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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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FEB 04 2010

FILE: WAC 07 130 53551 Office: CALIFORNIA SERVICE CENTER Date:

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 Director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, a corporation doing business as a Information Technology (IT) service firm, filed this nonimmigrant petition seeking to employ the beneficiary in the position of systems analyst as an H-1B nonimmigrant 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 separate grounds, namely, the director's determinations that the evidence of record failed to establish (1) that the petitioner is a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), and (2) the evidence of record did not establish employment for the beneficiary in the employment period specified in the petition.

In the brief on appeal, counsel contends that the director's decision should be reversed and the petition approved because the evidence of record establishes (1) that the petitioner does qualify as a U.S. employer, and (2) that the petition is based upon a reasonable and credible offer of employment. Counsel argues, in part, that the petitioner could not provide either a formal offer document or a signed employment agreement because, "in adherence [to] and compliance with the employment regulations of foreign nationals," the petitioner issues a formal offer letter and engages a beneficiary to sign an employment agreement only after approval of the petition filed on his or her behalf. Counsel asserts, however, that the copies of the offer letter and employment agreement submitted in response to the RFE accurately represent the types of documents that will be presented to the beneficiary upon approval of the petition. Counsel also asserts that there are no end-client contracts involving the beneficiary as he "will be assigned to the Petitioner's in-house projects it has currently for its numerous clients upon approval of the I-129 H1B Petition which has been filed for the beneficiary."[1] Further, counsel now submits on appeal the wage reports not provided in response to the RFE.

As will be discussed below, the AAO finds that the director was correct in denying the petition on each of the grounds noted in her decision. Therefore, the director's decision will not be disturbed. The AAO reaches this determination on the basis of its review and consideration of the entire record of proceeding as supplemented on appeal by the Form I-290B, the appellate brief, and the documentary exhibits submitted in support of the appeal.

PRELIMINARY FINDINGS

Regarding the State and Federal Wage Records Submitted on Appeal

The record reflects that the director was correct in stating that the petitioner's response to the RFE did not include copies of the requested federal and state wage reports. The AAO notes that counsel

[1] As the AAO will later discuss, the quoted statement conflicts with the petitioner's earlier indication, in response to the RFE, that the beneficiary would work on a single in-house project.

now submits those documents on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the 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)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider evidence that had been requested by the director's RFE but not submitted until the appeal.

Regarding Counsel's Rationale for Avoiding Written Offers of Employment and Contracts with Beneficiaries

As acknowledged by counsel on appeal, the petitioner neither (a) issued a written offer of employment to the beneficiary nor (b) entered into a written employment agreement with him. Counsel errs in asserting that U.S. Citizenship and Immigration Services (USCIS) regulations preclude a written offer of employment or a written employment agreement prior to petition approval. Both documents may be framed in language that makes them conditional upon the approval of the related petition. Further, the AAO notes that the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(C) identifies "[c]opies of any written contracts between the petitioner and the beneficiary" as part of the documentation that "shall accompany" an H-1B petition. Thus, counsel's rationale is incorrect.

The AAO also notes that, while USCIS regulations do not list a written contract between the petitioner and the beneficiary as one of the documents that should be submitted with the petition, they do permit in the alternative an oral agreement, evidenced by a summary of its terms under which the beneficiary is to be employed if the petition is approved. This is clear in the full statement of 8 C.F.R. § 214.2(h)(4)(iv)(C), quoted below:

> (iv) *General documentary requirements for H-1B classification in a specialty occupation.* An H-1B petition involving a specialty occupation shall be accompanied by:
>
> * * *
>
> (B) Copies of any written contracts between the petitioner and the beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

The AAO will first address the specialty occupation issue, that is, whether, as indicated in the director's decision, the evidence of record fails to establish that the petition was filed for H-1B caliber work that would exist for the beneficiary in the employment period specified in the petition.

FAILURE TO ESTABLISH A SPECIALTY OCCUPATION

The AAO analyzes specialty occupation issues 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)(l) of 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.

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.

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.

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) (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.

The specialty occupation ground for denying this petition resides in the director's determination that the record's documentary evidence failed to establish "that there is any work available" for the beneficiary. In this regard, it should be noted that an H-1B petition may be approved only to the extent that it is filed for H-1B caliber work that exists for the beneficiary at the time that the petition was filed. U.S. Citizenship and Immigration Services (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 based on speculation of future eligibility or 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); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As will now be discussed, the AAO finds that the petitioner failed to document that the petition was filed for work that would exist for the beneficiary for the period specified in the petition. Therefore, the director's decision will not be disturbed.

