



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 150 52394 Office: CALIFORNIA SERVICE CENTER Date: DEC 01 2009

IN RE: Petitioner:
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:

SELF-REPRESENTED

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).

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software development, staffing, and training, that it was established in 2002, that it employs 45 persons, and that it has a gross annual income of \$3,800,000. It seeks to employ the beneficiary as a computer data analyst from October 1, 2008 to September 30, 2011. Accordingly, the petitioner 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).

On September 18, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; or (4) the proffered position is a specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B and the petitioner’s statement in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its March 30, 2008 letter appended to the petition that it “provides proven technology expertise to application development projects.” The petitioner indicated the beneficiary would be employed as a computer data analyst and the job duties of the position included:

- Analysis, research, design, writes specifications effectively maintain, enhance, and develop applications software consistent with our needs.
- Design new application and develop application prototypes[.]
- Analysis, conversion coding, code walkthrough, unit and integration testing.
- During the course of his employment he will be expected to work on technologies like COGNOS, Informatica, Business Objects, Oracle and Legacy Systems like Main Frames.
- Implement applications using programming languages like ETL, COBOL.
- Suggest best practices for application implementation and enhancement.
- Perform analysis and design using methodologies OOA and OOD. Use analysis and design tools like Rational Rose, ERWIN etc.
- Analyze data model and implement SQL/PLSQL queries and stored procedures on a database like Oracle.
- Perform minor system administrative tasks on operating systems like UNIX.
- Promote efficient user utilization of the system.

- Co-operate with and provide technical support to project teams and members and associates.
- Develop and maintain proficiency in utilizing technical and analytical tools to give optimum results to the management and business.

The petitioner asserted that the duties of the proffered position are so specialized and complex that it requires, as a pre-requisite to employment, the possession of, at minimum, a bachelor's degree in computer science, engineering, or a related field. The petitioner noted that its requirement of a degree is consistent with industry standards nationwide and is supported by the Department of Labor's *Occupational Outlook Handbook (Handbook)*.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 22, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In an August 25, 2008 response to the director's RFE, the petitioner provided a copy of its signed contract with the beneficiary and contended that the position is not speculative in nature. The petitioner's March 15, 2008 offer letter to the beneficiary indicated that the petitioner expected that the beneficiary would work on projects implemented by the petitioner as well as the projects implemented by its clients. In the petitioner's August 25, 2008 response letter, the petitioner claimed that the beneficiary would be working on an in-house project at the petitioner's premises and would be working on the Web application tools for the requested employment period. The petitioner also submitted a letter dated August 20, 2008 stating: "[t]o accommodate the changes of a growing organization, we have found it necessary to temporarily hire [the beneficiary]" and "[the beneficiary] will continue to work on our in-house project in our AZ office" as a data analyst. The petitioner also provided the same description of duties as initially submitted as well as a copy of "ECM Design/Architecture Documentation."

As noted above, the director denied the petition on September 18, 2008. The director noted that in the petitioner's response to the RFE, the petitioner had indicated that the beneficiary would work in-house. The director, however, found the information regarding the in-house project vague and general and that the petitioner had not provided a history of developing in-house software products.

The director also determined that the petitioner must establish eligibility at the time of filing. The director found that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services and concluded that, without complete valid contracts relating to the beneficiary, the petitioner had not established that it had control of the beneficiary's actual work and the record did not contain sufficient information regarding the nature and scope of the beneficiary's services. The director found that the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that without an itinerary or documentation establishing the validity of the submitted contracts, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could not be determined valid. The director further found that without a description of specific duties the beneficiary would perform under contract for the petitioner's clients, the petitioner had not established that the beneficiary would be employed in a specialty occupation or that it had sufficient work for the beneficiary for the requested employment period.

