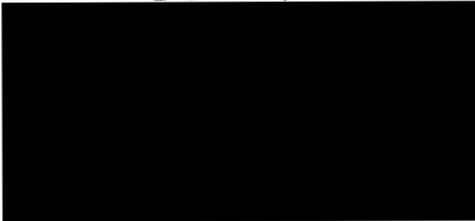


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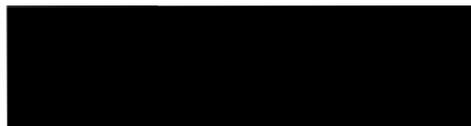


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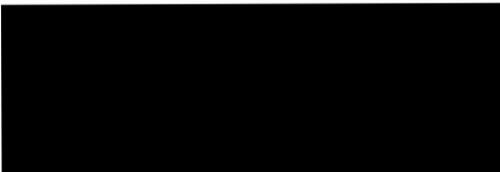
FILE: LIN 03 276 52301 Office: NEBRASKA SERVICE CENTER Date:

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:



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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Acting Director, Nebraska Service Center, and 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 consulting firm that engages in system design and development and field services for numerous clients in the United States. It desires to extend its authorization to employ the beneficiary temporarily in the United States as a computer software engineer, at an annual salary of \$27,456, for three years. The director determined that the petitioner did not establish that the proffered position qualifies as a specialty occupation. The director also determined that current facilities do not exist to employ the beneficiary in-house and denied the petition.

On appeal, counsel provides the petitioner's contract with QualxServ for installation services of voice and data telecommunications equipment. Counsel states that it would be inappropriate to include the precise duties of the position within this particular agreement. The contract states that the petitioner (TSI) "has the expertise in providing personnel who are qualified to install and service voice and data telecommunications equipment" and further, TSI "warrants and represents that it has the requisite expertise, ability and legal right to render the installation services and will retain and dedicate employees with such expertise so long as the agreement is in effect." *Installation Services Subcontract Agreement, Section 3, Manner of Performance*. Counsel states that the contract calls for the services of an individual with a degree and expertise in the applicable field.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1). . . .

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.

Similarly, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) provides that:

*Specialty occupation* means an 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) establishes four standards, one of which an occupation must meet to qualify as a specialty occupation:

- (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-290B and supporting documentation; (2) the director's denial letter; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; and (5) Form I-129 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. In the initial petition, the petitioner stated that the duties of the proffered position entail analyzing users' needs, designing, creating and modifying general computer applications software or systems. In an accompanying letter to the petition dated September 18, 2003, the petitioner gives the same duties for the beneficiary's position as computer software engineer.

The director issued a request for evidence (RFE) asking that the petitioner provide a detailed description of the specific projects that would require the beneficiary's services.

In response, the petitioner provided a listing of companies and the companies' computer systems descriptions, which it called external and internal projects. The petitioner asserted that the beneficiary had been primarily tasked to perform maintenance and revisions on these various internal and external projects. The petitioner did not submit contracts or work orders for any of the projects nor did the petitioner list any actual projects requiring the beneficiary's services.

In his decision, the director referred to *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) and noted that the court found that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. As such, the acting director found that absent a contract with the actual employer stating the duties to be performed pursuant to the contract, the petitioner had not established that the proffered position qualifies as a specialty occupation and denied the petition.

Upon review, the evidence of record establishes that the petitioner is an independent contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d at 388, held that for the purpose of determining whether a proffered 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 proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

The petitioner provided its contract with QualxServ for installation services on certain computer equipment for QualxServ customers. The contract does not describe, in detail, the specific duties the beneficiary would be performing for QualxServ customers. The petitioner states that the duties of a software engineer are complex and specialized and require a degree, and that its clients require degreed professionals. The record is not clear whether the beneficiary will work on the QualxServ contract or solely on the list of internal and external projects. The petitioner has not provided a job description or copies of work orders that the beneficiary will be working on. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's client, QualxServ, and the 22 internal and external projects listed in the response to the director's RFE, the AAO cannot analyze whether these duties 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 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)(ii)(B)(I).

