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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: EAC 07 150 53748 Office: VERMONT SERVICE CENTER

Date: **AUG 04 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).

John F. Grissom
Acting 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 information technology consulting company that seeks to employ the beneficiary as a systems analyst/developer. 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).

In the paragraph summarizing the bases of his decision to deny the petition, the director states, in pertinent part, the following:

USCIS [U.S. Citizenship and Immigration Services] . . . must conclude that the petitioner does not qualify as an [H-1B] employer as they failed to provide evidence to establish that they have sufficient work and resources. The beneficiary is therefore not eligible for the requested H-1B visa because the petitioner is unable or unwilling to provide qualifying employment. . . .

At the outset of its analysis, based upon its review of the totality of the record including the additional documentation submitted on appeal, the AAO withdraws the director's determination that the petitioner has been violating its obligations under the labor condition applications (LCA) certified by the Department of Labor for other employees. This action by the AAO is based solely upon the limited content of the evidence before it, which is not sufficient to establish whether or not the petitioner has been violating its obligations under those LCAs.

The AAO also withdraws that part of the director's decision denying the petition "in accordance with 8 C.F.R. [§] 214.2(h)(4)(D)(5) and 8 C.F.R. [§] 214.2(h)(11)(ii)." The regulation at 8 C.F.R. § 214.2(h)(4)(D)(5), which deals with USCIS's assessment of a beneficiary's qualifications to serve in a specialty occupation position, is not relevant, as the beneficiary's qualifications were not a subject of the director's decision. The regulation at 8 C.F.R. § 214.2(h)(11)(ii) is also not relevant, as it deals only with the grounds for the automatic revocation of an approved petition.

The AAO also notes that the director expressly stated that it appeared as though the petitioner qualified as an "employer" entity eligible to file the petition. A close reading of the decision reveals that the employment aspect with which the director took issue is the petitioner's claim to have H-1B caliber work for the beneficiary.

Remaining is the issue of whether the director was correct in his determination that the petitioner had not provided sufficient evidence to establish that it would be employing the beneficiary in a specialty occupation position. The director articulated this determination most clearly in the following paragraphs discussing the lack of documentary evidence of H-1B caliber work for the beneficiary:

No representative business contracts have been submitted whether in initial documentation or in response to the USCIS request for evidence. No contract specific to the beneficiary in the petition had been forthcoming from the petitioner. There are no additional contracts, work orders, master service agreements or statements of work establishing the specific dates and locations of the beneficiary's proposed employment. The record also contains no evidence to demonstrate that a work itinerary existed for the position at the time the petition was filed.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform, USCIS cannot properly analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty or field of endeavor, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO finds that the director was correct in his determination that the record before him failed to establish a specialty occupation position, and it also finds that the matters submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed. The AAO bases its decision upon its review of the entire record of proceedings, which includes: (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 for additional evidence; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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 equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of

highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, 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 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 record of proceedings is fatally defective because it fails to include documentary evidence corroborating the H-1B petition’s claim that for the period requested the beneficiary would be employed on matters requiring him to apply the theoretical and practical application of a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty.

The petitioner’s Form I-129 identifies the Job Title as “Systems Analyst/Developer” and as a Nontechnical Job Description states, “Design & develop programs.” In its March 1, 2007 offer letter of employment to the beneficiary, the petitioner stated that the beneficiary would work in support of either the petitioner’s projects, or in support of the petitioner’s clients.

In his September 7, 2007 letter, counsel stated that the proposed position would include the following duties:

- Gather and evaluate user requirements to modify existing programs, or to build new ones;
- Analyze software systems and project specifications;
- Develop application architecture;
- Design and develop user screens and components;
- Study design feasibility;
- Determine project specifications into logical steps for coding;
- Write scripts;
- Write stored procedures and triggers;
- Prepare technical documentation;
- Customize, modify, and enhance operational procedures;
- Integrate systems;
- Maintain programs;
- Generate reports;
- Test, tune, debug, and troubleshoot operational problems;
- Train and support users;
- Resolve errors; and
- Maintain software systems.

