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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

D2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 2 8 2010

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:

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 Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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.

The petitioner describes itself as a computer consulting company and indicates that it currently employs 49 persons. It seeks to employ the beneficiary as a consultant/senior database administrator. 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 because the petitioner failed to establish that the proffered position qualifies as a specialty occupation. Specifically, the director noted that in addition to failing to provide sufficient documentation regarding end clients and ultimate duties the beneficiary would perform for those clients, the petitioner had also failed to submit a valid labor condition application (LCA) and concise itinerary for all of the beneficiary's work locations.

On appeal, counsel contends that the petitioner submitted a valid LCA and that the proffered position does in fact qualify as a specialty occupation. Counsel contends that the documentation submitted satisfied the petitioner's evidentiary burden, and argues that the fact that the beneficiary's placement had changed since the filing of the petition was "part and parcel" of the consulting industry and should not be grounds for denial.

The AAO will first consider whether the proffered position is a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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

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.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director's determination that the record is devoid of documentary evidence with respect to the end-client firm, and, consequently of evidence establishing the substantive nature of the duties that the beneficiary would actually perform. Therefore, the petitioner has not provided a sufficient evidentiary basis to establish that the beneficiary would perform services requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The AAO notes, at the outset, that this deficiency in itself precludes approval of the petition.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, by documentation from an entity that the petitioner can demonstrate would be the end-user of the beneficiary's services, precludes a finding that the proffered position is a specialty occupation under any criterion at 8

C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of the work actually to be performed, as determined by that entity, 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. Thus, the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation. The appeal will be dismissed and the petition denied for that reason.

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, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely 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 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 beneficiary will likely perform for the entity or entities ultimately determining the work's content.

When filing the I-129 petition, the petitioner described itself in its January 2, 2008 letter of support as a fast-growing software engineering and software company. A certified LCA was submitted for the work location of Somerset, New Jersey. No additional evidence pertaining to the ultimate employment location of the beneficiary or any contracts or work orders with clients was submitted.

The petitioner's letter of support dated January 2, 2008 provided the following overview of the beneficiary's proposed duties. Specifically, the petitioner stated:

> As a Consultant/Senior Database Administrator for [the petitioner], [the beneficiary] will continue to review database codes prepared by a team of developers. He will coordinate changes to computer databases, including installation, configuration, implementation, and troubleshooting. He will perform database analysis, including system-focused requirements analysis and quantitative [sic] of business needs. In addition, [the beneficiary] will plan, coordinate, and implement security measures to safeguard computer databases and provide for data backup and recovery. He will also continue to monitor and optimize system performance.

As noted by the director, this description of duties is generalized and generic, and fails to specifically identify the exact nature of the beneficiary's duties and/or any projects or systems upon which the beneficiary would work.

Consequently, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on February 23, 2009. In the request, the director asked the petitioner to submit additional evidence, including information identifying the end client in New Jersey and any other clients for whom the beneficiary would work, as well as a complete itinerary for the beneficiary. The director requested specific documentation, including but not limited to contractual agreements with the actual end-client firm(s) where the beneficiary would work and additional information regarding the duties of the proffered position.

In a response dated April 7, 2009, counsel addressed the director's request. Among the documents submitted were (1) an LCA certified on March 19, 2009 for Shaumburg, Illinois and New York, New York; (2) an LCA certified on April 27, 2006 for Shaumburg, Illinois; (3) a copy of an employment agreement dated December 12, 2006; (4) a letter from the New York City Department of Sanitation (DSNY) dated March 23, 2009 confirming the need for the beneficiary's services for a six-month period; (5) a consultant services task-order between DSNY and [redacted] dated February 26, 2009; (6) a purchase order between [redacted] dated March 4, 2009; (7) a letter from [redacted] dated March 27, 2009; (8) a task order between [redacted] and the petitioner for the beneficiary's service on a project for [redacted]; and (9) a work order between the petitioner and [redacted] dated March 4, 2009. It is noted that other than the LCA certified in 2006 and the task order between the petitioner and [redacted], all documents submitted in response to the RFE were executed months after the filing of the instant petition.

On April 17, 2009, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation, and specifically noted discrepancies regarding work locations on the LCAs in comparison with the contracts and work orders. Additionally, the director noted that a concise itinerary was not included in the record.

On appeal and in response to the RFE, counsel states that the beneficiary has been and will continue to work in a specialty occupation position, and contends that the evidence submitted into the record was sufficient to demonstrate compliance with this requirement. Counsel contends that the director erred by stating that the petitioner had not established eligibility at the time of filing.

Upon review, the AAO concurs with the director's findings.

In response to the RFE, the petitioner submitted a task order between [redacted] and the petitioner for the beneficiary's services, executed by both parties on December 6, 2006. The task order indicated that the order would automatically renew every six months until terminated by one of the parties. Also submitted was a letter dated March 27, 2009 from [redacted] for [redacted] who claims that the beneficiary was working in Somerset, New Jersey for its client, [redacted] from December 20, 2006 until December 31, 2008. These documents provided little to no information regarding this project, as the task order merely outlined the terms of the agreement between [redacted] and the petitioner, and the letter from [redacted] simply provided a one-paragraph generic overview of the general duties the beneficiary performed.

