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FILE: WAC 07 002 53316 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2008**

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:

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 provider of information technology solutions that seeks to employ the beneficiary as a programmer analyst. 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 on four grounds: (1) her determination that the petitioner had failed to demonstrate that it meets the regulatory definition of an employer or agent; (2) her determination that the petitioner had failed to submit a complete itinerary; (3) her determination that the petitioner had failed to submit a valid labor condition application (LCA) certified for the location of intended employment; and (4) her determination that the petitioner had failed to establish that the proposed position qualifies for classification as 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 AAO disagrees with the director’s determination 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 the AAO withdraws the director’s decision to the contrary. The petition may not be approved, however, as the record does not establish that the beneficiary will be employed in a specialty occupation, or that the employer has submitted an itinerary of employment.

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 if the beneficiary’s duties will be performed in more than one location. 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 indicated that the beneficiary

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).

would be placed at various work locations to perform services established by contractual agreements for third-party companies, and did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment for the three-year period of requested employment in her January 31, 2007 request for additional evidence.²

In its April 24, 2007 response to the director's request for additional evidence, the petitioner submitted a "Software Services Agreement" with Onward Consultants, LLC (Onward), dated November 16, 2006. The petitioner also submitted a corresponding work order, also dated November 16, 2006. Pursuant to this work order, the beneficiary would provide services to Onward's client Upromise, Inc. (Upromise) in Needham, Massachusetts, beginning November 20, 2006. According to this work order, the beneficiary would provide services to Upromise for "3-6 months." On appeal, the petitioner submits a "Sub-Vendor Agreement with TEKsystems, Inc. (TEK), dated March 28, 2006. The petitioner also submits a corresponding work order, dated June 8, 2007. Pursuant to this work order, the beneficiary would provide services to one of TEK's clients³ in Pittsburgh, Pennsylvania from June 18, 2007 until December 30, 2007.

Thus, the record, as it presently stands, contains two statements of work: one beginning November 20, 2006 and ending "3-6 months" later, and one lasting from June 18, 2007 until December 30, 2007. The period of employment requested by the petitioner on the Form I-129 was September 26, 2006 through September 25, 2009.

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as the statements of work do 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 employment through September 25, 2009. Moreover, the AAO notes that the software services agreement between the petitioner and Onward is dated November 16, 2006, a date nearly two months subsequent to the September 26, 2006 filing date of this petition. The petitioner therefore, cannot use this document to establish that a specialty occupation existed at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not established that it has three years of work for the beneficiary to perform. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition cannot be approved. The petitioner has failed to submit an itinerary of services to be performed covering the entire period of requested employment.

The director also denied the petition on the basis of her determination that the petitioner had failed to submit a valid LCA for the location of intended employment. At the time the petition was filed, the petitioner submitted an LCA certified for employment in Jersey City, New Jersey and Providence, Rhode Island. In response to the director's request for additional evidence, the petitioner submitted an LCA certified for employment in Jersey City, New Jersey and Norfolk County, Massachusetts, and on appeal

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."

³ The name of TEK's client is not provided on the work order. The record establishes that the beneficiary would not be providing services to TEK directly, as the sub-vendor agreement between TEK and the petitioner appears to contemplate the beneficiary providing services to TEK's clients only.

the petitioner submits an LCA certified for employment in Jersey City, New Jersey and Pittsburgh, Pennsylvania.

As noted previously, the Form I-129 was filed on September 26, 2006. However, the LCA certified for employment in Jersey City, New Jersey and Norfolk County, Massachusetts was certified on January 18, 2007, and the LCA certified for employment in Jersey City, New Jersey and Pittsburgh, Pennsylvania was certified on June 13, 2007. Thus, both of these LCA's were certified after the 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 submission of a certified 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, 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 petitioner's failure to procure a certified LCA, valid for the locations of intended employment, prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements.⁴ The record does not establish that the beneficiary will be working in Jersey City, New Jersey and Providence, Rhode Island, as listed on the timely filed LCA. As such, this petition may not be approved, and the director was correct to deny the petition on this ground.

The AAO turns next to the director's determination that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. The AAO agrees. The record 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 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. In this particular case, the “more relevant employer” would be the clients of Onward and TEK for whom the beneficiary would be performing services.

⁴ Even if the AAO were permitted to accept these certified LCA's, as the record does not contain an itinerary covering the entire period of requested employment, the AAO would be unable to determine whether the LCA is valid for all work locations.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the clients of Onward or TEK, 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)(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).

Beyond the decision of the director, the AAO finds that the decision may not be approved for another reason, as the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner submits copies of diplomas and transcripts, reflecting that the beneficiary earned a degree in technology in India. However, the record does not contain a credentials evaluation of the beneficiary's foreign education. Accordingly, the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

Regarding the previous approvals in the record—which were not granted to this petitioner, 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 previous petitions were approved based upon the same evidence contained in this record, their approval would constitute gross and 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 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).

The record fails to establish that the beneficiary would be performing services in a specialty occupation, that the petitioner has submitted a valid LCA, or that the employer has submitted an itinerary of employment. Beyond the decision of the director, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

For all of these reasons, the petition may not be approved. 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.