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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: WAC 08 142 50494 Office: CALIFORNIA SERVICE CENTER Date: JAN 05 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:

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).

for Michael T. Kelly
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 appeal will be dismissed. The petition will be denied.

The petitioner provides software development services and has 21 employees. It seeks to employ the beneficiary as a programmer analyst 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 ground that the petitioner did not comply with the requirement that a Labor Condition Application (LCA) be certified by the Department of Labor (DOL) for the period of employment at the time of filing the H-1B petition.

As will be discussed below, the director's decision to deny the petition on the basis of the LCA issue is correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

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

The H-1B petition was received by the California Service Center on April 1, 2008. The Form I-129 lists the intended dates of employment as October 1, 2008 to September 25, 2011. Submitted with the petition was a certified LCA for a programmer analyst to work at the employer's place of business in Arlington Heights, IL for a period of employment from September 25, 2008 to September 25, 2011. The LCA was certified on March 25, 2008 by the DOL.

On May 5, 2008, the director issued an RFE. The RFE requested evidence that the proffered position qualifies as a specialty occupation as well as documentation regarding whether the petitioner is an employer or agent.

In the petitioner's response to the RFE, for the first time the petitioner stated that after one month of training, the beneficiary will be subcontracted to a company called Network Doctor in Englewood Cliffs, NJ, through a consulting services agreement between the petitioner and another company, [redacted] The petitioner included a copy of a services agreement between [redacted]. and Network Doctor, which does not name either the petitioner or the beneficiary. The petitioner also provided a statement of work between [redacted] and the petitioner, signed by [redacted]. on May 1, 2008, which names the beneficiary and states that she will be providing java development services for approximately 36 months. The statement of work and the consulting services agreement it is attached to do not mention Network Doctor and do not provide that the beneficiary will be working in Englewood Cliffs, NJ. Along with the RFE response, a new and revised LCA was submitted for a programmer analyst to work in Arlington Heights, IL, as well as Englewood Cliffs, NJ, contradicting the Form I-129, which only lists Arlington Heights, IL as a work location. The revised LCA covers the period of employment from November 1, 2008 to September 25, 2011 for the same job title and salary as the original LCA. The revised LCA was certified by the DOL on June 3, 2008, after the date the H-1B petition was filed.

The director correctly found that the LCA was not certified by the DOL until after the submission of the I-129 petition and, therefore, the petitioner did not comply with the requirement at 8 C.F.R. § 214.2(h)(4)(iii)(B), which states:

> The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

In addition, the director cites to 8 C.F.R. § 214.2(h)(4)(i)(B)(1), which, as part of the general requirements for petitions involving a specialty occupation, states that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

On appeal, counsel for the petitioner asserts that the petitioner will employ the beneficiary for approximately one month in Arlington Heights, IL, as stated in the LCA originally filed with the petition, at the time the petition was filed, and that therefore the petitioner fulfilled its obligation by obtaining a certified LCA prior to filing the petition, notwithstanding that, after one month, the beneficiary will be subcontracted to a third-party client site in Englewood Cliffs, NJ for the remainder of the petition period. Counsel argues that moving the employment location to the client site in Englewood Cliffs, NJ, does not constitute a material change because in all other aspects the position remains the same as stated in the initial submission.

The petition being considered on appeal does not involve a situation where an H-1B petition has already been approved for the beneficiary to work in a specialty occupation and the employer later submitted an amended H-1B petition with fee and a new LCA to reflect a change in employment. Instead, the petitioner signed a new agreement after the petition was filed but before it was adjudicated, under which it intended to subcontract the beneficiary to a different company at a location outside the area covered by the LCA filed with the petition, and then attempted to amend the petition in its response to the RFE, despite this material change in employment.

As will now be discussed, the AAO agrees with the director that the petitioner did not establish eligibility at the time of filing. Under 8 C.F.R. § 103.2(b)(1):

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

The petitioner errs in contending that an H-1B petition may be approved for the employment period for which it is filed and additional work locations not identified in the Form I-129 and the LCA filed with it, provided that the petition is filed with an LCA certified for the work location(s) known to the petitioner at the time of the petition's filing, and later supplemented with a new LCA, certified for any additional

location(s), if circumstances develop requiring the beneficiary to be assigned outside the geographical area(s) specified in the Form I-129 and the LCA filed with it.