In the Form I-129, the petitioner identifies its business as "[redacted]" In its March 30, 2007 letter filed with the Form I-129, the petitioner describes itself as "a privately held [IT] service firm providing systems and business solutions to business clients in the United States and globally." In his letter of reply to the RFE, counsel refers to the petitioner as a [redacted] In the Form I-129, the petitioner asserts that it would employ the beneficiary in a specialty occupation position as a programmer analyst for the period October 1, 2007 to September 22, 2010.

The record reflects that persons are assigned by the petitioner to either (1) projects for specific clients generated by contracts for various computer and IT services, or (2) the petitioner's own self-generated projects. For instance, in its March 30, 2007 letter, the petitioner asserts that it divides its resources between (1) "client projects," performed either at the client's or the petitioner's location , and (2) "in-house" projects, which involve the petitioner's developing software products, internal systems, and/or system tools to support its business. In pertinent part, the petitioner's March 30, 2007 letter states:

> [P]rojects can be broadly classified as client projects and in-house projects. Client projects can be performed on-site (client site) or off-site (at [the petitioner's] facilities). In-house projects are comprised of software product development, [the petitioner's] internal systems, and/or development of sophisticated systems tools. On-site and off-site client projects are determined by [the] client's needs and specifications.

The only location that the Form I-129 specifies for the beneficiary work is the petitioner's own address. The "[redacted]" section of the service center's RFE expressly afforded the petitioner opportunity to identify the client projects upon which the petitioner would work, and to document the nature and periods of such work. The petitioner's RFE response provides neither the itinerary requested nor documentary evidence of the beneficiary's selection for any project requiring his services at any client site. Further, on appeal counsel expressly acknowledges that no work exists for the beneficiary at any client sites.[2] Therefore, the AAO finds no basis in the record for finding that the petition was founded upon "off-site (at [the petitioner's] facilities)" projects designated for the beneficiary.

The acknowledged absence of client-site work for the beneficiary narrows the specialty occupation focus to whatever documentary evidence the record may contain regarding the beneficiary's involvement in projects at the petitioner's own facilities (which the petitioner defines as "off-site" projects).

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[2] After explaining that the contract and contract-related documents in the record (which, it should be noted, do not mention the beneficiary) were submitted to show that the petitioner has contractual relationships with clients, counsel states that "[t]he beneficiary will be assigned to the Petitioner's in-house projects it has currently for its numerous clients upon approval of the I-129 H1B Petition which has been filed for the beneficiary."

The Form I-129 was filed without mention of specific projects to which the beneficiary would be assigned, and without documentary evidence of any project that would exist during the employment period specified in the petition. Further, the petitioner's oral agreement with the beneficiary is not indicative of any project work having been reserved for the beneficiary when the petition was filed. The petitioner's summary of its oral agreement with the beneficiary does not reference any commitment to assign the beneficiary to any specific project or any particular location. It was only in the response to the RFE that the petitioner, through counsel, first associates the beneficiary with a particular project.[3]

In his letter of response to the RFE, counsel states that the beneficiary will be immediately assigned to the petitioner's in-house project for developing a "Credit Line Management (CLM) product." As evidence of this in-house project, counsel's RFE response includes a two-page "Project Details" (PD) document.[4] In the section of his RFE reply letter that addresses the RFE's request for an itinerary of the work proposed for the beneficiary, counsel states, in pertinent part, that the PD document (Exhibit III of the RFE response) is "a detailed submission of the project to which the beneficiary shall be assigned upon approval and entry on the H1B1 status." The PD document consists of two pages addressing an in-house project for the development of a CLM product for use by telecommunication companies.[5]

Upon review of the PD document, the AAO is not persuaded that either it or the CLM project that it addresses existed at the time the Form I-129 was filed. The document does not bear a date, was not mentioned prior to the RFE reply, and bears no internal indicia of timelines involved in the project. Further, there is no independent documentary evidence indicating that, at the time that the petition

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[3] In its March 30, 2007 letter filed with the Form I-129, the petitioner described its oral agreement with the beneficiary as follows:

> [T]he terms of our verbal agreement with [the beneficiary] are as follows: [The petitioner] will employ [him] as a Systems Analyst and [he] will have an annual salary of $51,000.00 per year for the requested temporary period. This offer is made contingent upon approval of this petition for [the beneficiary's] H-1B1 status. . . .

[4] It should be noted that the PD document is the only documentary evidence submitted in support of the petitioner's assertion that the beneficiary would work on the development of a CLM product.

[5] After an introductory paragraph on the petitioner's concept for the CLM product, the document divides into two sections, entitled "Nature of Project" and "Role in Project: Systems Analyst." The latter section subdivides into sections entitled "Complete, Detailed Description of Proposed Duties," and "DUTY." The "DUTY" section subdivides into three main blocks of duties, which are identified as "Requirements and Design Review," "Design," and "Program Specifications." The final section of the document divides "the technical environment of the project" into lists of Hardware, Software, and Platform/Operating System products to be used in the project.

was filed, CLM project work existed and/or would likely exist for the entire October 1, 2007 to September 22, 2010 period for which the petition was filed.

