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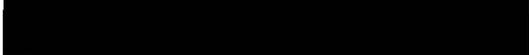
U.S. Citizenship  
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Services

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FILE: WAC 07 043 50574 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 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:



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.

*for* *Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The AAO reopened the petition pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for the purpose of entering a new decision. The appeal will be dismissed. The petition will be denied.

The petitioner is an information technology company that seeks to employ the beneficiary as a systems 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 two grounds: (1) her determination that the petitioner had failed to demonstrate that it meets the regulatory definition of an employer or agent; and (2) her determination that the petitioner had failed to submit a valid labor condition application (LCA) certified for the location of intended employment.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received at the service center on November 28, 2006; (2) the director's request for additional evidence, dated March 1, 2007; (3) the petitioner's response to the director's request for additional evidence, received at the service center on May 24, 2007; (4) the director's denial letter, dated June 26, 2007; (5) the Form I-290B and supporting documentation, received at the service center on July 31, 2007; (6) the AAO's April 30, 2008 rejection of the appeal, and remand of the matter to the director for consideration as a motion; (7) the director's May 27, 2008 dismissal of the motion; (8) counsel's follow-up letters, dated May 5, 2008, June 4, 2008, June 10, 2008, and June 20, 2008; (9) the AAO's July 10, 2008 notice that it was reopening the matter; and (10) counsel's July 15, 2008 letter waiving the regulatory 30-day period of days in which to submit a new brief. 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.<sup>1</sup> 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 fails to establish that the LCA is valid for the locations of employment.

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.

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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).

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 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 period of requested employment in her March 1, 2007 request for additional evidence.<sup>2</sup>

In its May 23, 2007 response to the director’s request for additional evidence, the petitioner submitted ten agreements between itself and the following companies: (1) Pinnacle Technical Resources, Inc.; (2) Patni Computer Systems, Inc.; (3) MIDCOM Corporation; (4) V.L.S. Systems, Inc.; (5) Modis, Inc.; (6) Yoh Services, LLC (two separate agreements were submitted); (7) Trustek, Inc.; (8) Synova, Inc.; and (9) Princeton Information, Ltd.

The petitioner submitted several purchase/work orders. The petitioner submitted two “descriptions of services” from Pinnacle: (1) one for ██████████ to work in Mason, Ohio between April 29, 2005 and December 31, 2005; and (2) one for ██████████ to work in Mason, Ohio between April 28, 2005 and December 31, 2005. The petitioner also submitted a purchase order from MIDCOM for ██████████ to work for EDS in Rockville, Maryland between January 18, 2005 and January 18, 2006. The petitioner also submitted a purchase order from V.L.S. Systems for ██████████ to work for Comsys Information Systems in Mullen, Massachusetts beginning on August 29, 2005 for “6+ months.” The petitioner also submitted five purchase orders from Modis: (1) one for ██████████ to work for ██████████ beginning on January 31, 2005, and continuing for 12 months “with possible extension”; (2) one for ██████████ to work for Capital One beginning on July 25, 2005, and continuing for 12 months “with possible extension”; (3) one for ██████████ to work for Pure Integration for an unclear period of time; (4) one for ██████████ to work for Pure Integration for an unclear period of time; and (5) one for ██████████ to work for Freddie Mac, beginning on October 11, 2005, and continuing for an undetermined period of time. The petitioner also submitted a purchase order from Trustek for ██████████ to work for Verizon in Massachusetts between October 5, 2005 and April 5, 2006. The petitioner also submitted a work order from Princeton Information for ██████████ to work for Medco Managed Care in Fair Lawn, New Jersey, beginning on October 31, 2005 and continuing for an undetermined period of time. Finally, although no subcontracting agreement was submitted, the petitioner submitted a work order from BCCUSA, Inc. for Praveen Singh to work for GE in Connecticut, beginning on October 3, 2005 and continuing for three months.

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B). The work orders, purchase orders, and “descriptions of services” do not mention the beneficiary, nor do they cover his period of requested employment (November 15, 2006 through November 14, 2007). The petitioner therefore, cannot use these documents to establish that a specialty occupation existed at the time the petition was filed. The petitioner has not established that it has one year 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.

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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.”

The director 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 Middlesex County, New Jersey. In response to the director's request for additional evidence, the petitioner submitted an LCA certified for employment in Edison, New Jersey. However, as the record does not contain an itinerary covering the entire period of requested employment, which would allow the AAO to determine where the beneficiary would actually be working under contract for the petitioner's clients, the AAO is unable to determine whether the LCA's are valid for all work locations. As such, the petition may not be approved, and the director was correct to deny the petition on this ground.

Beyond the decision of the director, the AAO finds that the record does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 end-users of the beneficiary's services, in this case the clients of Pinnacle, Modis, Trustek, or other companies contracting with the petitioner, for whom the beneficiary may actually be performing services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the clients of the companies for whom the beneficiary would perform services, 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). For this additional reason, the petition may not be approved.

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 first criterion requires a demonstration that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary did not earn a degree in the United States, so he does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record contains an evaluation of the beneficiary's credentials from Education Evaluation and Immigration Services (EEIS), dated January 21, 2000. However, this evaluation does not satisfy this criterion. While the EEIS evaluator did find the combination of the beneficiary's education and work experience equivalent to a bachelor's degree in information systems from an accredited college in the United States, this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). In order to qualify under this criterion, the evaluation must be based solely upon the beneficiary's foreign degree; a credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as there has been no demonstration that the EEIS evaluator possesses the authority to grant college-level credit for training and/or experience in this field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in either this or a related field.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because the EEIS evaluation was based upon both education and experience. In order to qualify under this criterion, the EEIS evaluation would have to have been based upon foreign educational credentials alone.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>3</sup>;

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<sup>3</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country;  
or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

While the record contains information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the specialty, that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field, and that he achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). The petitioner has failed to establish that the beneficiary qualifies 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 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 petitioner has submitted an itinerary of employment or that it has submitted a certified LCA valid for the employment locations. Beyond the decision of the director, the AAO also finds that the petitioner has failed to establish that the beneficiary would be performing

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and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

services in a specialty occupation, and that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.