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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



FILE:



Office: VERMONT

Date: FEB 03 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center 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.

On the Form I-129 visa petition the petitioner stated that it is a computer consulting and software development firm. To continue to employ the beneficiary in what it designates as a programmer analyst position, the petitioner endeavors to classify him 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, and (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed. The director also found that the petitioner had failed to provide an itinerary of the beneficiary's employment as required by both 8 C.F.R. § 214.2(h)(2)(i)(B) and an RFE issued by the service center.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's RFE; (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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 also 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in

a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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.

With the petition counsel provided a letter, dated April 2, 2008, from the petitioner’s human resources manager. That letter contains the following description of the duties of the proffered position:

The [beneficiary] shall design, develop, test and implement software products and applications using a variety of programming languages, operating systems, databases and graphical user interfaces. The [beneficiary] shall research, analyze and design computer[-]based solutions for our clients for specific business problems. The [beneficiary] formulates and outlines steps required to develop program, using structured analysis and design. He or she submits plans to the user for approval. The projects and applications will be designed with issues and considerations pertaining to scalability, security, transaction ease, speed and user efficiency in mind. The [beneficiary] shall be responsible for analyzing, reviewing, and altering programs to increase operating efficiency or adapt to new requirements.

The AAO notes that the description of the duties of the proffered position indicates that the beneficiary would work on projects of the petitioner’s clients, rather than the petitioner’s own in-house projects.

The petitioner’s human resources manager further stated that the proffered position requires, “at least a Bachelor’s degree in Computer Science or a related field,” and further noted that the beneficiary has a bachelor’s degree in mechanical engineering that had been evaluated to be equivalent to a bachelor’s degree in computer science.

The record does include an evaluation of the beneficiary’s foreign education from The Trustforte Corporation, an evaluation service in New York, New York. That evaluation did not, in fact, find that the beneficiary’s foreign mechanical engineering degree is equivalent to a U.S. bachelor’s degree in computer science, and, if it had, that conclusion would be inherently suspect. Instead, that evaluation concluded that the beneficiary’s foreign mechanical engineering degree is equivalent to a U.S bachelor’s degree in engineering.

Because the evidence did not demonstrate that the visa petition is approvable, the service center, on August 14, 2008, issued an RFE in this matter. The service center requested, *inter alia*, evidence

that the beneficiary is qualified to work in the proffered position; an itinerary showing where, when, and for what end-users the beneficiary would work throughout the period of requested employment; and letters from each of the end-users of the beneficiary's services stating their requirements for working in the proffered position. The service center also requested that the petitioner provide either a copy of its contract with the end-users of the beneficiary's services or letters from the end-users stating the specific duties to be performed and the length of time the end-users will require the beneficiary's services.

In response, counsel provided a letter, dated September 17, 2008. That letter has a signature line for [REDACTED] who is presumably a representative of the petitioner, but appears to have been signed for [REDACTED] by counsel. Why, if [REDACTED] reviewed the contents of that letter, he did not personally sign it is unknown to the AAO. As to the beneficiary's qualifications for working in the proffered position, that letter states:

[The beneficiary] has been working for Astir IT Solutions, Inc. as a Programmer Analyst since March 26, 2006. [The beneficiary] completed his Bachelor of Mechanical Engineering degree from the University of Madras in April 2000. In addition, [the beneficiary] has over five (5) years of experience in the IT Industry. **[Please see attached letters of work experience as Exhibit A].** An education evaluation by the Trustforte Corporation indicates that [the beneficiary] has the equivalent of a bachelor's degree in Engineering. [The beneficiary's] education in conjunction with his experience makes him well qualified for the position of programmer analyst.

The AAO notes that, if the beneficiary has been working in the proffered position for five years without a bachelor's degree in computer science or the equivalent, that is a very strong argument for the proposition that the proffered position does not require a bachelor's degree in computer science or the equivalent.

That letter also states:

The petitioner will be working on a project [REDACTED] c. **[Please see Exhibit P, Work Order and Contractor Services agreement between Astir IT Solutions, Inc. and Patni Computer Systems, Inc.]**

Counsel also provided numerous contracts and statements of work (SOWs) showing agreements between the petitioner and various other companies. Two documents do, in fact, pertain to agreements between the petitioner and Patni Computer Systems, Inc.