The petitioner's contention is refuted by the regulation at 8 C.F.R. § 214.2(h)(2)(E), which 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.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

The AAO notes, but is not persuaded by, counsel's argument that the petition was accurate at the time of filing because the beneficiary will receive training at the petitioner's offices for the first month of employment. Receiving training is not the same as performing duties in a specialty occupation. Moreover,

as the record of proceedings indicates that the petition was not filed for definite, non-speculative work determined for the beneficiary as of the petition's filing, the petition was not accurate.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified prior to the filing of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. That condition was not satisfied in this proceeding. The petitioner's attempt to remedy the deficiency by submitting an LCA certified after the filing of the petition is ineffective. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(8). Again, 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.

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO also finds that the proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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), 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. 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 this matter, the petitioner seeks the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's March 25, 2008 letter of support; and documentation provided in response to the RFE.

The support letter indicates the proffered position would require the beneficiary to "work with C, Java, J2EE, SQL, HTML, Microsoft technologies, etc."

In the RFE, the director requested additional evidence to establish that the proffered position qualifies as a specialty occupation.

In the response to the RFE, counsel for the petitioner included: a letter from the petitioner dated May 19, 2008; a copy of an employment offer from the petitioner to the beneficiary dated March 14, 2008; an LCA certified on June 3, 2008; a letter from Network Doctor dated May 23, 2008; a services agreement between and Network Doctor; a Consulting Services Agreement between and the

petitioner dated May 1, 2008; and a statement of work regarding the beneficiary signed by the petitioner and as of May 1, 2008.

In the letter replying to the RFE, the petitioner writes as follows:

> For approximately the first month of her employment with [the petitioner], [the beneficiary] will be training in-house at our office, located at [redacted] in Arlington Heights, Illinois. During her training period, [the beneficiary] will be oriented in [the petitioner's] policies and procedures. . . .
>
> After her training, [the beneficiary] will be placed at our client Network Doctor, located at [redacted]. She will use her education and experience to work with C, Java, J2EE, SQL, HTML, Microsoft technologies, etc.

The petitioner's offer letter states in part, "You will render all reasonable services expected of a Programmer Analyst, including but not limited to computer programming, software development, systems analysis, professional engineering, consulting and technical writing. *You will provide such services at locations designated by ACLAT and/or its customers.*" (Emphasis added.)

The letter from Network Doctor, dated after the petition was filed, states that the beneficiary is one of three employees assigned to provide assistance on a software development project in Englewood Cliffs, NJ until November 30, 2011. Network Doctor lists generic job duties that the beneficiary will perform and states that the duties "are extremely complex and require the theoretical and practical application of highly specialized knowledge. The position is one that only a person with a bachelor's degree or equivalent would be able to perform." This letter also stated that a project itinerary and services schedule for the software consultants, including the beneficiary, were enclosed, but no such documents were included with the response to the RFE. As mentioned above, the petitioner submitted a services agreement between Anovatek, Inc. and Network Doctor as well as a consulting services agreement with statement of work between Anovatek, Inc. and the petitioner, but these do not appear to be the documents described in the letter from Network Doctor.

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*. 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.

In response to the RFE and on appeal, the petitioner claims that the beneficiary will be working at Network Doctor in Englewood Cliffs, NJ after one month of training at the petitioner's offices, but provides no documentation describing the project at Network Doctor in sufficient detail to establish both the substantive nature of the work that the beneficiary would perform and also the correlation of such work to a body of highly specialized knowledge in a specific specialty that can only be gained by at least a bachelor's degree, or the equivalent, in a specific specialty. In this respect, the AAO notes that, as recognized by the court in *Defensor*, 201 F.3d 384, 387, where the work is to be performed for entities other than the petitioner,

evidence of the client companies' job requirements is critical. The *Defensor* 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 and explained as 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 proceedings 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.

The record lacks sufficient evidence for the AAO to determine whether the asserted project warrants the performance of the duties described, the substantive nature of the duties and their educational requirements, and whether the project is sufficiently complex to require the beneficiary to work in a specialty occupation for the duration of the period requested in the petition.

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.

Also beyond the decision of the director, the AAO finds that the petition must be denied for the additional reason that it was filed without an itinerary including the location where the petitioner now asserts the beneficiary would work for all but one month of the period specified in the petition. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition which requires services to be performed 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 petition is located ....

This provision's appearance under the subheading "Filing of petitions," and its content, particularly the use of the mandatory "must," indicate, *first*, that an itinerary is a material and necessary document that must be filed with any petition that would require the beneficiary's services in more than one location, and, *second*, that an H-1B petition may not be approved for any location other than that stated in the Form I-129 unless such location - and the dates of work there - are identified in an itinerary filed with the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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