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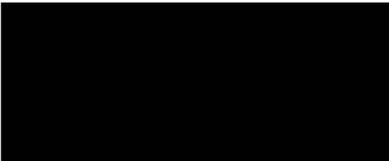
PUBLIC



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

U.S. Citizenship
and Immigration
Services

D-2



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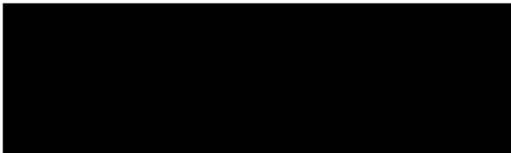
AUG 21 2009

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting 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 avers that it is engaged in “HR and software consultancy.” It seeks to employ the beneficiary as a programmer analyst and, 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).

On October 5, 2007, the director denied the petition because the petitioner failed to establish that the proffered position is a specialty occupation, it meets the definition of either a U.S. employer or agent, and the Labor Condition Application (LCA) is valid for all work locations. On appeal, counsel submits a letter.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it would employ the beneficiary as a programmer analyst. The petitioner indicated on the LCA that the beneficiary would work in Tustin, California. The LCA was certified by the Department of Labor on March 31, 2007.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 2, 2007. In the RFE, the director noted that the petitioner was engaged in the business of software consultancy and requested, in part, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary’s proposed duties.

In a response received on July 23, 2007, the petitioner submitted, among other items, a letter written by its attorney, a contract between it and a company called Irvine Technology Corporation, an “itinerary” of the beneficiary’s employment, and evidence to show that it had one employee. In the itinerary, the petitioner claimed that the beneficiary would be working on its premises in Tustin, California and at Irvine Technology Corporation in Santa Ana, California.

On October 5, 2007, the director denied the petition. The director declined to find that the proffered position was a specialty occupation because, as an employment contractor, the petitioner was in the business of contracting its employees to client sites and the record did not contain any evidence regarding the type of duties that the beneficiary would perform for these various clients. The director concluded that, without evidence regarding what duties the beneficiary would actually perform for the clients, the proffered position could not be classified as a specialty occupation. In addition, the director concluded that the petitioner could not be classified as a U.S. employer or agent because without the requested contracts, it was not possible to determine who would control the beneficiary’s work or for whom the beneficiary would be performing services. Similarly, the

director declined to find that the LCA was valid for all work locations because the petitioner was in the business of outsourcing its employees to other companies.

On appeal, the counsel submits a letter. Counsel states that it is an employer because it pays wages to its employees and it will control the beneficiary's work. In rebuttal to the director's conclusions regarding the LCA, the petitioner reiterates that it will employ the beneficiary in places such as Orange County, and the cities of Fullerton, Santa Ana and Tustin, all of which are covered by the LCA. Regarding the specialty occupation determination of the director, counsel states that the petitioner provided a very detailed position description for the beneficiary that undoubtedly shows that the position is a specialty occupation. On appeal, the petitioner also submits for the first time a contract for the beneficiary's services between the petitioner and Best IT Experts Inc. in Fullerton, California and a new itinerary.

Upon review of the record, the AAO agrees with the director's decision to deny the petition. Because the most important issue in this proceeding is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation, the AAO shall address this reason for denial first. It should be noted that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 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 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), 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. 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F.3d 384.

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 proffered 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.*

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.

Because the director wanted to know for whom the beneficiary would ultimately provide his services, she requested in May 2007 evidence of a contract to show the project to which the petitioner intended to assign the beneficiary. In response, the petitioner submitted a contract with Irvine Technology Corporation that, although did not list the beneficiary by name, had attached to it an itinerary for the beneficiary that listed his job responsibilities and provided the beneficiary's work locations as Tustin and Santa Ana, California. This evidence was submitted in July 2007.

On appeal, the petitioner submits a letter, dated March 10, 2007, from Best IT Experts Inc. in Fullerton, California that states:

Based on the interview we had with [the beneficiary] we are pleased to inform you that we have chosen to accept [the beneficiary] as a contractor . . . per the following terms:

1. **Project Information:** Design and develop a web site using Microsoft.net platform with peora themes to link many sites with the “one product per day” format. And also support customer facing web-site for Best IT Experts Inc.

2. **Location:** Fullerton, CA

* * *

5. **Duties to be performed:**

- a. Using ASP.Net and C# design and develop a customer facing web-site with peora themes to link many sites with the “one product per day” format. And also support customer facing web-site for Best IT Experts Inc.
- b. Production support of the software running in production including the web-site.
- c. Database development using Microsoft SQL Server.

The AAO questions the authenticity of this letter from Best IT Experts Inc. Although it is dated March 10, 2007, and therefore existed before the petitioner filed this H-1B petition, the petitioner never submitted it as evidence of the beneficiary’s duties either when it filed the petition on March 31, 2007 or in its July 2007 response to the director’s RFE. Prior to the denial of the petition, the petitioner maintained that the beneficiary would be working either at its office or for Irvine Technology Corporation in Santa Ana, California and never mentioned that it had also entered into a contract with Best IT Experts Inc. specifically for the beneficiary’s services. The petitioner is obliged to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, there is no clarifying evidence why the beneficiary’s job duties and work location changed so dramatically from the time of the initial petition to the time of the appeal.¹ Accordingly, the AAO does not accept this letter as evidence of the beneficiary’s proposed responsibilities as a programmer analyst. Even if we had accepted the letter, it would not have sufficed to establish the petitioner’s burden of proof. Nothing in the description of the duties depicts a position that would require the theoretical application of a body of knowledge that is usually associated with a particular field of study.

Overall, the evidence in the record fails to establish that the proffered position is a specialty occupation. As stated previously, the duties that the beneficiary will perform for the petitioner’s client control whether the job is a specialty occupation, not the petitioner’s generalized description of a programmer analyst position with its firm. While the petitioner claimed that the beneficiary would be working for Irvine Technology Corporation, the contract between the petitioner and that company did not contain any information about the requirements Irvine Technology Corporation would impose on the beneficiary such as the type of project on which the beneficiary would be

¹ The AAO notes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

working or the responsibilities that he would have. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, because the petitioner has not established what the beneficiary will ultimately be working on while a contractor with one of its clients, the Service cannot find that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

The director also denied the petition for two additional reasons that relate to the LCA and the petitioner's status as either a U.S. employer or an agent. The AAO affirms, but will not address these issues, because the petitioner has failed to establish that the job is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

ORDER: The appeal is dismissed. The petition is denied.