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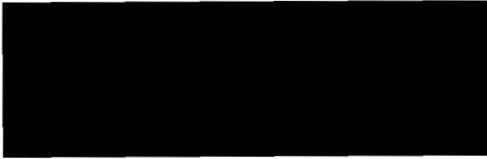
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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SEP 23 2009

FILE: EAC 07 228 53224 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in IT consulting and development, that it was established in 2004, employs 82 persons, and has an estimated gross annual income of \$3,200,000 and an estimated net annual income of \$177,376. It seeks to employ the beneficiary as a programmer analyst from July 11, 2007 to July 11, 2010. Accordingly, the petitioner 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 May 27, 2008, the director denied the petition, determining that the petitioner failed to file a Form ETA 9035E, Labor Condition Application (LCA) for the area in which the beneficiary would perform work that had been certified prior to filing the Form I-129, Petition for a Nonimmigrant Worker.

On appeal, the petitioner submits a statement and an LCA certified by the Department of Labor on June 11, 2008, for the Alpharetta, Georgia area.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on July 27, 2007; (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 and the petitioner's brief and 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 its July 11, 2007 letter appended to the petition that it was founded "with the objective of providing top quality services in software engineering, systems design and development, system integration, web development, e-commerce, Internet solutions, and technical support." The petitioner listed a number of clients and noted that the proffered position of programmer analyst is highly complex and professional in nature. The petitioner listed the duties of the proffered position as:

- System Analysis and Design – 40% (16 hours a week)
- Write code and Develop programs – 40% (16 hours per week)
- Unit and System Testing and attending meetings – 20% (8 hours per week)

The petitioner also noted that the beneficiary would be working in PL/SQL, MySQL, MS Access, Oracle 8.i databases, would work in the Java, C#, COBOL, .Net languages and would use Visual C++, Visual Basic GUI and would use .Net, J2EE, J2ME, Adobe Photoshop, Apache, Tomcat, IIS 6 tools and packages. The petitioner also provided an LCA for the Tampa, Florida area that had been certified by the Department of Labor on July 11, 2007.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 19, 2008. In the request, among other things, the director: noted that the petitioner had provided a broad description of the beneficiary's proposed duties and asked that the petitioner clarify the beneficiary's duties and for whom the beneficiary would perform the proposed duties; requested that the petitioner provide a detailed itinerary with contracts to show for whom and where the beneficiary would work for the requested employment period; requested evidence establishing that the client for whom the beneficiary would work would include qualifying employment; and requested a detailed description of the duties the beneficiary would perform along with evidence to substantiate that the performance of the duties requires a bachelor's degree.

In a response dated March 10, 2008, the petitioner noted that it had offices in Tampa, Florida and Alpharetta, Georgia and that it provided professionals and services to Fortune 500 companies. The petitioner listed a number of its clients. The petitioner indicated that the beneficiary would telecommute from its office located in Lutz, Florida while working "for B2B workforce's client IBM" and would work at the petitioner's offices in Alpharetta, Georgia after finishing work with the client.

The petitioner also included a job description listing the beneficiary's proposed duties as:

- Interacting with Business Analysts to understand the Business requirements, and converting them into code.
- Understand the functional requirements to generate technical specs. And code according to requirements[.]
- Created database objects like tables, views, indexes, sequences and triggers.
- Used Sql Loader to load the data into staging tables, the data is sent from the Siebel Database as delimited flat files.
- Worked extensively on loading the staging tables from different file formats using Sql Loader and external tables.
- Created PL/SQL packages, procedures and functions in accord[ance with] converting Business logic into code.
- Written Korn Shell Scripts.
- Used Capture, Staging and Propagation methodology for Oracle Streams using the Advanced Queues.
- Participated in Technical Spec reviews, Code reviews.
- Coordinated with the team to resolve issues.
- Involved in end-to-end testing.
- Coordinated with team during Integrated System Testing and resolve issues.

