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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: NOV 14 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Rory Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. We find that the petitioner has not overcome the specified grounds for revocation. Accordingly, the appeal will be dismissed and the approval of the petition remains revoked.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. In the Form I-129 petition and supporting documentation, the petitioner describes itself as a computer and software consultancy firm that was established in [REDACTED]. Seeking to employ the beneficiary in what it designates as a systems analyst position, the petitioner filed this H-1B petition in an endeavor to classify her 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).¹

The petitioner stated that it seeks the beneficiary's services on a full-time basis.² In the Form I-129 petition and in the letter of support, the petitioner attested that it would employ the beneficiary to serve on a project at [REDACTED]. On the Form I-129, the petitioner identified an address in [REDACTED] California as the beneficiary's place of employment. On the Labor Condition Application (LCA), however, the petitioner indicated an address in [REDACTED] California as the beneficiary's place of employment.³ The petitioner did not request other worksites

¹ There are numerous instances within the record of proceeding in which the petitioner and counsel mistakenly referenced the beneficiary in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, we must question the accuracy of the documents and whether the information provided is correctly attributed to this particular position and beneficiary.

² It must be noted for the record that the petitioner provided inconsistent information regarding the beneficiary's rate of pay. In the Form I-129 (pages 5 and 17), the petitioner indicated that the beneficiary would be paid \$68,500 per year. On the Labor Condition Application (LCA) submitted with the initial petition, the petitioner indicated that the beneficiary would be compensated at the rate of \$60,000 per year. In the March 24, 2014 letter, submitted in response to the director's NOIR, the petitioner stated that the beneficiary would be paid \$75,500 per year. Within the same submission, however, the petitioner submitted two LCAs, which indicated the beneficiary's annual salary as \$72,197 and \$67,101. No explanation for the variances was provided by the petitioner.

³ With certain limited exceptions, the applicable U.S. Department of Labor (DOL) regulations define the term "place of employment" as the worksite or physical location where the work actually is performed by the H-1B nonimmigrant. See 20 C.F.R. § 655.715. The Office of Management and Budget established Metropolitan Statistical Areas to provide nationally consistent geographic delineations for collecting, tabulating and publishing statistics. See 44 U.S.C. § 3504(e)(3); 31 U.S.C. § 1104(d); Exec. Order No. 10,253, 16 Fed. Reg. 5605 (June 11, 1951); 75 Fed. Reg. 37,246, 37,246-252 (2010) (discussing and defining, *inter alia*, Metropolitan Statistical Areas).

We observe that the petitioner has provided inconsistent information concerning the beneficiary's place of

and did not submit an itinerary. *See* 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location).

After the petition was approved, an administrative site visit was conducted.⁴ The site inspector made contact with several managers and the associate director for the end-client, none of which had any knowledge of the beneficiary or of the petition filed on her behalf.⁵

The site inspector contacted the petitioner through email. The petitioner responded to the site inspector's email and stated that the beneficiary was working at [REDACTED] California. With its response, the petitioner submitted an LCA. The LCA provided a different place of employment than claimed in the email. Specifically, the LCA indicated the place of employment as an address in [REDACTED], California.⁶ Furthermore, the job title and wage level on the new LCA did not correspond with the job title and wage level that were provided in initial H-1B filing.

The director reviewed the site visit report and the record of proceeding and issued a NOIR. The NOIR provided a detailed statement of the revocation grounds, and afforded the petitioner an opportunity to provide a rebuttal. *See* 8 C.F.R. § 214.2(h)(11)(iii)(B).

In response, the petitioner indicated that the beneficiary was not working on the project or at the location specified in the original petition. The petitioner stated the following:

[S]ubsequent to the Service approving our H-1B petition on behalf of [the beneficiary], and at the time [the beneficiary] joined [the petitioner], to be exact, on October 16, 2013, we identified a need for her services performing the same duties as noted in our H-1B petition filing under the direction and control of a [petitioning] Manager to support [the petitioner's] engagement with our client, [REDACTED], at [REDACTED] California. . . . In January 2014, [the beneficiary] was selected to support [the petitioner's] engagement with our client, [REDACTED] located

employment. No explanation for the variance was provided by the petitioner.

⁴ USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. *See* 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184.