One of those documents is a Contractor Services Agreement between the petitioner and [REDACTED] stating terms pursuant to which the petitioner might provide "personnel to perform defined services under one or more work orders." It was ratified by a representative of the petitioner on October 13, 2006 and by a representative of Patni on October 16, 2006. That agreement states, "All the work shall be performed by [the petitioner's]

personnel at such locations as specified in an Assignment hereto, which may either be at premises or its customer's premises." It indicates that it remains effective indefinitely unless terminated.

One of those documents is a work order stating that the petitioner will provide the beneficiary to work for . The contents of that work order are discussed below, in a discussion of other work orders submitted subsequently.

The director denied the visa petition on April 27, 2009. As was noted above, the bases of the denial were the petitioner's failure to demonstrate that it will employ the beneficiary in a specialty occupation position, its failure to demonstrate that the LCA is valid for the intended place of employment, and its failure to provide an itinerary of the beneficiary's employment.

In a brief filed on appeal, counsel cited asserted that the description of the duties of the proffered position provided by the petitioner's human resources manager and the petitioner's requirement of a bachelor's degree in computer science or its equivalent demonstrates that the proffered position qualifies as a specialty occupation. Counsel also cited a memorandum issued by the Director, Nebraska Service Center, as evidence that programmer analyst positions qualify as specialty occupation positions.

The AAO observes that memoranda of service center directors do not modify relevant statutes and regulations and do not govern decisions of the AAO. Rather, they explain the directors' interpretation of the statutes and regulations. Further, as was noted above, the job title accorded to a position by the petitioner does not govern whether it qualifies as a specialty occupation position. The position must be shown to qualify, based on its duties, as a specialty occupation.

With the appeal, counsel also provided additional work orders pertinent to the agreement with to provide the beneficiary to

One of the work orders provided states, "the initial assignment is expected to be for a duration of approximately 2 months or more starting October 17, 2006." It also states that the start date and end date are October 17, 2006 and December 31, 2006. A representative of the petitioner signed that work order on October 20, 2006, shortly after the period it purports to cover had begun. The signature of the Patni representative who signed the work order is not dated.

Another work order state states that it extends the duration of the work order for "approximately 6 months or more starting August 2, 2007," and states that the start date and end date are August 2, 2007 and February 29, 2008. That agreement was signed by a representative of the petitioner on September 10, 2007, more than a month after it purports to have taken effect. A representative of the petitioner signed that work order on September 20, 2007, after the period it purports to cover had begun. The signature of the Patni representative who signed the work order is not dated.

Another work order state states that it extends the duration of the work order for "approximately 6 months or more starting February 1, 2008," and states that the start date and end date are February 1,

2008 and September 30, 2008. Representatives of the petitioner and Patni signed that work order on June 2, 2008, about halfway through the period it purports to cover. The signature of the Patni representative who signed the work order is not dated.

Another of those work orders states that it extends the duration of the work order for “approximately 38 months or more starting April 17, 2006.” It also states that the start date and end date are October 1, 2008 and June 30, 2009. That discrepancy is unexplained. A representative of the petitioner signed that work order on August 17, 2009, after the period it purports to cover had ended. The signature of the Patni representative who signed the work order is not dated.

The work order provided with the RFE states, “The work order is extended for a duration of approximately 6 months or more starting February 1, 2008. Thereafter the assignment may be extended by mutual written agreement.” Elsewhere, that work order states, “Start Date/End Date: February 1, 2008/September 30, 2008.” Representatives of the petitioner and Patri signed that work order on June 2, 2008, about halfway through the period it purports to cover.

All of those work orders state, [REDACTED] requiring the following skill set: SAP MM.” Neither the petitioner nor its counsel submitted into the record of proceeding evidence documenting that SAP MM skills necessarily require a minimum of a bachelor’s degree or the equivalent in a specific specialty.

The AAO observes that the period of requested employment in this matter is from October 1, 2008 through September 30, 2011. The most recent work order covers the period from October 1, 2008 and June 30, 2009. The other work orders have no apparent relevance to where the beneficiary would work during the period of intended employment.

