



U.S. Citizenship  
and Immigration  
Services



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FILE: EAC 08 143 52743 Office: VERMONT 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

*for Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an IT consulting firm with three employees. It seeks to employ the beneficiary as a business analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the ground that the petitioner did not comply with the requirement that a Labor Condition Application (LCA) be certified by the Department of Labor (DOL) for the period of employment at the time of filing the H-1B petition.

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

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

The H-1B petition was received by the Vermont Service Center on April 2, 2008. The Form I-129 lists the intended dates of employment as October 1, 2008 to September 22, 2011. Submitted with the petition was a certified LCA for a business analyst to work at the employer's place of business in Livingston, NJ for a period of employment from September 23, 2008 to September 22, 2011. The LCA was certified on March 24, 2008 by the DOL. In the support letter submitted with the petition, the petitioner stated the following:

[The beneficiary] will work under supervision from our office. He will do requirement clients analysis, prepare business specifications to translate coding by development team which is usually on offshore. He will do the coordination testing, code debug to facilitate the clients deliveries in enterprise applications software support and enhancement requests.

The support letter emphasized that the beneficiary was to be employed exclusively at the petitioner's office location specified in the LCA and the Form I-129, stating:

[The petitioner] currently intends to employ [the beneficiary] for a period of about three years to complete our in-house assignment and it is critical that the same professional be involved throughout this assignment.

On May 30, 2008, the director issued an RFE. The RFE requested evidence that the proffered position qualifies as a specialty occupation, including documentation highlighting the nature, scope, and activity of the petitioner's business enterprise(s) in order to establish the beneficiary will be employed with the duties specified for the position. The RFE also requested documentation to evidence that the beneficiary's degree qualifies him for a specialty occupation.

In the petitioner's response to the RFE, for the first time the petitioner stated that the beneficiary will be subcontracted to [REDACTED]. Along with the RFE response, a new and revised LCA was submitted for a business analyst to work in Columbus, OH as well as Livingston, NJ, contradicting the Form I-129, which only lists Livingston, NJ as a work location. In the RFE response, counsel for the petitioner also submitted a copy of an e-mail from the U.S. Department of Labor, Employment and Training Administration stating that the LCA submitted with the initial petition was withdrawn on June 30, 2008. The

revised LCA covers the period of employment from October 1, 2008 to September 30, 2011 for the same job title and salary as the original LCA. The revised LCA was certified by the DOL on June 30, 2008, after the date the H-1B petition was filed.

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

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 . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

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

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

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

On appeal, counsel for the petitioner asserts that the petitioner intended to employ the beneficiary in Livingston, NJ, as stated in the LCA filed with the petition, at the time the petition was filed. However, counsel states that in between the time that the petition was filed and the RFE was issued, the petitioner had a new work order for [REDACTED] and therefore filed an amended LCA to cover the new Ohio worksite as well as the petitioner's offices in Livingston, NJ. Counsel for the petitioner states that the petitioner's intent was to amend or supplement the initial LCA, rather than replace it, and argues the following:

[T]he USCIS improperly disregarded the fact that a valid LCA was continuously in place at all stages of the I-129 process. From the time of I-129 filing to June 30, 2008, the initial, certified LCA was valid and correct in all material respects. Upon withdrawal of the initial LCA on June 30, 2008, a new supplemental LCA was immediately certified on the same day and remains valid and correct in all material respects at the present time. Accordingly, the USCIS blatant disregard of these facts, leading to its determination that petitioner did not have a valid, certified LCA at all times from the point of I-129 filing onward, is clear error.

Petitioner humbly asserts that submitting an amended/supplemental, certified LCA in this fashion was appropriate under the circumstances, and requests that the USCIS decision mischaracterizing the effect of withdrawal of the initial LCA, minimizing the effect of the amended/supplemental LCA, and denying the I-129 petition be accordingly reversed.

Counsel notes, and the AAO has no reason to question, that the location that the initial certified LCA identified as the beneficiary's workplace was accurate at the time of the filing of the Form I-129, but that the location had changed by the time the request for evidence was received, months after the submission of the Form I-129 with the initial certified LCA.

At the time of filing the petition the petitioner must file a certified LCA valid for the work location specified in part E of the LCA, and part F for an additional or subsequent work location. The work location is critical in determining the prevailing wage for the occupation in the area of intended employment. *See* 20 C.F.R. §§ 655.730(c)(4) and (d)(1).

