



U.S. Citizenship
and Immigration
Services

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DEC 02 2009

FILE: WAC 08 149 50366 Office: CALIFORNIA SERVICE CENTER Date:

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:



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, 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 provides “consultancy” services, that it was established in 1995, that it employs 85 persons, and that it has a projected gross annual income of \$10,000,000. The petitioner seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 27, 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 5, 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) counsel for the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B and counsel’s brief and documentation submitted in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

The petitioner averred in its March 27, 2008 letter appended to the Form I-129 petition that it “is in the business of providing Fortune 1000 companies and medium size organizations with Computer Software Development Services and related Systems Engineering Consulting to various clients nationwide.” The petitioner indicated that the beneficiary would be employed as a programmer analyst and would:

[S]tudy the program specification, design, develop and implement software programs and carry out unit testing and documentation and assist in system testing. He will also be responsible for identifying problems, come up with solutions, develop and design systems, develop codes and programs using the appropriate language, exercise and test programs for accuracy, train and assist other team members and clients as needed in the intricacies of the newly developed programs.

The petitioner provided further information on the “project scope” indicating that the beneficiary would design and develop ETL using Informatica, would use the Teradata loader connection, and would write Teradata utilities scripts, duties that appear to relate to the beneficiary’s foreign work experience. The petitioner did not identify a specific project to which the beneficiary would be assigned but stated generally that the beneficiary would “utilize his extensive knowledge as he performs broad range of computer analysis and network design, towards the goal of designing and

implementing network applications, and integrated network systems, to accommodate multiple business information systems.” The petitioner also noted that the beneficiary would use ETL tools, Informatica, and the Oracle database and provided the following daily task activity:

- Systems Design (Gross Design and Modifications) – 20%
- Systems Analysis – 25%
- Write Code and Develop Programs – 30%
- System Test and produce prototype – 25%

After completion of initial systems development:

- Project Management – 25%
- Down-Loading Historical Data – 20%
- Developing a Graphical User Interface – 25%
- Generating management reporting and the implementation and provision of software support for the client and technical staff. – 30%

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 1, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner’s employer-employee relationship with the beneficiary; requested evidence that a specialty occupation exists for the beneficiary; requested an 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 copies of contractual agreements, statements of work, work orders, service agreements, and letters from authorized officials of the ultimate client companies where the work will actually be performed that lists the beneficiary by name and provides a detailed description of the beneficiary’s proposed duties; and an evaluation of the beneficiary’s foreign education.

In an August 11, 2008 response to the director’s RFE, counsel for the petitioner acknowledged that the petitioner provided software services to clients nationwide but asserted that the petitioner would be the beneficiary’s actual employer. Counsel indicated that as the beneficiary would be working in-house at the petitioner’s offices in Farmington Hills, Michigan, copies of contractual agreements, statements of work, work orders and/or letters between the petitioner and its client(s) were not available. The record in response to the director’s RFE also included the petitioner’s August 4, 2008 letter. The petitioner indicated that it had in-house projects at its offices “requiring software design and development programmers” and that the beneficiary would “be required to design, analyze and develop the product ‘Component Sales Automation’ (CSA) applications using Oracle technologies.” The petitioner submitted a different overview of the beneficiary’s duties indicating that the beneficiary:

[W]ill gather user requirements, arrive at design specification, and conduct System study. He will create user administration, creation of universe using oracle application. He will be responsible for developing the architecture and integration of different modules. User’s demands for customization have to be addressed taking

into account enterprise requirements, data modeling, debugging and testing, documenting user manuals and adding enhancements.

The petitioner noted that after completing the software designs the beneficiary would write reports, analyzing data gathered which would encompass assessments of all modules' technical adequacy, and their efficient integration into functioning software systems. The petitioner listed the different phases of the proposed project and projected the time the beneficiary would be involved in each phase. The petitioner also provided the names and educational accomplishments of each of the proposed eight team members, including the beneficiary, who would work on the CSA project. The record also includes the project plan for the CSA software which again lists the names of the CSA team indicating that five of the six programmer analysts would work on the project from October 2008 to September 2011.

