

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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
and Immigration
Services**

PUBLIC COPY



D,

FILE: WAC 08 138 52737 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 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 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 a software development and consulting company that 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 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 proposed position qualifies for classification as a specialty occupation; and (4) 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 two requests for additional evidence; (3) the petitioner's responses to the director's requests; (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 has 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 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 filed the instant petition on April 14, 2008, and outlined the duties proposed for the beneficiary in its March 31, 2008 letter of support. In its letter, the petitioner described the consulting services it offers to its clients, and stated that the beneficiary would work for one of its clients – referred to as ██████ – in Woodbridge, New Jersey. In her April 23, 2008 request for additional evidence, the director requested, among other items, information regarding the beneficiary’s proposed duties directly from Hess.

The petitioner submitted, among other items, a June 15, 2008 consulting services agreement between the petitioner and the Caldence Corporation (Caldence), which called for the petitioner to provide consultants to Caldence in order to assist Caldence in providing services to its clients, pursuant to statements of work to be executed by both parties. The petitioner also submitted a July 4, 2008 work order issued pursuant to that agreement, which called for the beneficiary to work at ██████’s site in Woodbridge, New Jersey, beginning on October 1, 2008. No end date was specified. The petitioner, however, submitted no information from Hess directly, as the director requested. Nor did the petitioner make any reference to, or explanation for, this failure to comply with the director’s specific request. Noting as such, the director denied the petition on July 22, 2008, finding the record to lack documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment.

In his September 18, 2008 appellate brief, counsel contends that the director erred in denying the petition. With regard to the existence of a specialty occupation, counsel states, at page 4, that the beneficiary was to work for the petitioner on an in-house project after completion of the Hess project. Counsel states that Hess was reluctant to release confidential documents to USCIS and, as such, the petitioner has decided that the beneficiary will work on the in-house project upon the commencement of his employment with the petitioner.

Upon review, the AAO finds that the petitioner has failed to demonstrate the existence of a specialty occupation. As a preliminary matter, the AAO places counsel and the petitioner on notice that it will accord no weight to counsel’s assertions on appeal with regard to the existence of an in-house project upon which the beneficiary would work. In its letter of support, the petitioner made no mention of any in-house project upon which the beneficiary would work. Rather, the petitioner stated that the beneficiary would work on a project for Hess in New Jersey. Nor did the petitioner reference any such in-house project in response to the director’s request

for additional evidence. It is only on appeal, following the director's denial, that counsel now asserts that that beneficiary would be working on an in-house project. The AAO finds that this change to the nature of the beneficiary's proposed job role by the petitioner on appeal to be a material alteration to the petition rather than a mere clarification or effort at further description. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). For this reason, the AAO's analysis of this issue will be based upon on the record as it existed at the time the director issued her decision.

As was noted previously, the instant petition was filed on April 14, 2008. The petitioner and Caldence entered into their agreement on June 15, 2008, more than two months after the petition was filed, and the work order was not issued until July 4, 2008. As such, neither the consulting services agreement nor the work order existed at the time the petition was filed. The petitioner has failed to establish that when it filed the petition the petitioner had secured work 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. 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 (Reg. Comm. 1978). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. at 176, "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

However, even if such were not the case, the record of proceeding as it existed at the time the director issued her decision was still insufficient to establish that the proposed position is a specialty occupation, as it lacked a meaningful description of the duties to be performed by the beneficiary from Hess, the actual end-user of his services.

Accordingly, 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 agrees with the director’s determination that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. 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. 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 (Reg. Comm. 1978). For this reason also, the appeal must be denied.

As the petitioner’s petitioner 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 affirms, but will not discuss, those grounds of the director’s decision.

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.