U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 143 53386 Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and dismissed a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development company that seeks to employ the beneficiary as a programmer-analyst consultant.[1] 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 director denied the petition on the basis of her determination that the petitioner had failed to establish: (1) that it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) that it meets the regulatory definition of an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) that it had submitted a valid labor condition application; and (4) that the proposed position qualifies for classification as a specialty occupation.

The AAO affirms the director's decision on the above issues regarding the failure to establish an employer-employee relationship, evidence of status as an agent, and to provide a valid LCA for the requested period of employment but will not further address these issues because the petitioner has failed to establish that the proposed position is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human

[1] The petitioner initially referred to the proposed position as that of a programmer-analyst. However, in response to the director's request for additional evidence, the petitioner, through counsel, began referring to the proposed position as that of a programmer-analyst consultant.

> 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, a proposed 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.

As a threshold issue, it is noted that 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 particular positions 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). 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), 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. Applying this standard, USCIS regularly approves H-1B petitions for

qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

Upon review of the entire record of proceeding, the AAO finds that the director was correct in her determination that the record before her failed to establish the existence of a specialty occupation position, and also finds that the documents submitted on appeal have not remedied that failure.

The petitioner filed the petition on April 14, 2008. On its tax return, the petitioner described its "business activity" as consulting. The March 10, 2008 employment agreement between the petitioner and the beneficiary stated the following:

> Employee acknowledges that the Company provides labor directly to clients. Employee also acknowledges that the Company provides clients who act as agencies who supply labor to the final client.

The employment agreement also provided for the beneficiary's rate of pay when not on assignment, yet awaiting assignment:

> For times when you are not on assignment and are awaiting assignment at the Rolling Meadows, IL office, you will receive the prevailing wage. . . .

For times during which the beneficiary would be on assignment, he would receive the greater of either $49,000 or the prevailing wage of the area in which he would be working. In its March 27, 2008 letter of support, the petitioner stated that the beneficiary "possesses the education and experience necessary to understand our clients' software and systems needs and to design and develop software which fulfills those needs," but did not identify a particular project upon which the beneficiary would work. The petitioner described the specific duties proposed for the beneficiary as follows:

- Analyze, design, modify, and implement software/systems applications in a client/server environment using C, C++, HTML, Java, XML, and Oracle on the Windows operating system;
- Research and gather user requirements;
- Prepare technical requirement specifications according to corporate regulated standards;
- Participate in the Data modeling and design of the application database, research system requirements, data modeling, and design of documents for the business process according to requirements;
- Apply Java and J2EE Technologies, including Servlets;
- Maintain repositories for various applications including users, user groups, and security access control;

- Create and maintain Web Applications in WebLogic Server for Development/QA/ Production environments; and
- Work alongside other programmer analysts in a team environment developing user-friendly software and systems applications in accordance with project specifications.

The petitioner noted that the beneficiary could provide onsite professional services to the petitioner's clients, in accordance with the certified LCA it submitted.

The director issued a request for additional evidence on June 3, 2008 and requested, among other items, further information regarding the duties proposed for the beneficiary. The director stated that if the petitioner was engaged in the businesses of consulting, employment staffing, or job placement that contracts short-term employment, in any way, it must submit evidence to establish that a specialty occupation exists for the beneficiary. The director requested that the petitioner clarify its employer-employee relationship with the beneficiary and submit: (1) copies of signed contracts between the petitioner and the beneficiary; (2) a complete itinerary of services or engagements listing the dates of each services or engagement, names and addresses of the actual employers, and names and addresses of the establishment, venues, or locations where services would be performed for the period of time requested; and (3) copies of signed contractual agreements, statements of work, or work orders, etc., specifically naming the beneficiary and describing his proposed duties.

The petitioner responded to the director's request on July 15, 2008. The petitioner, through counsel, stated that it would be the actual employer of the beneficiary for the entire period of requested employment. Although the petitioner had documentation affirming that it "provides labor directly to clients," and that it had required the beneficiary to acknowledge "that the Company provides clients who act as agencies who supply labor to the final client," and placed the beneficiary on notice as to how he would be paid during periods in which he was awaiting assignment, as well as when working outside the area for which the LCA was certified, counsel now stated that the beneficiary would be "working on an in-house project" called "Employee Self-Service Solution" during the period of requested employment.

The director denied the petition on August 19, 2008. Counsel submitted a timely motion to reopen or reconsider, but counsel's motion was dismissed by the director on October 18, 2008, as her submission satisfied the regulatory requirements of neither a motion to reopen, nor a motion to reconsider. Counsel submitted a timely appeal from that decision on October 30, 2008.

On the Form I-290B, which is dated October 28, 2008, counsel states that the beneficiary "will not be working on a project for any third-party clients, thus it is impossible to submit such contracts as they do not exist." In her brief, counsel states that, in light of the fact that the beneficiary will be working on the in-house project, "it is only natural that the work will be performed at the petitioner's office in Rolling Meadows, Illinois."

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the record lacks documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment, and

therefore whether his services would actually be those of a programmer-analyst consultant for that entire period of time.

The AAO is not persuaded by the assertions of counsel on appeal. As a preliminary matter, the AAO notes the evolution in the nature of the duties proposed for the beneficiary between the time the petition was filed and the petitioner's response to the director's request for additional evidence. The duties as described by the petitioner at the time the petition was filed were set forth previously, and the AAO notes again that no mention was made of the in-house project. Rather, the petitioner set forth duties general to those of programmer-analysts, and provided information regarding how the beneficiary would be paid during times in which he was not on assignment, but waiting for assignment. The petitioner provided further information regarding the rate at which the beneficiary would be compensated during times he was working outside the geographical location named on the petitioner's certified LCA. The petitioner also required the beneficiary to sign an acknowledgement that the petitioner "provides labor directly to clients," and that the petitioner "provides clients who act as agencies who supply labor to the final client."

However, by the time the petitioner responded to the director's request for additional evidence, the beneficiary was to be working on an in-house project, although counsel did acknowledge in her July 11, 2008 letter that "[f]rom time to time, the beneficiary's services may be temporarily required on other projects as needed," and also that "the beneficiary's expertise may be required onsite in accordance with one of the various Technical Service Vendor Agreements." This evolution continues on appeal: in her brief, counsel now contends, as noted previously, that "the beneficiary will not be working on a project for *any* third-party clients [emphasis added]." The AAO finds this change in the nature of the beneficiary's duties by the petitioner to be a material alteration to, rather than a mere clarification or further description of, the beneficiary's proposed duties. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The petitioner's failure to provide a consistent description of the beneficiary's proposed duties renders the AAO unable to assess whether the beneficiary's 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 as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A)(iii) 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)*(1)*.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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)(12).

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). For this reason also, the appeal will be denied.

As the petitioner's failure to demonstrate the existence of H-1B caliber work for the beneficiary to perform precludes approval of this petition, the AAO need not address the remaining grounds of the director's denial of the petition.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The appeal will be dismissed and the petition denied 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.