



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: EAC 07 147 51266 Office: CALIFORNIA SERVICE CENTER Date: **DEC 08 2009**

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:

[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 reopen or reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the 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 petitioner is a software development and consulting provider that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, 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).

The director denied the petition based on the following grounds of ineligibility: 1) the petitioner failed to provide a bona fide job offer showing that it otherwise qualifies as a United States employer as that term is defined in the regulations; 2) the petitioner failed to provide an adequate description for the proffered position such that the job duties can be established as those performed in a specialty occupation; and 3) the petitioner failed to provide a valid labor condition application (LCA).

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

The record of proceeding before the AAO contains: 1) the Form I-129 and supporting documentation; 2) the director's request for evidence (RFE); 3) the petitioner's response to the RFE; 4) the director's denial letter; and 5) the Form I-290B, with the petitioner's brief and documentation in support of the appeal.

The first issue before the AAO is whether the petitioner has a bona fide offer of employment for the beneficiary and that it otherwise qualifies as a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner has a bona fide offer of employment for the beneficiary or that it will have an employer-employee relationship with the beneficiary.

In a letter dated March 27, 2007, the petitioner stated that the beneficiary would assist with the designing, developing, and implementation of software applications. Although the letter stated that the beneficiary would primarily provide those services at the petitioner's headquarters, the petitioner indicated that the beneficiary would also work at client locations when necessary. The petitioner provided no specifics as to where the beneficiary will be performing his services, as no actual user or job location has been identified aside from the petitioner's headquarters location.

On August 27, 2007, the director issued a request for additional evidence (RFE), which instructed the petitioner to provide various tax documents and samples of service contracts to establish that the petitioner's offer of employment is bona-fide.

In response, the petitioner provided the requested IRS Form 941 quarterly tax returns for the first two quarters of 2007. It is noted that neither document expressly states how many employees the petitioner had each month, nor is there any specific employee information, such as names or social security numbers to establish exactly whom the petitioner employed during the time period in question. Although the petitioner also provided a year-to-date statement of employee names, wages, and tax withholding amounts, this information pertained to the 2006 tax year. However, the instant petition was filed on April 2, 2007. Even if the petitioner could establish that it was eligible for the benefit sought in 2006, this factor is irrelevant, as the petitioner is required to establish its eligibility as of the date the petition was filed. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Additionally, the petitioner provided several service agreements in which the petitioner was identified as a provider of consulting services. It is noted that the contracts with [REDACTED] and [REDACTED] specifically named the consultant who would provide the services. The beneficiary was not one of the consultants named in any of these contracts.

In a decision dated November 30, 2007, the director concluded that the petitioner failed to establish the ability to provide the beneficiary with qualifying employment in a specialty occupation. The director first noted that, with the exception of the U.S. corporate office address and phone number, the petitioner's business contact information included residential condominium and apartment addresses as well as cell phones and invalid phone numbers. The director also questioned the validity of the job offer in light of the petitioner's apparent inability to sustain its claimed payroll of over 100 employees given its overall gross income of approximately \$2 million.<sup>1</sup> Additionally, the director observed an

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<sup>1</sup> While the director noted that the petitioner claimed a gross income of \$2,595,725 in the Form I-129, this observation appears to be inaccurate, as the petitioner claimed to have had a gross income of approximately \$2 million in Part 5, No. 13 of the Form I-129. This harmless error is merely noted for the record and will have no bearing on the outcome in this matter.

inconsistency between the number of W-2s the petitioner issued, i.e., 80, and the number of employees that were named on an internally generated employee list, which included 132 names. Lastly, the director noted that the H-1B validity dates being requested by the petitioner are for periods much longer than the duration of the relatively short-term contracts provided in support of the petition.

On appeal, counsel asserts that the petitioner would pay the beneficiary's wages and control his work as it currently does with its other employees. Counsel also points out that the petitioner has a valid tax identification number. In conclusion, counsel asserts that the petitioner has provided ample evidence that a bona fide offer of employment exists and that the petitioner qualifies as an employer.

