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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



U.S. Citizenship
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FILE: WAC 08 143 52864 Office: CALIFORNIA SERVICE CENTER Date: **JAN 12 2010**

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a software consulting business and indicates that it currently employs 14 persons. It seeks to employ the beneficiary as a business 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 because the petitioner failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

On appeal, counsel states, in part, that the petitioner is a bona fide employer, that the petitioner submitted a valid labor condition application, that the proffered position qualifies as a specialty occupation, and that the beneficiary will work on the petitioner's in-house "Interoperability Database and Customer Web Interface" product development project. As supporting documentation, the petitioner submits excerpts from the petitioner's website and previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its March 3, 2008 letter of support as "a mature and industry wide reputed software consulting group . . . helping customers in providing leading edge technology solutions and augmenting their IT staff needs when necessary."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 3, 2008. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director requested documentation such as contractual agreements with the actual end-client firm where the beneficiary would work. The director also requested documentation such as: the petitioner's federal income tax returns for 2006 and 2007; the petitioner's lease agreement, floor plan, and photographs of the exterior of its business premises; and college/university transcripts for the beneficiary.

In a letter dated July 14, 2008 from the petitioner's human resources manager submitted in response to the director's RFE, the beneficiary's duties are described as working as a business analyst at the petitioner's office location in Dayton, Ohio on the petitioner's in-house "Interoperability Database and Customer Web Interface" project. The petitioner submitted additional documentation, including a product development description for the "Interoperability Database and Customer Web Interface" project.

On July 30, 2008, the director denied the petition. The director found that the petitioner had failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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, the 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 are 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.

In addressing whether the proffered position is a specialty occupation, the record is unclear as to whether the beneficiary’s services would be that of a business analyst.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner’s letter of support dated March 3, 2008 listing the beneficiary’s proposed duties has been reviewed. The petitioner’s human resource manager states that the beneficiary would be utilized as a business analyst in Houston, Texas, and describes the duties as follows: gather and organize information on business problems or procedures and analyze the data gathered; develop solutions or alternative methods of proceeding; confer with personnel to ensure successful functioning of newly implemented systems or procedures; develop and implement a records management program for filing, protection, and retrieval of records, and assure compliance with the program; review forms and reports; confer with management and users about format, distribution, and purpose, and identify problems and improvements; interview personnel and conduct observation to determine unit functions, work performed, and methods, equipment, and personnel used, and document findings and recommend changes; and study work problems and procedures to work towards providing business performance management solutions.

On appeal and in response to the RFE, counsel and the petitioner state that the beneficiary will work on the petitioner’s in-house “Interoperability Database and Customer Web Interface” project in Dayton, Ohio. As indicated above, however, information in the petitioner’s March 3, 2008 letter indicated that the beneficiary would be utilized as a business analyst in Houston, Texas. It is also noted that the duties listed in the petitioner’s March 3, 2008 letter are described only generically and

differ from the duties described in the petitioner's response to the director's RFE, which pertain to a specific project. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the generic duties to a specific project, and changed the location of the proffered position from Houston, Texas to Dayton, Ohio.

In this matter, the job description provided in the petitioner's March 3, 2008 letter indicates that the beneficiary would be utilized as a business analyst in Houston, Texas. Despite the director's specific request for documentation to establish the actual job duties in relation to the proposed duties, as described in the petitioner's March 3, 2008 letter, however, the additional evidence submitted by the petitioner was insufficient. The AAO, therefore, cannot analyze whether 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. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Although the director also denied the petition because the petitioner had not demonstrated that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, and that it has sufficient work for the requested period of intended employment, the AAO affirms, but shall not discuss, these additional issues because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

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 director's decision is affirmed. The petition is denied.