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

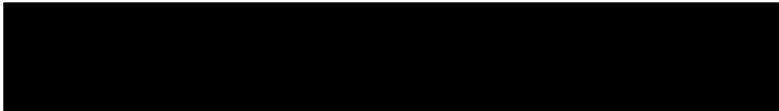
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FILE: WAC 04 202 50129 Office: CALIFORNIA SERVICE CENTER Date: NOV 14 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded.

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 includes: (1) the Form I-129 and supporting documents; (2) the director's December 2, 2004 notice of intent to revoke approval (NOIR); (3) the petitioner's December 23, 2004 rebuttal to the NOIR; (4) the director's January 18, 2005 decision revoking approval of the petition; (5) the petitioner's February 17, 2005 timely appeal; (6) the director's February 28, 2005 decision rejecting the appeal; and (7) counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On December 2, 2004 the director issued a NOIR and ultimately revoked approval of the petition on January 18, 2005 determining that the petitioner had failed to establish the existence of an employer/employee relationship and that the beneficiary is qualified to perform the duties of a specialty occupation. The director rejected the petitioner's appeal as untimely on February 28, 2005. On appeal, counsel for the petitioner submits a brief and supporting documentation.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal.

The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director issued the NOIR on December 2, 2004, which stated in pertinent part:

Submit an explanation for filing 2,237 petitions when you listed 200 employees on your petitions. Provide current employment status and locations for all previously approved H-1B, L-1A, and L-1B employees. Furthermore, in accordance with 8 C.F.R. § 214.2(h)(4)(E), provide proof of reimbursed transportation costs for all dismissed employees. If the petitioner no longer employs a previously approved H-1B, L-1A, or L-1B nonimmigrant, the petitioner should send an original signed letter explaining so. The letter should include the receipt number and the date the beneficiary's employment was terminated with the petitioner.

The director's NOIR does not comply with the notice requirements at 8 C.F.R. § 214.2(h)(11)(iii). To properly issue a NOIR, the director must: (1) specify the part or parts of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which the director proposes to revoke the approved petition; (2) for each section of 8 C.F.R. § 214.2(h)(11)(iii)(A) specified as a basis for revocation, present a detailed statement of the factual grounds that justify the proposed revocation; and (3) specify the time period (of at least 30 days) allowed for the petitioner to submit a response to the NOIR.

The director's statements indicated that the approval of the petition "violated 8 C.F.R. § 214.2(h) and/or involved gross error" and that "in accordance with 8 C.F.R. § 214.2(h)(11)(iii), it is the intent of USCIS to revoke the petition." The NOIR does not detail factual grounds for the basis of the proposed revocation and does not detail how approval of the petition violated 8 C.F.R. § 214.2(h) and/or involved gross error. Thus, the petition will be remanded in order for the director to properly issue a notice of intent to revoke.

The AAO agrees with the director's statement indicating that the record does not establish that the position is a specialty occupation or that the beneficiary qualified to perform the duties of a specialty occupation, and will discuss the deficiencies of the record.

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 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

¹ See also Memorandum from [REDACTED] 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).

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.

As the petitioner notes on appeal, the beneficiary would not perform his duties at the petitioner's place of business. Rather, he 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

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 may not be approved.

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 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.

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 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)(I).

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).

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.

Finally, the beneficiary does not appear to be qualified to perform the duties of the specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), the AAO does not accept the conclusion, reached by [REDACTED] that the beneficiary has attained the equivalent of a bachelor of science degree in computer information systems. The evaluator based his evaluation of the beneficiary's bachelor of science degree in mathematics from Uthal University, master of business administration from Berhampur University and his work experience. On the last page of the evaluation, [REDACTED] states that he has the authority to grant college-level credit for training, and/or courses taken at other U.S., or international universities. However, the record does not contain a letter from the dean or provost of any university establishing that [REDACTED] has such authority or that the university has a program for granting credit based on training and/or experience. Thus the petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Citizenship and Immigration Services (CIS) uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. However, this evaluation is based upon a combination of the beneficiary's education and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved.

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 beneficiary is qualified to perform the services of a specialty occupation. As the director did not address these issues in his NOIR or revocation decision, the petition will be remanded in order for the director to issue a new NOIR outlining the deficiencies of the petition as enumerated above. The director shall give the petitioner 30 days to respond to the NOIR as provided at 8 C.F.R. § 214.2(h)(11)(iii). Upon submission of any rebuttal, the director shall issue a new decision.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 18, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.