With regard to the discrepancy between the number of W-2s issued and the number of employees named in the employee list, counsel explains on appeal that while the W-2 statements were issued in 2006, the employee list was generated in 2007 when additional employees had been hired.

Next, with regard to the issue of the petitioner's ability to sustain its payroll, counsel merely replies that this topic is a matter to be addressed by the Department of Labor rather than by USCIS. Although counsel indicates that the petitioner has the burden of establishing that it has the ability to pay the beneficiary's proffered wage and that the job offer currently extended to the beneficiary is valid, he finds that the director has imposed an undue burden on the petitioner by questioning its ability to sustain its payroll. Counsel's argument, however, is incorrect, as it fails to acknowledge the nexus between a company's ability to pay the wages of its claimed employees and its ability to make a valid offer of employment to one specific employee, i.e., the beneficiary of an I-129 petition. Here, the director has clearly indicated that, based on evidence he found outside of the record, he had reason to question the validity of the petitioner's offer of employment. The AAO notes that evidence of compliance with the H-1B program requirements with regard to other H-1B sponsored aliens is directly material to the director's determination of whether the job offered to the beneficiary is bona fide and whether the petitioner will adhere to and abide by the H-1B program requirements with regard to its proposed employment of this alien beneficiary. Thus, while it may not be standard protocol for the director to generally question every petitioner's ability to sustain its payroll, the AAO cannot rule out the occasional need for USCIS to conduct a more comprehensive review of additional factors in order to determine a petitioner's eligibility. It is noted that 8 C.F.R. § 103.2(b)(8)(iii) states the following:

*Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

It is further noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the present matter, counsel has

failed to acknowledge that the requested information is relevant in making a determination regarding a factor directly concerning the petitioner's eligibility.

In summary, the director did not err in denying the petition on the ground that the petitioner failed to establish that a bona fide offer of employment existed at the time the petition was filed. Without a bona fide offer of employment, the petitioner cannot be deemed a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). For the reasons set forth above, the petition must be denied.

The second issue in this proceeding is whether the petitioner provided an adequate description for the proffered position such that the job duties can be established as those to be performed in a specialty occupation

USCIS interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The director found that the petitioner had not provided sufficient evidence to establish that it would be employing the beneficiary in a specialty occupation position. Specifically, the director stated:

As the record does not contain documentation that establishes the specific duties the beneficiary would perform, USCIS cannot properly analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty or field of endeavor, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(ii)(B)(I).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

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.

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 (5<sup>th</sup> 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.

In this matter, the record of proceedings fails to include documentary evidence corroborating the H-1B petition's claim that for the period requested the beneficiary would be employed on matters requiring him to apply the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

In the March 27, 2007 support letter, the petitioner stated that it is engaged in the business of providing software solutions to a wide spectrum of client companies in various industries throughout the United States. The beneficiary's proposed duties in the proffered position of software engineer were provided as follows:

- Plan, develop, test, and document computer programs, applying knowledge of programming techniques in C, C++, XRAY, Visual Studio.
- Design and development, testing and implementation of Vendor Management applications using C and C++.
- Evaluate user request for new or modified program, such as for financial or human resources management system, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities.

The petitioner claimed that it requires a baccalaureate degree in a computer-related field in order for the beneficiary to qualify for the proffered position. The AAO notes that the petitioner's letter does not identify any project upon which the beneficiary would be employed. Furthermore, as properly pointed out by the director, the petitioner did not submit any contracts, work orders, master service agreements or statements of work establishing the specific dates and locations of the beneficiary's proposed employment. As the petitioner clearly does not know which company would ultimately use the beneficiary's services, it cannot accurately convey the work requirements the beneficiary would have to meet. Thus, despite the petitioner's claim and supporting documents indicating that it requires a

baccalaureate degree in a computer-related field, the record fails to establish that the beneficiary would ultimately be employed at or by one of the petitioner's client companies.

