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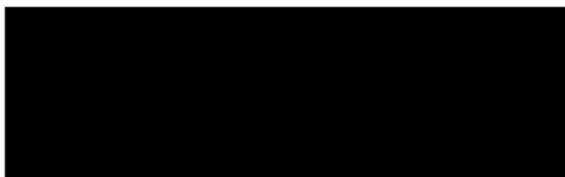
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: WAC 08 145 51475 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 2009**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

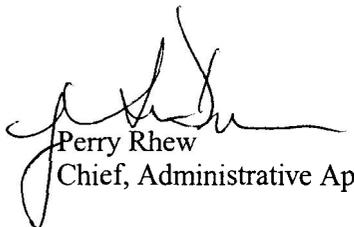
ON BEHALF OF PETITIONER:



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 an IT consulting and software development/marketing company that seeks to employ the beneficiary as a systems analyst. 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 her determination that the petitioner had failed to establish: (1) that it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) that it meets the regulatory definition of an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) that the petitioner had submitted a valid labor condition application (LCA); and (4) that the proposed position qualifies for classification as a specialty occupation.

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 AAO will first address the director's determination that the petitioner had failed to establish that its proposed position qualifies for classification as a specialty occupation.

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 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.

Upon review of the entire record of proceeding, the AAO finds that the director was correct in her determination that the record before her failed to establish the existence of a specialty occupation position, and also finds that the documents submitted on appeal have not remedied that failure.

The petitioner filed the petition on April 14, 2008. In its March 28, 2008 letter of support, the petitioner stated that the beneficiary would perform the following tasks:

- Design, develop, and test plans;
- Create scripts and scenarios;
- Execute tests and document the results;
- Gather, analyze, and interpret functional specifications and user requirements;
- Design appropriate software solutions, including logical and physical database structures and entity-relationship diagramming;
- Developing and coding system features, including user interfaces and internet/intranet functionality;
- Logging defects;
- Working with the helpdesk to resolve and test system;
- Providing management reporting for progress and status for all business-related work products and deliverables; and
- Providing user training and documentation as needed.

The petitioner also submitted information regarding a project entitled “eProcessWTK (ERP).” Although the petitioner made no reference to the project in its letter of support or to any role for the beneficiary in the project, the project description stated that the specific job functions of its systems analysts, software engineers, and business systems analysts working on the project would consist of the following duties:

- Understanding and consolidating business requirements;
- Preparing high-level design;
- Preparing low-level design;
- Analyzing use-cases and modeling the application using UML;
- Generating codes and DB scripts using PL/SQL;
- Managing the configuration and controlling the version using VSS;
- Managing data extraction to web services using the online data loader tool;
- Managing change requests;
- Carrying out root cause analysis of bugs;
- Environment set-up for the testing of applications;
- Conducting unit testing;
- Conducting integration testing;
- Deploying application/module; and
- Improving the performance of the application using eProcessWTK.

The director found the petitioner's initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence on April 28, 2008. The director stated that if the petitioner was engaged in the businesses of consulting, employment staffing, or job placement that contracts short-term employment, in any way, it must submit evidence to establish that a specialty occupation exists for the beneficiary. The director requested, among other items, that the petitioner clarify its employer-employee relationship with the beneficiary and submit: (1) copies of signed contracts between the petitioner and the beneficiary; (2) a complete itinerary of services or engagements listing the dates of each service or engagement, names and addresses of the actual employers, and names and addresses of the establishment, venues, or locations where services would be performed for the period of time requested; and (3) copies of signed contractual agreements, statements of work, work orders, etc., specifically naming the beneficiary and describing his proposed duties.

The petitioner responded to the director's request on July 18, 2008. The petitioner stated that it would be the actual employer of the beneficiary for the entire period of requested employment, and that the beneficiary would indeed work on the "eProcessWTK (ERP)" project. The petitioner stated that the project would last a minimum of three years, and that it would cover the term of the beneficiary's employment with the petitioner.

The director denied the petition on August 6, 2008. In part, the director's denial was based upon her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. In arriving at this conclusion, the director found that the petitioner had failed to establish that it had actual work for the beneficiary to perform during the period of requested employment. On appeal, counsel reiterates the petitioner's assertion that the beneficiary would be working on the "eProcessWTK (ERP)" project, and refers the AAO to the job description submitted with the petitioner's March 28, 2008 letter of support.

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the petitioner has failed to demonstrate the existence of a specialty occupation. The record lacks a detailed description of the specific duties to be performed by the beneficiary on the "eProcessWTK (ERP)" project upon which he is to work. The list of duties described in the project outline was vague and generic, and were not specific to the beneficiary. Rather, that listing described the duties to be performed by all systems analysts, business systems analysts, and software engineers working on the project. As the job functions of those three occupations are not interchangeable, it is unclear which of those functions would be performed by the beneficiary. Although the petitioner describes additional job duties for the beneficiary in its March 28, 2008 letter, it did not describe those duties in relation to the "eProcessWTK (ERP)" project upon which he would work. Rather, that letter contained another listing of generalized duties typically performed by systems analysts. The generic nature of the duties described by the petitioner makes it impossible for the AAO to assess whether performance of the beneficiary's duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Furthermore, the summary provided by the petitioner regarding its “eProcessWTK (ERP)” project was also very generic, and the AAO cannot assess, based upon the scant evidence of record regarding the project, whether the project currently exists or whether it is a project that the petitioner hopes to develop when it has a sufficient cadre of clients who are interested in purchasing it. For example, the petitioner’s summary does not establish when the project began or expects to begin, and when it is expected to end. Providing a generic job description that speculates what the beneficiary may or may not do is insufficient. Simply 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

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 petition the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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 will be denied.

As the petitioner’s failure to demonstrate the existence of H-1B caliber work for the beneficiary to perform precludes approval of this petition, the AAO need not address the remaining grounds of the director’s denial of the petition.

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 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.