⁵ The site inspector made multiple attempts to contact the beneficiary – each time, he identified himself stating his name, position title, agency and the reasons for contacting her. The beneficiary refused to cooperate. There is no evidence that the beneficiary took steps to verify the site inspector's identity and role.

⁶ The LCA submitted in response to the site inspector's email has a determination date of November 7, 2011 (approximately two years prior to the beneficiary's worksite change to [REDACTED] California). Moreover, the period of employment certified on the LCA does not correspond to the requested dates of H-1B employment.

at [REDACTED] California, where she remains to the present date, performing the same duties as noted in our H-1B petition filing under the direction and control of a [petitioning] Manager.

With its response, the petitioner submitted, in part: (1) the LCA that it previously submitted in response to the site inspector's email; and (2) a new LCA that provided a new worksite – in [REDACTED] California as the beneficiary's place of employment.⁷ Again, the job title and wage level on the new LCA did not correspond with the job title and wage level that were provided in initial H-1B filing.

The director reviewed the response and found the evidence submitted insufficient to overcome the grounds for revocation. The director revoked the approval of the petition on April 16, 2014. Thereafter, counsel submitted an appeal.

II. REVIEW OF THE DIRECTOR'S DECISIONS

A. Specialty Occupation

We will first review the director's decision that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of 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

⁷ With each submission, the petitioner provided inconsistent information as to the beneficiary's place of employment. For example, in response to the NOIR, the petitioner stated that the beneficiary was working in [REDACTED] California. However, the new LCA, submitted in response to the NOIR, indicates Rancho Cordova, California as the beneficiary's place of employment. No explanation for the variance was provided by the petitioner.

Further, we note that the new LCA has a determination date of May 2, 2012 (approximately two years prior to the beneficiary's worksite change to [REDACTED] California). Moreover, the period of employment certified on the LCA does not correspond to the requested dates of H-1B employment.

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 [(1)] 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 [(2)] 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 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 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 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 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Moreover, when determining whether a position is a specialty occupation, USCIS must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. 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."

Furthermore, when determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner (1) has provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) has established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

In the initial petition, the petitioner stated that the beneficiary would work at [REDACTED] California from October 1, 2013 to March 11, 2016. Thereafter, in response to the site inspector's email, the petitioner indicated that the beneficiary's worksite changed

to [REDACTED] California. Further, in response to the NOIR, the petitioner asserted that on January 2014 the beneficiary was assigned to [REDACTED] California. Upon review, we find that, while the petitioner may be able to eventually locate some type of work for the beneficiary, it has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*.⁸ There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do and where the beneficiary would work, as well as how this would impact the circumstances of her relationship with the petitioner. 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)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

Further, although the petitioner provided a list of the beneficiary's proposed duties, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

⁸ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

In that regard, we have reviewed the information in the record regarding the petitioner's computer and software consultancy business. Upon review of this information, we find that the record of proceeding lacks documentation regarding the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The beneficiary's job title and wage level are different in the LCAs submitted in response to the site inspector's email and in response to the NOIR from the initial petition and supporting documentation. The petitioner has not established that the beneficiary would perform the claimed duties set out in its letter of support. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based upon a complete review of the record of proceeding, we find that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, 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 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Therefore, the director properly revoked the approval of the petition, and the appeal must be dismissed for this reason.

B. Labor Condition Application

We will now address the director's additional basis for denial of the petitioner specifically that the petitioner failed to provide a valid LCA that corresponds to the petition.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition that 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 USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

In addition, the regulations governing LCAs state that "[e]ach LCA *shall state . . . [t]he places of intended employment.*" 20 C.F.R. § 655.730(c)(4) (emphasis added). "Place of intended employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant." 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment "with as much geographic specificity as possible" and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

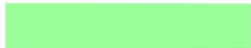
While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular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

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 . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 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. Here, the petitioner has failed to submit the required itinerary as well as a valid LCA that corresponds to all of the proposed work locations, and the approval of the petition must remain revoked for these additional reasons.

III. CONCLUSION

It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. We will affirm the decision of the director. The Form I-129



petition's approval is revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (A)(3), and (A)(4).⁹

ORDER: The director's decision is affirmed, and the appeal is dismissed. The approval of the petition remains revoked.

⁹ As the identified grounds for revocation are dispositive of the petitioner's continued eligibility, we need not address any additional issues in the record of proceeding.