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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 07 110 53491 Office: CALIFORNIA SERVICE CENTER Date: APR 30 2008

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:

[redacted]

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.

Michael T. Kelly

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, a company describing itself on the Form I-129 as an "IT & Staffing Consulting Firm,"[1] seeks to employ the beneficiary as a programmer-analyst. 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 two grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an employer or agent; and (2) that the petitioner had failed to submit a valid 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:

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[1] Although the petitioner describes itself on the Form I-129 as an IT and staffing consulting firm, later, in its September 5, 2007 response to the director's request for additional evidence, it stated that it "is not engaged in the business of consulting, employment staffing o[r] job placement." 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).

> (*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
>
> (*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.[2] *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 petition does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment.

The petitioner filed the Form I-129 on March 19, 2007. In its March 2, 2007 letter of support, the petitioner stated that it had "secured a consulting contract from TriZetto, Inc. to provide software development, integration, migration, and testing services." The petitioner submitted a copy of its August 9, 2005 "Master Contractor Services Agreement" with TriZetto. The petitioner stated that the beneficiary

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[2] *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 work at TriZetto's corporate headquarters in Newport Beach, California, and requested a three-year period of approval.

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 2 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. While the petitioner submitted a copy of its "Master Contractor Services Agreement" with TriZetto, that document specifically states that the petitioner would create and deliver work product for, and provide services to, TriZetto as outlined in forthcoming "statements of work." Such statements of work would provide descriptions of the work product and services to be provided for each project that the petitioner would perform for TriZetto. However, no such statements of work were provided at the time the petition was filed. Thus, 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, and the director properly exercised her discretion to require an itinerary of employment.[3]

In her September 5, 2007 request for additional evidence, the director requested, among other items (1) a complete itinerary of services or engagements specifying the following: the dates of each service or engagement; the names and addresses of the actual employers; and the names of the establishments, venues, or locations where the services will be performed for the period of time requested; and (2) copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed, that specifically name the beneficiary on the contract, and describe the duties to be performed, qualifications, salary to be paid, hours to be worked, benefits, and the supervision to be received.

In its September 5, 2007 response to the director's request for additional evidence, the petitioner stated that it "is not engaged in the business of consulting, employment staffing o[r] job placement." The petitioner submitted a statement of work, dated August 18, 2006, pertaining to the TriZetto contract. According to this statement of work, the beneficiary would perform services in Hanover, Maryland. The projected start date for the services is April 25, 2007, and the projected end date is June 1, 2007.

The petitioner also submitted a contract between itself and Healthcare Technology Management Services, Inc. (HTMS). The HTMS contract, like the TriZetto contract submitted at the time the petition was filed, states that the petitioner would provide services as described in forthcoming statements of work. A statement of work pertaining to this contract was also submitted. The projected start date for the services is March 5, 2007, and the projected end date is May 31, 2007.

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[3] 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."

Thus, the record, as it presently stands, contains two statements of work: one lasting from March 5, 2007 through May 31, 2007, and one lasting from April 25, 2007 through June 1, 2007.

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 March 5, 2010. 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. As noted previously, the LCA submitted at the time of filing was certified for employment in Newport Beach, California. However, as neither statement of work submitted in response to the request for evidence was for employment in Newport Beach, the director found the petitioner had failed to submit a valid LCA.

The petitioner submits two certified LCA's on appeal: one certified for employment in Hanover, Maryland; and one certified for employment in Indianapolis, Indiana. Both are certified for employment between November 14, 2007 and March 5, 2010. Counsel states that the petitioner's failure to provide valid certified LCA's "is comparable to harmless error." The AAO disagrees.

Both LCA's were certified on November 14, 2007. 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] As such, this petition may not be approved, and the director was correct to deny the petition on this ground.

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[4] Even if the AAO were permitted to accept these certified LCA's, the petition could still not be approved. As the record does not contain an itinerary covering the entire period of requested employment, the AAO would be unable to determine that the LCA is valid for all work locations.

Based on the foregoing analysis, the AAO has determined that the petitioner failed to submit a certified LCA for the locations of intended employment in a timely manner. Beyond the decision of the director, the record also fails to establish that the petitioner has submitted an itinerary of employment. Therefore, the petition may not be approved.

Regarding the previous approvals—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 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 petitioner has failed to submit a certified LCA for the locations of intended employment in a timely manner. Beyond the decision of the director, the record also fails to establish that the petitioner has submitted an itinerary of employment for the beneficiary, and that it has three years of work for the beneficiary. 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.