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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 208 53205 Office: VERMONT SERVICE CENTER Date: OCT 02 2009

IN RE: Petitioner: [redacted]
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:

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development, engineering, and consulting company that seeks to employ the beneficiary as a "computer programmer/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 on the basis of his determination that the petitioner had failed to establish that it had submitted a valid labor condition application (LCA).

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

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, U.S. Citizenship and Immigration Services (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)(12).

The petitioner filed the instant petition on July 11, 2007. In its June 13, 2007 letter of support, the petitioner stated that the petitioner would work at client locations in Miami, Florida and O'Fallon, Missouri. The petitioner submitted an LCA certified on June 11, 2007 for employment in Miami, Florida, and O'Fallon, Missouri.

The director issued a request for additional evidence on December 17, 2007. On December 21, 2007, the petitioner obtained an LCA certified for employment in Miami, Florida, and Eden Prairie, Minnesota. According to the petitioner, the beneficiary would now be providing services at a client location in Eden Prairie, Minnesota.

Citing to the regulations referenced above, the director denied the petition on May 19, 2008. The director noted that the LCA certified for employment in Eden Prairie, Minnesota had been certified on December 21, 2007, well after the filing date of the petition on July 11, 2007, and that, as such, the petition could not be approved.

On appeal, counsel contends that the director erred in denying the petition. Although Cigna Behavioral Health (Cigna), the end-user of the beneficiary's services in Eden Prairie, Minnesota, stated in a December 27, 2007 letter that the beneficiary would be providing his services to the company until July 2008, and counsel stated in his January 11, 2008 letter that the project was expected to last "for the next three years," counsel now states in his June 13, 2008 letter that the beneficiary is again working in O'Fallon, Missouri. Counsel contends that, as such, the petition should be approved, since the LCA certified for employment at that location was certified on June 11, 2007, prior to the date the petition was filed.

Counsel also contends that, despite the fact that the LCA for employment in Eden Prairie, Minnesota was certified subsequent to the date the petition was filed, it was nonetheless valid because, at the time it was certified, the beneficiary had been assigned to work at that location.

The AAO disagrees with counsel's analysis. The fact remains that the LCA certified for employment in Eden Prairie, Minnesota, the certification of which was a condition precedent to the beneficiary's lawful employment at that location, was certified subsequent to the filing of the petition. The petitioner's failure to procure a certified LCA for that location prior to filing the petition precludes approval of the petition, and the regulations contain no provision for the AAO to provide discretionary relief from the LCA requirements. The director properly denied the petition on this ground.

Beyond the decision of the director, the AAO finds that the petition may not be approved for another reason, as the record of proceeding fails to establish that the proposed position qualifies for classification as a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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, a proposed position must 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.

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.

As was noted previously, the petitioner filed the instant petition on July 11, 2007. It outlined the duties proposed for the beneficiary in its June 13, 2007 letter of support. According to the petitioner, the beneficiary would be responsible for performing the following tasks:

- Planning, developing, testing, and documenting computer programs;
- Evaluating user requests for new or modified programs, compatibility with current systems, and computer capabilities;
- Consulting with users to identify current operating procedures and clarifying program objectives;
- Formulating plans;
- Submitting plans to users for approval;
- Preparing flowcharts and diagrams to illustrate the sequence of steps programs must follow;
- Describing the logical steps for coding and computer language;
- Entering codes and commands to run and test programs;
- Detecting and modifying syntax or logic errors;
- Writing documentation to describe program development, logic, coding, and corrections;
- Assisting users in solving operating problems; and
- Providing technical assistance to the user group.

Again, the petitioner stated that the beneficiary would perform services at client sites in Miami, Florida, and O'Fallon, Missouri.

In his December 17, 2007 request for additional evidence, the director requested, among other items, a detailed itinerary with the dates and locations of services to be performed, as well as a copy of the contract with the end user of the beneficiary's services which specifically mentions the beneficiary and the duties he would perform for that end user.

The petitioner submitted responses to the director's request for additional evidence on January 14, 2008 and January 28, 2008. In his January 11, 2008 letter, counsel stated that the beneficiary would work for Cigna, pursuant to an agreement with AGS Consulting, Inc. (AGS). As evidence of this project, the petitioner submitted a statement of work signed by AGS and the petitioner on September 21, 2007. According to this document, the beneficiary would perform services for Cigna from October 8, 2007[1] until April 8, 2008. The petitioner also submitted a letter from Cigna regarding the project, which was dated December 27, 2007.

In his June 13, 2008 letter, which was submitted by counsel in support of the petitioner's appeal, counsel states that the beneficiary will work for MasterCard, pursuant to an agreement with Programmer Resources International (PRI). As evidence of this project, counsel submits a March 5, 2008 statement of work signed by PRI and the petitioner. According to this statement of work, the beneficiary will work for MasterCard from March 10, 2008 until August 8, 2008.

As was noted previously, the instant petition was filed on July, 2007. However, both statements of work (the September 21, 2007 statement of work relating to work for Cigna, and the March 5, 2008 statement of work relating to work for MasterCard) were issued subsequent to the filing of the petition. Neither document was in existence at the time the petition was filed and, accordingly, the record fails to establish that when the petitioner filed the petition the petitioner had secured work for the beneficiary to perform during the requested period of employment.[2] 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)(12). 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, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

Moreover, even if these documents had been in existence at the time the petition was filed, they would still be deficient, as they do not indicate that the petitioner has secured work for the beneficiary to perform during the entire period of requested employment (October 1, 2007 through September 30, 2010). Again, the documentation regarding the Cigna project called for that project to end on April 8, 2008, and the documentation regarding the MasterCard project called for that project to end on August 8, 2008.

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[1] The AAO notes that although this statement of work calls for the project to begin on October 8, 2007, the petitioner did not procure an LCA certified for this location of employment until December 21, 2007, after the director issued his request for additional evidence.

[2] The AAO acknowledges the December 11, 2006 statement of work signed by PRI and the petitioner, which called for the beneficiary to perform services for MasterCard from January 1, 2007 until December 31, 2007. However, PRI's June 7, 2008 letter, which was submitted on appeal, makes clear that the beneficiary ceased working on this project in October 2007. As the period of employment requested in this petition did not begin until October 2007, this document does not aid the petitioner in establishing that it had work for the beneficiary to perform during said period of requested employment.

For all of these reasons, the AAO finds that the record fails to contain substantive evidence about any particular project on which the beneficiary would work during the period of requested employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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 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 proposed 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.* In *Defensor,* the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes finding 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.

In accordance with its previous discussion, the AAO finds that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, the petition may not be approved for this additional reason. Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the

record lacks evidence that when the petitioner filed the petition, the petitioner had secured work for the beneficiary to perform during the requested period of employment. Again, 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)(12). 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). For this reason also, the appeal must be denied.

Finally, the AAO notes again that, according to PRI's June 7, 2008 letter, the beneficiary ceased working on the MasterCard project in October 2007. Although the September 18, 2007 statement of work from AGS indicated that the beneficiary was to commence working on the Cigna project on October 8, 2007, an LCA was not certified for that location until December 21, 2007. It is unclear whether the beneficiary was working between October and December of 2007 and, if not, how he was maintaining lawful nonimmigrant status. However, this matter will not be pursued by the AAO, as matters relating to the lawful maintenance of nonimmigrant status are beyond the scope of its jurisdiction; such matters are within the sole jurisdiction of the director.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.