As noted above, the director denied the petition on September 5, 2008. The director observed that in response to her RFE, the petitioner had indicated that the beneficiary's work would be performed in-house at the petitioner's facility, but had not provided evidence to support that it is developing a proprietary product. The director also found the information submitted was generic in nature. The director observed that the petitioner had provided the project plan only after USCIS had pointed out the deficiencies in the petition and thus implicitly questioned the validity of the claimed project when the petition was filed. The director found that the petitioner had not established that it is the beneficiary's employer. The director also found that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services and that without contracts and a complete itinerary, the petitioner had not provided sufficient evidence to establish that the petitioner meets the definition of an agent. Moreover, the director determined that without an itinerary or valid contracts, the director could not determine that the submitted LCA is valid for all work locations. Finally, the director found that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of valid contracts detailing the beneficiary's ultimate duties.

On appeal, counsel for the petitioner asserts that the petitioner offers "end-to-end information technology solutions and does in-house development of a number of customized software products." Counsel references the submitted website pages of the petitioner which noted that the petitioner is engaged in in-house projects and lists the products including the CSA product. Counsel contends that the LCA submitted is valid as the beneficiary will only be working in-house at the petitioner's Farmington Hills, Michigan offices. Counsel claims that the offered position is synonymous with the occupation of a computer systems analyst, that a baccalaureate degree is normally the minimum requirement for entry into the occupation, and that the petitioner normally requires a degree or its equivalent for the proffered position. Counsel also provides a June 16, 2008 letter from another company that confirms the company's interest in the CSA product.

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, while the AAO affirms the director's decision on the issues of whether an employer-employee relationship exists and the validity of the LCA, these issues will not be discussed as the petition is not approvable on the crucial

issue of failure to establish that the proffered position is a specialty occupation. Although the petitioner provided evidence of an in-house project in response to the director's RFE, the AAO finds the petitioner's initial submission did not reference this project or plans regarding development of in-house products and the petitioner failed to mention that the beneficiary would be assigned to this ongoing or planned project. 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). The AAO further 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 was available when the petition was filed and has been sufficiently and consistently described by the company that is utilizing the beneficiary's services. 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 actual 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 has 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 initial description of duties and finds that the description was generic, did not identify a project to which the beneficiary would be assigned, and did not provide sufficient information to establish the actual duties the beneficiary would be expected to perform. In response to the director's RFE, the petitioner identified a project, indicated that the focus of the beneficiary's duties would encompass the use of Oracle technologies, would involve gathering user requirements, arriving at design specification, and developing architecture and integration of different modules but failed to reiterate that the beneficiary would use Teradata tools. The petitioner seemed to suggest that the beneficiary would be customizing current software to take into account enterprise requirements, data modeling, debugging and testing, documenting user manuals and adding enhancements. Nonetheless, the description again fails to provide sufficient information relevant to the beneficiary's daily duties and that is specifically connected to identified elements, applications, or endeavors related to the petitioner's CSA software 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 petitioner in this matter has provided a general outline of programming duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular

programming language is necessary. The descriptions provided are so general that the descriptions can be manipulated to include duties that may or may not comprise specialty occupation duties. The descriptions lack sufficient specificity to ascertain that the proffered position of programmer analyst requires more than a basic understanding of a computer program, an understanding that could be attained with a lower-level degree or certifications in a program.

The AAO acknowledges counsel's contention that the petitioner regularly recruits individuals with a baccalaureate or higher degree and the petitioner's outline of educational degrees attained by other employees proposed to work on the project. However, the record does not provide the underlying documentation establishing the educational credentials of the petitioner's other computer personnel or evidence that the petitioner's computer personnel only work on assignments that require a theoretical and practical application of highly specialized knowledge. Further, educational accomplishments do not establish that a position is a specialty occupation; rather the comprehensive description of duties provides the necessary information to establish a position is a specialty occupation. General statements and an overview of proposed work are insufficient. The petitioner's general outline of duties is insufficient to establish that the beneficiary's actual duties as they relate to the CSA project 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.

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. Moreover, this information must be provided when the petition this filed to avoid the conclusion that the beneficiary's assignment to a particular project is an afterthought, created only after USCIS points out deficiencies in the petition. In this matter, the petitioner has failed to timely provide such evidence.

The AAO also 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 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 descriptions of actual work that adequately describe and detail the specific duties the beneficiary will perform as his work relates to the CSA project. 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.