Evidence in the instant case shows that the petitioner does not intend to assign the beneficiary to specific duties. Rather, it intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary’s services.

Because the petitioner will not, itself, be assigning the beneficiary’s duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary’s proposed duties from an authorized representative of that client of the petitioner, or of the client of the petitioner’s client, or whoever will be the end user of the beneficiary’s services and will assign his duties and supervise his performance.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor’s degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency’s clients.

The record in this case includes a description of the duties of the proffered position provided by a representative of the petitioner. However, the evidence indicates that the petitioner would not be assigning work to the beneficiary and would not control the content of the work. Thus, the petitioner's description of those duties is not probative on the issue of whether the proffered position qualifies as a specialty occupation.

work orders each state that the skill set required is SAP MM (Systems, applications, and products in data processing -- materials management). SAP may be a very complex system. However, the record contains no evidence on that point or what the beneficiary's duties would be pertinent to SAP MM. The record does not demonstrate that any duties involving SAP MM necessarily require a minimum of a bachelor's degree or the equivalent in a specific specialty or, more specifically, that the beneficiary's duties pertinent to SAP MM require such a degree.

Without such evidence, and without a comprehensive description from the end-user entities of the specific duties that the beneficiary would perform for them in the context of their particular business operations, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation.

Further, the work orders provided cover only a small portion of the period of requested employment, there is no evidence that the petitioner has secured employment for the beneficiary to perform during the balance of that requested employment period. USCIS 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)(1). 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). Even if the petitioner had demonstrated that the beneficiary's duties pertinent to SAP MM require a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would still not have demonstrated that the beneficiary would be employed in a specialty occupation during the majority of the period of proffered position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, throughout the period of requested employment, precludes a finding that the proffered position qualifies as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining

whether to approve a Form I-129 visa petition “. . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition . . .” In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in South Plainfield, New Jersey. The petitioner’s offices are, in fact, in South Plainfield. The Patni work orders submitted, however, indicate that the petitioner wished to employ the beneficiary in Minneapolis, Minnesota at least from October 1, 2008 and June 30, 2009. The record does not contain an LCA valid for employment in Minneapolis. Therefore, the petition was correctly denied on this additional basis.

The director also denied the visa petition based on the petitioner’s failure to provide an itinerary of the beneficiary prospective employment. The AAO will address that issue.

The petitioner is obliged, by 8 C.F.R. § 214.2(h)(2)(i)(B), to provide an itinerary as initial evidence submitted with the visa petition. Counsel provided a memorandum from an assistant commissioner of USCIS which he asserted shows that is unnecessary in the instant case. Again, the AAO notes that such memoranda do not alter the effect of the statutes and regulations, but are merely an interpretation of them. The petitioner is bound by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary of the beneficiary’s proposed employment, unless it has demonstrated that the employment would all occur in one location.

In his response to the RFE, counsel stated:

The beneficiary’s are assigned to projects as soon as they arrive in the United States. If there are gaps between being placed from one project to another project, the employee will remain at our office [sic] in South Plainfield, New Jersey to train for further skills or to provide support to Client’s remotely.

The implication of that statement is that the beneficiary might, during the period of requested employment, work for one employer in a remote location, then at the petitioner’s offices in South Plainfield, then for other employers at other locations. Counsel does not even allege that the beneficiary would be employed in Minneapolis throughout the period of requested employment, and was obliged, therefore, to provide the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B). The petitioner has not complied with that requirement. The appeal will be dismissed and the petition will be denied for this additional reason. The petitioner’s failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B).

Rather than merely denying the visa petition because of the petitioner’s failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the August 14, 2008 request for evidence, that the petitioner “Submit a detailed itinerary of the work sites the beneficiary

is to be assigned to, to include specific dates, locations, and clients that the beneficiary will be servicing.” The petitioner did not comply with that request.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.”

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner’s failure to submit documentary evidence substantiating the petitioner’s claim that it had H-1B caliber work for the beneficiary for the beneficiary throughout the period of employment requested in the petition.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner’s failure to provide this specifically requested evidence precluded a material line of inquiry. As such, the appeal will be dismissed and the petition will be denied for this additional reason.