Further, certain aspects of the PD document lead the AAO to question its authenticity as a document prepared in the ordinary course of business, as opposed to one prepared after-the-fact in response to the RFE. Not only is the PD document undated, but it also contains no references to dates, timetables, calendar milestones, project stages or other such practical information that one would expect in a document developed to focus a business's capital and resources on an actual project. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Because it is not established that the PD document was prepared in the ordinary course of business, rather than in response to the RFE, the AAO accords it little weight, and does not regard it as corroborative evidence that systems analyst work for the beneficiary in the specified employment period existed when the petition was filed.

In summary, the AAO finds that, when the petition was filed, its proposal for H-1B employment in a systems analyst position was not based on any project work ("on site" or "off site") that had been determined for performance in the October 1, 2007 to September 22, 2010 period for which this petition was filed. Consequently, there is no basis in the record for the AAO to find that the proffered position qualifies as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO further finds that even if the PD document proved that the petition was filed on the basis of actual CLM project work for the beneficiary that existed or that had been determined by the time the petition was filed - which it does not - neither the PD document nor any other documentary evidence establishes that the CLM project would require performance of H-1B caliber services.

The CLM Project information in the PD document comports with the general type of work that the pertinent chapter of the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) attributes to the Systems Analyst occupational category.[6] However, as will now be discussed, this fact is not persuasive, as the *Handbook* indicates that systems analyst jobs do not comprise an occupation that categorically requires, or is usually associated with, at least a bachelor's degree in a specific specialty. As indicated in the following excerpt from the "Educational and training" subsection of the *Handbook's* "Computer Systems Analysts" chapter, a wide spectrum of educational credentials is associated with the occupation:

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[6] The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations which it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site *http://www.bls.gov/OCO/.*

> When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.
>
> The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.
>
> For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.
>
> Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.
>
> Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

As evident above, the *Handbook's* "Computer Systems Analysts" chapter indicates that a bachelor's degree or higher in a specific specialty is not a normal minimum requirement to perform the duties of
a systems analyst. In light of this information, it would be incumbent on the petitioner to distinguish the proffered position from the range of systems analyst positions that do not merit specialty occupation recognition. This would require the petitioner to produce evidence that the technical requirements of the proffered position require the theoretical and practical application of a body of highly specialized knowledge attainable only by a U.S. bachelor's degree, or the equivalent, in an IT or computer related specialty. This the petitioner has failed to do.

The PD document is largely a combination of generically stated functions (such as "analyzing user requirements, procedures, and problems to automate processing and/or to improve the existing computer system" and "[p]rototype and iterate design concepts based on development team and customer feedback") and listings of hardware, software, and platform/operating system aspects of the project. Whatever level of education in a particular specialty may be required to perform the

CLM project is not evident in the PD document. Yet the petitioner does not supplement the record with evidence establishing whatever educational level of highly specialized knowledge in an IT or computer-related specialty would have to be theoretically and practically applied to perform the CLM project as described in the PD document. Consequently, even if the petitioner had not failed to establish that the petition had been filed for the CLM project work, the record lacks sufficient evidence regarding the educational requirements of that project to establish that it would require specialty occupation services from the beneficiary. For this additional reason, the petition must be denied.

FAILURE TO ESTABLISH U.S. EMPLOYER STATUS FOR FILING

As will now be discussed, the AAO also finds that the director was correct in determining that the petition should be denied for the petitioner's failure to establish that it was qualified to file this H-1B petition as a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

> (i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

"United States employer" is defined in the Code of Federal Regulations 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.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met.

The AAO finds that the record of proceeding lacks sufficient evidence of the relationship between the beneficiary and the petitioner to characterize it as one where the petitioner would exercise an employer's control over the beneficiary. The AAO accords little weight to the petitioner's summary of its oral agreement with the beneficiary, in light of: the generality of the agreement as summarized;

the absence of any document, signed or otherwise adopted by the beneficiary, relating specific terms of the relationships between the beneficiary, the petitioner, and other business entities to which the beneficiary might be assigned; and, especially, the absence of persuasive evidence that, on the date when the petition was filed – the date by which the petitioner's standing to file is to be measured – the petitioner had actual work for H-1B employment of the beneficiary in the period specified in the petition. Thus, the AAO finds that the petitioner has failed to establish an employer-employee relationship in accordance with the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(2). Accordingly, the director's decision on the U.S. employer issue will not be disturbed.

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.