On appeal, the petitioner acknowledges that an element of its business is to provide highly skilled computer professionals to clients; however, the petitioner asserts that it also provides solutions and develops products. The petitioner re-submits the "ECM Design/Architecture Documentation" (ECM Product) as well as "BMS Design/Architecture Documentation" to show that it also engages in developing products. The petitioner also provides the pay stubs of resources it claims are working on its project(s), and hardware procurement bills. The petitioner asserts that it is the beneficiary's employer and that there is a true employer-employee relationship between the petitioner and the beneficiary.

The AAO finds that the principle issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, the director's decision on the issues of whether an employer-employee relationship exists and the validity of the LCA, the AAO affirms but will not discuss, as the petition is not approvable on the crucial issue of failure to establish that the proffered position is a specialty occupation. The AAO finds that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties for the user of the beneficiary's services and whether those duties comprise the duties of a specialty occupation.

For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be 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.

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.

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). 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. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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.

The petitioner in this matter provided a general overview of the beneficiary’s proposed duties. As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that appear

to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the petitioner's information regarding its ECM Product. Upon review, the AAO does not find that the petitioner has allocated a specific number of resources to the project or described the number of analysts or other computer-related positions that will assist in working on the project. The petitioner does not indicate the specific duties the beneficiary will perform on the project or identify a team to which the beneficiary will be assigned. This is of particular importance when petitioning for an individual as a generic data analyst. The petitioner in this matter has provided a general outline of duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language or tool is necessary. In addition, the petitioner has not provided a description of the beneficiary's daily duties that is specifically connected to identified elements, applications, or endeavors related to the petitioner's development of the ECM product. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO acknowledges the petitioner's assertion that the duties of the proffered position are so complex that it must hire an individual with a bachelor's degree in computer science, engineering, or a related field and that this is standard in the industry. However, the record does not provide the underlying documentation that the petitioner's computer personnel only work on assignments that require a theoretical and practical application of highly specialized knowledge. General statements and an overview of proposed work are insufficient to establish that a specific proffered position is a specialty occupation. The general outline of duties provided is insufficient to establish that the beneficiary's actual duties as they relate to the ECM product comprise the duties of a specialty occupation. The description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform.

In addition, the petitioner does not explain the inconsistencies in the record regarding the position proffered to the beneficiary. The AAO observes that the petitioner's March 15, 2008 offer letter to the beneficiary indicated that the beneficiary would work on projects implemented by the petitioner as well as the projects implemented by its clients and only in response to the director's RFE, does the petitioner claim that the beneficiary would be working on an in-house project at the petitioner's premises and would be working on "Web application tools" for the requested employment period. The petitioner's August 20, 2008 letter further confuses the matter by indicating that "[the beneficiary] will continue to work on our in-house project in our AZ office." However, this is not a petition extension request. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, as the director found, 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).

Without evidence of statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. 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. *Id.*

Although the *Defensor* court noted that evidence of the client companies’ job requirements is critical, where the work is performed for entities other than the petitioner, the AAO finds that as in this matter, when the record does not include a comprehensive description of the beneficiary’s actual duties as they relate to specific project(s) for the duration of the requested employment period, even if for the petitioner, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary’s duties from the ultimate user of the beneficiary’s services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

The AAO observes that the petitioner’s self-imposed standards in its recruitment of computer personnel without the specific details necessary to ascertain that the actual work to be performed is work that actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, does not establish that the position is a specialty occupation. The AAO finds that if USCIS were limited to reviewing a petitioner’s self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to

perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees or the equivalent.

The petitioner in this matter does not provide the underlying statements of work or descriptions of actual work that adequately describe and detail the specific duties the beneficiary will perform as his work relates to the ECM product. The AAO, therefore, is unable to analyze whether the beneficiary's duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Without a comprehensive description of the beneficiary's actual duties from the user of the beneficiary's services and the evidence supporting such a position exists for the entire requested employment period, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the petitioner has not established that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Again, without a meaningful job description, the petitioner has not established any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed for the above stated reason. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed.

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