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

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FILE: WAC 08 145 50317 Office: CALIFORNIA SERVICE CENTER Date: MAY 03 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, 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 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 is a computer technologies employment contractor. To employ the beneficiary in a position designated as a programmer analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The appeal is filed to contest each of the three independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and (3) that the petitioner is a United States employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii).

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

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the director did not err in denying the petition on each of the three independent grounds that she cited in her decision. While fully affirming the director's decision, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status is generally the first and primary issue to be addressed in determining eligibility for H-1B classification.

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly

specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A)

should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in 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.

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

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

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

Thus, without such a job description, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation. Further, 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)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided in support of the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition "[USCIS] determines whether the petition is supported by an LCA which corresponds with the petition" In order for an H-1B petition to be approvable, the occupation and location shown on the supporting LCA must correspond to the occupation and location where the beneficiary would work, as that occupation and location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Mason, Ohio as a programmer/analyst. The petitioner's offices are, in fact, in Mason. The record, however, contains no evidence to support the proposition that the beneficiary would work at the petitioner's offices or for an end-user company in Mason, and the petitioner has not, therefore, demonstrated that the LCA provided corresponds with the instant visa petition. Moreover, for the reasons discussed above, it is unclear what the beneficiary will be doing at each worksite and, thus, it *cannot be found that the submitted LCA even corresponds to the occupation in which the beneficiary will actually be placed.* As such, the petition was correctly denied on this additional basis.

The remaining issue cited in the decision of denial is whether the petitioner demonstrated that the *petitioner is or will be a United States employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii), which states, in pertinent part:*

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.

Although the petitioner would pay wages directly to the beneficiary, it is not the end-user of the beneficiary's services, and has not demonstrated that it would supervise or otherwise control the details of his performance. In weighing the different factors, it does not appear that the petitioner will provide the tools necessary to perform the work; the beneficiary will not work or perform his duties at the petitioner's offices; the duration of the relationship between the petitioner and the beneficiary is uncertain and unspecified; it remains unclear to what extent the petitioner has the right to assign additional projects to the beneficiary; it remains unclear that the petitioner has ultimate discretion over when and how long the beneficiary will work; and the method of payment, even with the petitioner paying the beneficiary directly, appears only to be a pass-through payment from the end-user instead of a payment or purchase of a product or specific service, other than labor, provided by the petitioner.

Thus, against factors that may weigh in the petitioner's favor, *e.g.*, the tax treatment of the beneficiary, the petitioner has failed to demonstrate that it will have and maintain an employer-employee relationship with the beneficiary such that it will qualify as a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO therefore affirms the director's finding that the petitioner has not demonstrated that it is a United States employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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