As discussed by the director in the denial, the record is devoid of evidence to show that the beneficiary would be employed in a specialty occupation position. First, although the petitioner supplemented the record with additional evidence in response to the RFE, all of the documents pertaining to the beneficiary's assignment to [redacted], an additional third-party client, were executed after the filing of the instant petition. 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. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, no documentation was submitted with respect to MetLife, the third-party client at the time of filing, which would have been probative in determining whether the duties as actually performed by the beneficiary comprise a specialty occupation. For example, such evidence might have included a copy of the contract with the third-party client and a detailed description of the project to be performed for the third-party client that explains why the proffered position is required at the third-party client site. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

Again, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is 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.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third-party party client, the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis endorsed by the court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant entity for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end-user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, 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.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The AAO will next address the director's determination that the LCA submitted with the petition was not valid (that is, did not encompass the locations where the beneficiary would be employed). On Form I-129, the petitioner indicated that the beneficiary's place of employment would be Somerset, New Jersey. Noting that no evidence in the record identified the employer and the nature of the beneficiary's employment in Somerset, New Jersey, the director issued the RFE for further information. In response, counsel submitted numerous documents, including the [redacted] documentation affirming that the beneficiary worked in Somerset at the time of filing, and the [redacted] contracts which indicated that the beneficiary would be employed in New York, New York for a six-month period from March 16, 2009 to September 24, 2009. Counsel contended that since Somerset, New Jersey was within commuting distance of New York City, the LCA requirement had been met for all work locations.

The regulation at 20 C.F.R. § 755.715, defines *Area of intended employment* for the purpose of an LCA as: "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed." Somerset, New Jersey and New York City, as verified by counsel's printout from Google Maps submitted on appeal, are approximately 36 miles from each other. Moreover, Somerset County, New Jersey is within the Metropolitan Statistical Area of New York City. Therefore, the AAO finds that counsel is correct in her interpretation of the regulation at 20 C.F.R. § 655.715 and that Somerset, New Jersey is within the normal commuting distance of New York City. Moreover, the petitioner submitted substantial documentation to demonstrate that Somerset, New Jersey was the work location of the beneficiary while contracted with [redacted] at the time the petition was filed on November 13, 2008. Consequently, the AAO withdraws the director's finding that the LCA submitted with the petition was invalid. However, for the reasons set forth below, this conclusion is irrelevant since the petitioner has failed to establish eligibility for the benefit sought.

The AAO concludes, beyond the decision of the director, that the petitioner's evidence provided in response to the RFE constitutes a material change to the petition. For this reason also, the petition must be denied. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

Specifically, the evidence pertaining to the work to be performed for [redacted], a third-party client in New York City, was executed in February and March of 2009, over three months after the petition was submitted. The LCA and Form I-129, which list the proffered position's location as being in Somerset, New Jersey, do not correspond with the documentation provided by the petitioner in response to the RFE that the beneficiary will be subcontracted through another company to a third-party client site. The fact that the new worksite location of New York City, provided in response to the RFE, is within normal commuting distance of the initial worksite provided is irrelevant, because the issue here is that the beneficiary will work in a different location on a project not described or anticipated in the initial petition.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *See generally Matter of*

Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If material 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.

In this matter, the anticipated assignment of the beneficiary for the duration of the requested validity period, as confirmed by counsel, was terminated during the adjudication process. As a result, the petitioner found a new position for the beneficiary which, coincidentally, was located within the commuting area of the prior position. Rather than file a new petition, the petitioner sought approval of the instant petition by relying on this same LCA.[1] This is not permissible. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 additional reason, the petition cannot be approved.

The final issue before the AAO is the petitioner's failure to submit a concise itinerary for all work locations of the beneficiary during the requested validity period.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

> *Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located.

Moreover, the language of the regulation at 8 C.F.R. § 214.2(h)(i)(2)(B), which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations.

In the instant case, the petitioner filed the Form I-129 with USCIS on November 18, 2008. On the Form I-129, the petitioner indicated that the beneficiary would work in Somerset, New Jersey, and submitted a certified LCA with the petition for this location. The petitioner requested H-1B status for the beneficiary under these provisions from December 27, 2008 until December 27, 2011.

In response to the RFE, the petitioner submitted additional documentation indicating that the beneficiary's assignment in Somerset, New Jersey was terminated on December 31, 2008, a date subsequent to the filing of the petition. The petitioner submitted additional documentation, including the March 23, 2009 letter from DSNY confirming the need for the beneficiary's services for a six-month period. Consequently, the facts under which the petitioner claimed eligibility changed subsequent to the filing of the petition. As previously stated, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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.

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[1] Although the petitioner submitted a new LCA in response to the RFE for New York City and Schaumburg, Illinois, certified on March 19, 2009, this LCA is not acceptable since it was not certified at the time of filing.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Counsel asserts on appeal that since the beneficiary's new assignment with [redacted] is in the regular commuting distance of the location identified in the original labor certification, an itinerary is not required. The AAO disagrees. As stated above, the itinerary requirement is not satisfied simply by stating a general commuting area. The petitioner must specify the dates and locations of the beneficiary's services for the duration of the validity period. In this matter, while the six-month contract with [redacted] was executed subsequent to the filing of the petition and cannot be accepted for that reason, the petitioner nevertheless submitted no documentation to demonstrate the dates and locations of the projects upon which the beneficiary will work beyond September of 2009. Since the petitioner is requesting H-1B status for the beneficiary through December 27, 2011, the petitioner has failed to comply with the itinerary requirement. For this additional reason, the petition may not be approved.

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 director's decision is affirmed. The petition is denied.