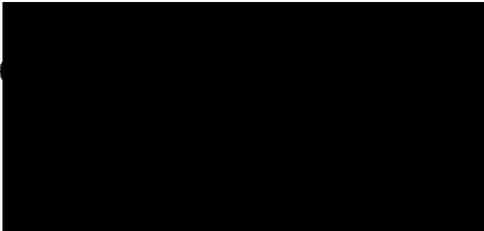
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FILE: LIN 04 021 52694 Office: NEBRASKA SERVICE CENTER Date: NOV 02 2005

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, Director  
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 and solutions company that seeks to employ the beneficiary as a computer software engineer. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

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 request for additional evidence; (3) the petitioner's response to the director's request; (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 computer software engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to the petitioner's October 15, 2003 letter, the beneficiary would perform duties that entail analyzing users' needs and designing, creating, and modifying general computer applications and systems. The petitioner states that the beneficiary is qualified to perform the proposed position.

The director found that the evidence did not establish that the beneficiary would perform the proposed duties. According to the director, when the beneficiary works at client sites or on specific client projects, it is the contract or work order that determines the beneficiary's duties; and that the record did not contain this evidence. According to the director, the petitioner submitted 226 petitions in 2003 seeking nonimmigrant workers and 4 petitions on behalf of employees seeking immigrant status; and in 2004 submitted 45 petitions seeking nonimmigrant workers and 1 petition for an employee seeking immigrant status. The director determined that the petitioner did not have a facility in which to employ the beneficiary in-house: 7 workstations would be insufficient for 276 employees.

On appeal, counsel states that CIS previously approved an H-1B petition filed on behalf of the beneficiary by the petitioner; that the evidence reflects that the petitioner contracts out most of its employees, as is the industry's custom, and that the number of onsite workstations is therefore irrelevant; and that the beneficiary will be employed at a client site. Counsel states that the beneficiary was initially assigned to work in Springfield, Missouri; but in December 2003 had been reassigned to work in California. Counsel explains that the beneficiary's address on the submitted W-2 Form reflects the California location, and submits a labor condition application (LCA) covering the California location.

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.

Counsel asserts that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross 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 a prior approval 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 had approved the nonimmigrant petition 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).

The prior approval does not preclude CIS from denying an extension of the 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 (5<sup>th</sup> Cir. 2004).

The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) states that the H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation. The AAO finds that the evidence in the record does not substantiate the petitioner's claim that the beneficiary will perform the position described in the October 15, 2003 letter; thus, the record does not reflect that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. The record contains two Installation Services Subcontract Agreements entered into with QualxServ. The first agreement involves repairing PC/Laptops; the second agreement is to provide installation services on computer equipment. Thus, the duties in the two agreements differ from those of the proposed position. In addition, the AAO observes that the agreements and the submitted statement of work do not specifically identify the beneficiary as the person to provide services to QualxServ. Moreover, the second agreement and work order were entered into in January 2004, which is a date subsequent to the filing of the H-1B petition on January 5, 2004. 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). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Consequently, the second agreement carries little weight in this proceeding. While the petitioner states that it is a contracting company that provides computer solutions to its clients, it has provided no evidence of work offering the kinds of duties it outlines on the Form I-129 and in the support letter that the beneficiary will be doing.

In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 alien beneficiaries requires 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 alien beneficiaries to the United States for employment with the agency's clients.

The record does not contain an agency service agreement between the petitioner and its client, where the beneficiary will work, and does not contain a comprehensive description of the beneficiary's duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at its client worksite will qualify as a specialty occupation.

Furthermore, the record contains the LCA submitted with the initial H-1B petition<sup>1</sup>, which reflects that the beneficiary will work in Springfield, Missouri. However, on appeal, counsel asserts that in December 2003 the beneficiary was assigned to work in Oakland, California. The AAO finds that this evidence of a changed work location fails to show that the beneficiary was coming temporarily to the United States to perform services in a specialty occupation in Springfield, Missouri, as described in the initial petition and its accompanying documents.

For these reasons, the petitioner fails to establish any one of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A): 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 petitioner normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

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 on this ground.

Beyond the decision of the director, 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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record reflects that the petitioner's I-129 petition was received by CIS on October 30, 2003, and on appeal, the petitioner seeks to submit an LCA with a November 20, 2003 certification date. Because the petitioner seeks to submit an LCA with a November 20, 2003 certification date, which is subsequent to the filing of the H-1B petition on October 30, 2003, the petitioner fails to comply with CIS regulations set forth at 8 C.F.R. § 103.2(b)(12) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). For this additional reason, the petition may not be approved.

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.

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<sup>1</sup> The AAO notes that the H-1B petition was filed on 10/30/2003.

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**ORDER:** The appeal is dismissed. The petition is denied.