Counsel also stated in his September 7, 2007 letter that, as a general rule, and in keeping with industry standards, the petitioner requires, as a prerequisite, that candidates for Systems Analysts/Developer positions possess, at minimum, a bachelor's degree, or its equivalent, in a relevant field of study.¹

The petitioner described itself on the Form I-129 as an "information technology consultancy" and, on its 2006 tax return, told the Internal Revenue Service that the type of business in which it engaged was "consulting." In response to the director's June 14, 2007 request for additional evidence, the petitioner submitted a printout of its website, which stated the following:

When clients need software development expertise, [the petitioner] deploys experts with the unique skills and platform knowledge each job demands. And, when clients decide to buy rather than build software applications, [the petitioner] offers top-notch implementation expertise. [The petitioner's] consultants are available to perform both staff augmentation and project outsourcing services for clients in a wide range of industries. . . .

Although the March 1, 2007 offer letter of employment stated that the beneficiary would work in support of the petitioner's projects, or in support of the petitioner's clients, the petitioner made no mention of any specific project on which the beneficiary would be employed in either its initial submission or in response to the director's request for additional evidence.

On appeal, the petitioner submits a "Staffing Services Subcontractor Agreement" (the "staffing agreement") between the petitioner and Mark InfoTech, Inc. ("Mark"), which was executed on October 24, 2007. The petitioner also submits a work order, also dated October 24, 2007, for work to be performed by the beneficiary for Mark's client between February 18, 2008 and February 20, 2009. However, the AAO will not consider this evidence. As the staffing agreement was signed on

¹ Counsel's assertion that the petitioner requires, as a general rule, that candidates for Systems Analysts/Developer positions possess, at minimum, a bachelor's degree, or its equivalent, in a relevant field of study is inconsistent with evidence he submitted in response to the director's June 14, 2007 request for additional evidence. In that submission, counsel stated that the petitioner employed two individuals in similar positions, and submitted copies of their degrees. Both of those individuals possess bachelor of science degrees from Andhara University, which is located in India. Those degrees, however, are not equivalent to bachelor's degrees from accredited institutions of higher education in the United States. According to the website of the American Association of Collegiate Registrars and Admissions Officers' Electronic Database for Global Education (EDGE), a bachelor of science degree from an Indian institution "represents attainment of a level of education comparable to two to three years of university study in the United States." (<http://aacraoedge.aacrao.org>) (accessed July 11, 2009). Two to three years of university study is not synonymous with the attainment of a bachelor's degree, or its equivalent. Thus, contrary to counsel's assertion, neither individual holding a similar position to the one proposed for the beneficiary possesses the equivalent of a bachelor's degree.

October 24, 2007, this document did not come into existence until several months after the Form I-129 was filed at the service center on April 2, 2007. 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). 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.”²

Moreover, even if the staffing agreement and corresponding work order with Mark, pursuant to which the beneficiary would provide services, had been in existence at the time the Form I-129 was filed, it would still be deficient. First, neither the staffing agreement nor the work order provides the name of the end-client (i.e., the client of Mark) for whom the beneficiary would ultimately be providing his services.³ Second, neither the staffing agreement nor the work order sets forth the duties that would actually be performed by the beneficiary for the end-user, pursuant to the work order. Third, as the end-user is not identified, there is no evidence that the end-user normally requires individuals providing such services to possess a bachelor’s degree, or its equivalent. Fourth, the work order does not provide the location at which the beneficiary would provide his services to the end-user for the specified period, other than to state that it will be in the “NYC Metro.”

Accordingly, the AAO finds that the record fails to contain any 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 this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The 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. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine

² Nor does this work order cover the entire period of requested employment (October 1, 2007 through September 28, 2010).

³ The AAO also notes that the staffing agreement states, at Item 1 (“Scope of Agreement”), that the petitioner is to assign its workers to the clients of Mark “identified on the applicable [w]ork [o]rder.” However, the work order submitted on appeal does not identify Mark’s client.

what the beneficiary would actually do on a day-to-day basis. In short, as noted by director, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

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 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.

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.