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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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SEP 14 2009

FILE: EAC 07 148 52765 Office: VERMONT SERVICE CENTER Date:

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:

SELF-REPRESENTED

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 Director, Vermont 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 is a software development and consulting business that seeks to employ the beneficiary as a systems 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 based on a finding that the evidence of record did not establish that the proffered position is a specialty occupation. Specifically, the director found that the petitioner had not submitted any contracts or work orders, as requested. As a result, the director correctly concluded that the petitioner had not demonstrated that it had an H-1B position available for the beneficiary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submits a new job posting and also submits for the first time a Master Service Agreement, dated March 5, 2007, between the petitioner and Summitworks Technologies, Inc., and a work order for the beneficiary, signed on June 4, 2007. The petitioner states that it mistakenly failed to submit the Master Service Agreement and related work order in response to the director's RFE.

The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As stated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in its August 2, 2007 response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be adjudicated based on the record of proceeding before the director.

The record of proceeding before the AAO contains: (1) Form I-129 filed on April 2, 2007 and supporting documentation; (2) the director's June 11, 2007 request for evidence (RFE); (3) the petitioner's August 2, 2007 response to the director's RFE; (4) the director's September 25, 2007 denial decision; and (5) the Form I-290B and letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position is a specialty occupation.

The AAO applies the following statutory and regulatory framework in analyzing whether a proffered position qualifies as a specialty occupation.

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.

In this matter, the AAO notes that in the Form I-129 and the labor condition application (LCA), the petitioner refers to the proffered position as that of a systems analyst. In its March 31, 2007 letter, however, the petitioner refers to the proffered position as a programmer analyst. As will be discussed below, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not 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 the factors to be considered. In this case, in response to the director's June 11, 2007 RFE, the petitioner indicated that the beneficiary would be its first employee recruited for the position of systems analyst. The petitioner described the proposed duties and approximate time allocations (totaling 80%) as follows:

- Analyzes user requirements, procedures, and problems to automate processing or to improve existing computer system: Confers with personnel of organizational units involved to analyze current operational procedures, identify problems, and learn specific input and output (40% of time);
- Prepare detailed flow charts and diagrams outlining systems capabilities and processes (20% of time);
- Plans and prepares technical reports, memoranda, and instructional manuals as documentation of program development. Upgrades system and corrects errors to maintain system after implementation (10% of time);
- Client/Server architecture with different database engines (10%).

In addition to the above description, the record also contains the petitioner's letters dated March 31, 2007 and August 2, 2007, respectively, a job description, and the petitioner's job posting, all of which contain only general information regarding the proffered position. It is also noted that, although the record contains a copy of an appointment letter dated January 25, 2005 from Velankani Software Private Limited, located in Bangalore, India, confirming the hiring of the beneficiary as a "Module Leader," the record does not contain an employment agreement between the petitioner and the beneficiary. As the petitioner is a software development and consulting company and engaged in an industry that typically outsources its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director's specific request for these documents, the petitioner failed to comply.

Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

As mentioned above, to determine whether a particular job qualifies as a specialty occupation, USCIS does not 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 the factors to be considered. USCIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384, 387-388 (5th Cir. 2000). 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.

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.* 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.*

In this matter, despite the director’s specific request for documentation to establish the ultimate location of the beneficiary’s employment, the petitioner failed to comply. Moreover, the petitioner’s failure to provide evidence of a credible offer of employment and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

Beyond the decision of the director, it is noted that the petitioner has not established that: (1) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); or (3) it submitted a valid LCA for all locations. For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For the reasons set forth above, even if a bona fide offer of employment was found to exist, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation.

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.