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 *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 alien will likely perform for the entity or entities ultimately determining the work's content.

On appeal, counsel claims that the petitioner will primarily work in-house on various projects but provides no documentary evidence of their existence or the nature and educational level of specialized knowledge required for such work. 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)). Also, while petitioner indicates that the beneficiary will periodically work at a client site when necessary, no specific information has been provided to establish who the client will be or what requirements the client will have for its prospective employee(s). As stated above, none of the work contracts provided in response to the RFE pertain to the beneficiary.

In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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.

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, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the Form I-129, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. While the petitioner says that the beneficiary's employment will primarily be in-house, the AAO cannot ignore the fact that such onsite employment would nevertheless be client-based, thus requiring evidence that the petitioner has secured contracts with clients for whom the beneficiary would perform the services underlying the proffered position. 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. Although counsel asserts on appeal that industry practice is such that companies simply provide system access to their subcontractors in lieu of providing signed contracts, the record lacks any evidence to corroborate this assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof, as the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In fact, counsel's statements are actually contradicted by the evidence of record, which contains several contracts establishing the business relationships formed between the petitioner and the various client companies who agreed to hire the petitioner's consultants to work on their respective projects. Thus, in light of the above, the petitioner has failed to submit sufficient evidence establishing that the beneficiary would be employed in a specialty occupation. For this reason also, the appeal will be denied.

The third issue in this proceeding is whether the petitioner submitted a valid LCA in support of its Form I-129. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), 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 with the Secretary,
- (2) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
- (3) Evidence that the alien qualifies to perform services in the specialty occupation. . . .

In the present matter, the LCA submitted at the time of filing lists the petitioner as the beneficiary's employer with the work location at the petitioner's main headquarters at [REDACTED]. The LCA indicates that the beneficiary will be employed at that address for three years. In its March 27, 2007 support letter, the petitioner stated that the beneficiary's proffered position would involve "providing services at [the p]etitioner's headquarters or[,] when required[,] at client locations."

The director ultimately concluded that the petitioner failed to submit a valid LCA covering the entire period of requested employment. The director noted that the petitioner submitted no additional work contracts, work orders, master service agreements or statements of work establishing the specific dates and locations where the beneficiary will carry out his proposed job duties. The director further observed that the service contracts submitted by the petitioner in response to the request for evidence were all for short-term employment.

On appeal, the petitioner provides the beneficiary's schedule for services, identifying the client company for which the beneficiary will purportedly provide services and the duration of time those services will be provided. The petitioner also provides a document entitled "Strategic Alliance Agreement," which was signed in January 2007 by the petitioner and the entity that the petitioner, in separate submissions, identified as the client company that would serve as the basis for the beneficiary's proffered employment. However, the terms of the agreement merely indicate each party's intent to form a subcontracting relationship in which the petitioner and the other entity agree to subcontract out to one another any services for contracts that either entity is unable to fulfill in-house. The AAO notes that the agreement does not name any specific projects for which the petitioner was or would be scheduled to provide consulting services.

Furthermore, counsel asserts on appeal that the beneficiary's proffered position will "mostly" involve work on in-house projects, thus indicating that some portion of the beneficiary's work would involve working off-site. However, the petitioner provided no information establishing the frequency or duration of any work that the beneficiary would perform at a location other than the petitioner's primary headquarters. Thus, it is unclear how long the in-house employment would last, and there is no evidence that the in-house employment would last the full three years for which employment has been requested in the LCA.

Additionally, in Part A, Item 1 of the Form I-129 H-1B Data Collection Supplement, the petitioner indicated that it is a dependent employer. However, this information does not correspond with the response provided at Part F-1 of the petitioner's LCA. Thus, in light of the above, the AAO finds that the petitioner failed to submit a valid LCA for the locations where the beneficiary will work. For this additional reason, the instant petition cannot be approved.

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.