The petitioner errs in contending that an H-1B petition may be approved for the employment period for which it is filed, provided that the petition is filed with an LCA certified for the work location(s) known to the petitioner at the time of the petition's filing, and later supplemented with a new LCA, certified for any additional location(s), if circumstances develop requiring the beneficiary to be assigned outside the geographical area(s) specified in the LCA.

The AAO first notes that the petitioner does not provide any statute, regulation, or precedent decision in support of this contention.

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

*Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

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

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

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

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

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified prior to the filing of the petition, with accurate information about where the beneficiary would actually be employed through the employment period specified in the Form I-129. That condition was not satisfied in this proceeding. The petitioner's attempt to remedy the deficiency by submitting an LCA certified after the filing of the petition is ineffective. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 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). Moreover, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought had been established at the time the petition was filed. See 8 C.F.R. §§ 103.2(b)(1) and (b)(8).

In view of the foregoing, the petitioner has not overcome the director's objections. Therefore, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a business analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 25, 2008 letter of support; and documentation provided in response to the RFE.

The support letter indicates the proffered position would require the beneficiary to:

[D]o requirement clients analysis, prepare business specifications to translate coding by development team which is usually on offshore. He will do the coordination testing, code debug to facilitate the clients deliveries in enterprise applications software support and enhancement requests.

In the RFE, dated May 30, 2008, the director requested additional evidence to establish that the proffered position qualifies as a specialty occupation. The RFE states as follows:

Submit a detailed statement setting forth the beneficiary's proposed duties and responsibilities. Indicate the percentage of time that the beneficiary is to perform each of the proposed duties each day. Use specifics, not generalities. For each of the job requirements indicate how the degree requirements directly relate. Explain how a degree is essential for the satisfactory execution of each of the proffered duties.

In response, on July 1, 2008, counsel for the petitioner submitted: a letter from the petitioner dated June 25, 2008; a letter from [REDACTED] dated June 23, 2008, confirming that it will use the IT consulting services of the beneficiary for the period of October 1, 2008 forward; a memorandum from [REDACTED] addressed to the petitioner, dated June 18, 2008, confirming its need for the beneficiary to be assigned to Abercrombie & Fitch; a general signed subcontractor agreement between [REDACTED] and the petitioner; and a work schedule attached to the subcontractor agreement listing the beneficiary's assignment as an IT-Consultant – Business Analyst to work at [REDACTED] in Columbus, OH from October 1, 2008 to September 20, 2011.

In the response to the RFE, the petitioner writes as follows in its letter dated June 25, 2008:

The Nature, Scope and Activities of my business enterprise are Software Development and IT Services. I am the President of the Company and by profession a Chemical Engineer. I provide IT consulting services and working on software product development for integration Chemical Process industry software with business applications software. I have provided IT consulting services to [REDACTED] (symyx.com) and identified the potential of this new software product for integration of [REDACTED] process industry software with business applications. It also has future plans to spend some time and resource on that product development as per the opportunity. I need the services of highly qualified Chemical Engineer having software experience to assist on my Product Development.

[The beneficiary] is highly qualified Chemical Engineer with software experience suitable to assist me on my project per need basis. We also have confirmed business requirement for his services from his past employer/end client [REDACTED] [The beneficiary] will be working at the main office of the company and the office at OHIO and therefore the LCA has been suitably amended to show this as an additional workplace.

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 DOL's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

Under 8 C.F.R. § 103.2(b)(8)(ii), “if all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS.”

In response to the RFE and on appeal the petitioner claims that the beneficiary will be working at [REDACTED] but provides no documentation that specifies the duties to be performed by the beneficiary at [REDACTED]. 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. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

In addition to providing documentation asserting that the beneficiary will be assigned to work at [REDACTED] the petitioner states in response to the RFE that it requires the beneficiary's services to integrate [REDACTED] chemical process industry software with business applications and therefore requires the services of a chemical engineer with software experience. However, it is well known that Abercrombie & Fitch is a clothing retailer. No evidence is provided to explain the nexus between the petitioner's requirement of the beneficiary's services with respect to chemical industry software integration and the duties that the beneficiary would perform at Abercrombie & Fitch.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Also beyond the decision of the director, the AAO finds that the petition must be denied for the additional reason that it was filed without an itinerary of the dates and locations where the beneficiary would work, as required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office

which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition denied 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.