The record suggests additional issues that were not addressed in the decision of denial.

In his April 2, 2008 letter, the petitioner’s human resources manager stated that the proffered position requires a minimum of a bachelor’s degree or the equivalent in computer science. The documentary evidence, however, indicates that the beneficiary has a bachelor’s degree in mechanical engineering from a foreign educational institution. Counsel appeared to imply that the beneficiary’s

mechanical engineering degree, considered together with his employment experience, qualifies him to work in the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) indicates that education other than a U.S. or foreign degree may be relied upon, with or without supplementary employment experience, if it is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and has conferred expertise that has been recognized through progressively responsible positions directly related to the relevant specialty. In order for USCIS to consider that education, training, and/or experience pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), 8 C.F.R. § 214.2(h)(4)(iii)(D) requires one or more of the following types of evidence:

- (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;¹
- (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 record contains an evaluation of the beneficiary's educational credentials, but that evaluation does not reach the conclusion that the beneficiary has the equivalent of bachelor's degree in computer science. That evaluation satisfies neither the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) nor that of 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The record contains no evidence pertinent to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(D)(2) or 8 C.F.R. § 214.2(h)(4)(iii)(D)(4). The AAO finds that the beneficiary does not have the equivalent of a U.S. bachelor's degree in computer science.

¹ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

The record does not demonstrate that a bachelor's degree in mechanical engineering, when considered separately or together with his employment experience, qualifies the beneficiary for a position that requires a minimum of a bachelor's degree or the equivalent in computer science. The appeal will be dismissed and the petition will be denied for this additional reason.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf." The petitioner and counsel have not asserted that the petitioner is the beneficiary's agent. In the appeal brief, in fact, counsel explicitly disclaimed an agency relationship, and the AAO concurs that no agency relationship exists between the petitioner and the beneficiary. As no one but the prospective employer or agent is permitted to file a petition in this visa category, the remaining issue is whether the petitioner has demonstrated that it qualifies as the beneficiary's employer.

To qualify as a United States employer, a petitioner must satisfy all three of the criteria of the definition of United States employer at 8 C.F.R. § 214.2(h)(4)(ii), which criteria are set out above. Further, the petitioner must satisfy the criteria at the time that the petition is filed. This is obvious in the plain reading of 8 C.F.R. § 214.2(h)(2)(i)(A). USCIS regulations 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)(1). 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). Therefore, the director correctly concentrated upon whatever evidence the record might contain of work existing for the beneficiary at the time the petition was filed.

As noted in the definition of United States employer at 8 C.F.R. § 214.2(h)(4)(ii), in order to qualify as the beneficiary's employer, the petitioner must demonstrate that it has an employer/employee relationship with the beneficiary. The record demonstrates that the beneficiary would not, at least

not exclusively, work at the petitioner's own location on its own projects, but would be sent to the locations of other entities, or at least the location of St. Jude Medical in Minneapolis, to work on those other entities' projects. This arrangement suggests that the petitioner would not assign work to the beneficiary and supervise his performance, but that those functions would be the province of those other entities, St. Jude Medical, for instance, or of intervening contractors, [REDACTED], for instance. Given that it has not demonstrated that it would assign the beneficiary's work and supervise his employment of it, the petitioner has not demonstrated that it has control over the beneficiary's work sufficient for an employer/employee relationship with the beneficiary. Because it has not satisfied this criterion of the definition of United States employer at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it is the petitioner's employer. As it has demonstrated neither that it is the beneficiary's employer nor that it is his agent, the petitioner does not have standing to file the instant visa petition. The appeal will be dismissed and the petition denied for this additional reason.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approval of the previous nonimmigrant petition filed on behalf of the beneficiary. If the previous nonimmigrant petition was approved based on the same unsupported assertions and evidentiary deficiencies that are contained in the current record, that approval would constitute material and gross 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 USCIS 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

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 had approved the instant nonimmigrant petition on behalf of the beneficiary, 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 prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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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. The appeal will be dismissed and the petition denied.

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