U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 227 50999 Office: CALIFORNIA SERVICE CENTER Date: SEP 2 0 2007

IN RE: Petitioner: [redacted]
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:

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, 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 systems integration and software development company that seeks to employ the beneficiary as a computer programmer. 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 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.

The director denied the petition on three grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; (2) that the petitioner had failed to demonstrate the existence of a specialty occupation, as it had not submitted an itinerary of services to be performed; and (3) that the petitioner had not established that it would comply with the terms and conditions of the labor condition application (LCA) certified for the location of intended employment.

On appeal, counsel contends that the director erred in denying the petition.

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:
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> (*1*) Engages a person to work within the United States;
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> (*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
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> (*3*) Has an Internal Revenue Service Tax identification number.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. 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). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment.

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[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).

As the petitioner notes on appeal, the beneficiary would not perform her duties at the petitioner's place of business. Rather, she would be "assigned to these client projects outside its place of business," as "[t]he needs of each project is dictated and prescribed by the client." Further, the AAO notes that, at page 2 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated that subsequent work locations for the beneficiary were unknown at the time of the filing.

Accordingly, the AAO concludes that, although the petitioner will act as the beneficiary's employer, 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.

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 in such situations. 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 three years of work for the beneficiary to perform, the director properly exercised his discretion to require an itinerary of employment.[2]

In its August 11, 2004 letter of support, the petitioner stated the following:

> We respectfully request that the USCIS approve this petition for the entire period listed on the I-129. For various reasons, our company may assign [the beneficiary] to a project for a period less than requested on the petition. However, we fully believe that [the beneficiary] shall be employed for the period requested on the petition. There are various reasons why our projects are not projected for 3-year periods. Good business sense dictates that we must re-evaluate the project periodically and make the necessary changes.

In his November 23, 2004, request for additional evidence, the director stated the following:

> From the evidence provided it appears that the petitioner is engaged in the business of software development and consulting and is seeking the beneficiary's services as a computer programmer to perform work for clients outside the petitioner's work site. As such, it is requested that the petitioner submit an itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services. The itinerary should specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary. . . .
>
> The itinerary should include all service planned for the period of time requested – in this case until 09/30/2007.

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[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."

In its February 9, 2005 response to the director's request for additional evidence, the petitioner stated that it would be the beneficiary's actual employer, that the beneficiary would always be its employee, and that it would comply with the LCA. The petitioner did not submit the requested itinerary, stating the following:

> In the past, [the petitioner] has provided itinerary attestations to the CIS. To support these attestations, [the petitioner] has included copies of our contracts with our clients to demonstrate to the government that we are an active and on-going concern with active business activities. In this way, we felt the CIS would understand that we are much like the law firm who works with clients but is the actual employer. Lately, the CIS has asked for such specific information and documentation that is relatively impossible for [the petitioner] to provide.

As noted previously, the petitioner's failure to submit an itinerary of services to be performed, which covers the entire period of requested employment, was one of the grounds of the director's denial of the petition.

On appeal, the petitioner states, in response to this portion of the denial, that it is not an agent and is therefore not required to submit an itinerary.[3] However, as noted previously, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires employers to submit an itinerary with the dates and locations of employment in situations where the employment will occur in more than one location.

On appeal, counsel submits contracts from the following companies: (1) Wells Fargo; (2) Intuit; (3) Oracle; and (4) MBNA. However, none of these documents specifically request the services of the beneficiary, and do not indicate that the beneficiary was selected from the petitioner's qualified workers. None of these contracts have any effect until work orders (referred to as "assignment memorandums," in the case of the contract with Wells Fargo and "statements of work" in the case of the contracts with Intuit, Oracle, and MBNA) are issued. The record contains no work orders with the beneficiary's itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence contained in the record 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. 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 record also does not establish that the proposed position is a specialty occupation. 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 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

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[3] On appeal, counsel submits a copy of regulations that were proposed in 1998. However, those regulations were never published and have no legal effect here.

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 any documentation that establishes the specific duties the beneficiary would perform under contract for any of the petitioner's clients, 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)*(1)*.

The director also found that the record did not establish that the LCA was valid for all work locations. As the record does not contain an itinerary for the period of employment, it cannot be determined that the LCA is valid for the work locations. For this additional reason, the petition may not be approved.

The petitioner's assertion that denial of the petition constituted a due process violation fails. The petitioner has failed to overcome the director's denial, and it has demonstrated no prejudice on the part of the director that would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). As discussed previously, the petitioner has not met its burden of proof, and the denial was the proper result under the regulation.

The petitioner cites to 8 C.F.R. § 103.3(c) on appeal, and states that the "hundreds of petitions" that the petitioner has had approved in the past should serve as precedents. However, the petitioner has misread 8 C.F.R. § 103.3(c), which states the following:

> *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General . . .[D]esignated Service decisions are to serve as precedents in all proceedings involving the same issue(s). . . .

The petitioner's prior approval notices are not precedent decisions. The petitioner submits no evidence that its previous approvals have been designated by the Secretary of Homeland Security, with the concurrence of the Attorney General, as precedent decisions, and published by the Director of the Executive Office for Immigration Review. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Regarding the petitioner's previous approvals, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the petitioner's previous petitions were approved based upon the same evidence contained in this record, their 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 notes that the petitioner has requested oral argument before the AAO, citing to "the issues being decided herein and public policy at stake." The AAO disagrees. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). The instant petition does not involve unique factors or issues of law, and the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petitioner has failed to establish that it has an itinerary of employment for the beneficiary, that it has three years of work for the beneficiary, that the proposed position qualifies for classification as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, or that the LCA is valid for the work locations. Accordingly, the AAO will not disturb the director's denial of the petition.

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.