The record also includes a July 12, 2007 contract between the petitioner and B2B Workforce (B2B), located in Alpharetta, Georgia, wherein the petitioner retained the services of B2B to act as a brokering agent for the petitioner to provide services to B2B's clients. An attachment to the contract, Exhibit "A" identified the beneficiary as the individual to be assigned to perform work under the contract, indicated the estimated duration of the assignment would be 15 months, and listed the work to be performed as "Oracle Admin Business Analyst."

On May 27, 2008, the director denied the petition. As noted above, the director found that the certified LCA in the file did not include the beneficiary's proposed work location in Alpharetta, Georgia. Based on the petitioner's representation that the beneficiary would work in Alpharetta, Georgia and the failure to file a certified LCA for this work location, the director denied the petition.

On appeal, the petitioner submits an LCA for the Alpharetta, Georgia work location that was certified by the Department of Labor on June 11, 2008, a date that is almost one year after the Form I-129 petition was filed on July 27, 2007.

However, the Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). The AAO concurs with the director's decision that the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) by not submitting a certified LCA for the beneficiary's proposed work location when the petition was filed.

Beyond the decision of the director, the AAO finds of greater importance, the petitioner's failure to establish that the proffered position is a specialty occupation. 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. Therefore, the AAO will specifically review 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 observes that the issue is whether the petitioner has established that the beneficiary's actual duties for the ultimate user of the beneficiary's services comprise the duties of a specialty occupation.

The AAO notes that the petitioner indicated in its June 11, 2008 statement on appeal that: "[i]rrespective of client needs we keep the employees on our payroll and we keep them [in] reserve at our office and guest house [and] then send them to clients['] places based the [sic] on the client's requirements." The petitioner also stated: "[w]e pay our employees all the time 365 days in [the] year whether they work at [the] client site or stay at home" and "[w]e have contracts in place with employees." The petitioner further stated: "CLIENT's MAY COME and Go But We are here to pay employees every two weeks irrespective of the client jobs." The AAO observes that the petitioner does not provide a detailed description of the beneficiary's proposed work from the ultimate end user of the beneficiary's services and does not provide evidence that it has specialty occupation work for the beneficiary to perform for the requested employment period.

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), 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.

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 submitted an overview of the beneficiary’s proposed duties in response to the director’s RFE. The petitioner did not provide a comprehensive description of the duties the beneficiary would perform for the ultimate end user of the beneficiary’s services or the underlying statements or contracts that would support a detailed description of the beneficiary’s proposed duties. The only information in the record regarding the beneficiary’s assignment is the Exhibit “A” to the July 12, 2007 contract indicating that the beneficiary would perform work as or in conjunction with an “Oracle Admin Business Analyst.” In addition, this work is for a limited duration and does not include the total requested employment period. The AAO notes that despite the director’s specific request that the petitioner provide a detailed itinerary with contracts to show for whom and

where the beneficiary would work for the requested employment period and a detailed description of the duties the beneficiary would perform along with evidence to substantiate that the performance of the duties required a bachelor's degree, the petitioner failed to comply. 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). 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).

Without a comprehensive description of the beneficiary's actual duties from the ultimate end user of the beneficiary's services and the evidence supporting such a position exists for the entire requested employment period, the petitioner has not established that the proffered position is a specialty occupation. To reiterate, the record in this matter is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the project(s) the beneficiary will work on for the duration of the requested employment period, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties from the ultimate end user of the beneficiary's services, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, 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. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 this matter, the record demonstrates that the petitioner acts as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various client worksites when contracts are executed. The petitioner has not provided substantive evidence of in-house projects to which the beneficiary would be assigned or a description of the work the beneficiary would perform in-house. The petitioner's failure to provide work orders or employment contracts between the petitioner and its clients and its client's clients throughout the requested employment period renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, is unable to 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)(A)(iii) or that the beneficiary would perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

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).

The petition will be denied and the appeal dismissed for the above stated reason. 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.