The petitioner also acknowledged the director's statements regarding the number of H-1B petitions submitted by the petitioner. In the request for evidence, the director noted that the petitioner had filed in excess of 270 petitions in the previous two years and requested the petitioner to submit evidence of its facility's ability to hold 270 employees. In response, the petitioner stated that it had withdrawn eight petitions and that not all of the beneficiaries are assigned to the corporate office. The petitioner provided a list of 16 employees currently assigned to its corporate office. The petitioner also provided photographs of its office's exterior and interior

showing eight work stations. The petitioner asserted that some of its employees have labor condition applications (LCA's) for Springfield, Mo., and may work in locations within Springfield, but outside of its corporate offices.

In his decision, the director noted that in fiscal year 2003, the petitioner submitted 226 petitions for non-immigrant workers and four petitions for immigrant workers. The director also noted that as of the date of the decision in 2004, the petitioner submitted petitions for 45 nonimmigrant workers and one immigrant worker. The director found that eight work stations are insufficient for the petitioner's 271 workers. The director noted that the petitioner claimed that not all of its employees worked at the company office. Nevertheless, the director found that the petitioner had not established that it had an adequate facility for employing the beneficiary in-house.

In response to the director's concern about the number of visa petitions filed, counsel reiterates on appeal that the petitioner has 55 service locations throughout the United States. These employees are deployed throughout the United States to work at client's sites. Counsel also states that many of these petitions were denied or withdrawn and many of the beneficiaries never obtained visas or have legally transferred or ported to other employers. However, the petitioner has not provided a list of all its employees and their respective work sites or provided a list of the petitions it filed that were denied or withdrawn, or whose employment terminated. The regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) states that a petitioner who no longer employs a beneficiary of an approved petition shall notify the director of the change. The petitioner has not included any notification to the director to explain its current workforce of 103 employees. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the petition is unclear about where or for which client the beneficiary will work, there does not appear to be sufficient workspace at the headquarters location to house the beneficiary on any in-house projects.

Under the circumstances, it would have been appropriate for the director to request the petitioner to submit an employment itinerary. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary<sup>1</sup> with the dates and locations of employment if the beneficiary's duties will be performed in more than one location. The petitioner's contract with QualxServ includes a *Statement of Work* which states under *Vendor Territory*, "The area of coverage shall be defined within the United States. Subject to resource availability, vendor will accept all service requests assigned within the defined territories." Neither the location nor the term of the beneficiary's employment is identified in the QualxServ contract.

Pursuant to the Aytes memorandum cited at footnote 1, the acting director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. As the record does

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<sup>1</sup> 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).

not establish any concrete details about the beneficiary's proposed employment, it would have been appropriate in this case to request an itinerary.<sup>2</sup>

Beyond the decision of the director, the United States Department of Labor's Labor Condition Application for H-1 Nonimmigrants (LCA), submitted with the petition indicated a worksite of Springfield, Mo. The contract between the petitioner and QualxServ indicates that QualxServ is based in Tewkesbury, Massachusetts. The contract does not specifically state a location or address where it requires the service of the beneficiary. The contract indicates that the work location may be anywhere in the United States. The locations of clients listed as internal and external locations where the beneficiary will work include locations in Harrison, Arkansas and Louisville, Kentucky.

Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B), petitions involving a specialty occupation require the following:

- (1) 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 occupation specialty in which the alien(s) will be employed.

The evidence of record does not allow CIS to determine that the petitioner has provided a certified LCA for all the worksites, as required by the above cited regulation. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation. The record indicates that the beneficiary has a Bachelor of Science degree in Computer Engineering from the University of Cebu, Cebu City, Philippines. The record does not contain an evaluation of the beneficiary's foreign degree by a reliable credentials evaluation service stating that the beneficiary's education is equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. 8 C.F.R. §214.2(h)(4)(iii)(C)(2). Absent such evidence, the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation. For this additional reason, the petition may not be approved.

The AAO notes that the petition seeks an extension of previously approved employment. The director's decision does not indicate whether the director reviewed the prior approvals of the other nonimmigrant petitions. If the prior nonimmigrant petitions were approved based on the same set of facts that are contained in the current record, the approval would constitute 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 (6<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Moreover, the AAO is not 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

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<sup>2</sup> 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."

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(5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S. Ct 51 (2001). Each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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