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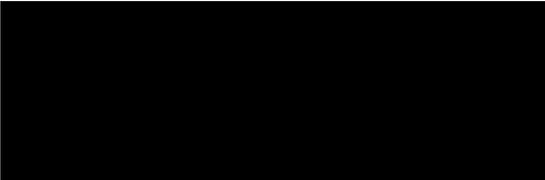
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 08 136 51414

Office: VERMONT SERVICE CENTER

Date: **APR 05 2010**

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)

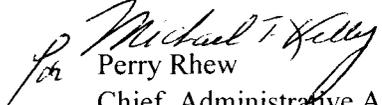
ON BEHALF OF PETITIONER:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a company that engages in software training, development and consulting services that seeks to employ the beneficiary as a programmer 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 on the ground that the record failed to establish that the beneficiary will be employed in a specialty occupation.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition, the petitioner described itself as a company located in Clearwater, FL that engages in software training, development and consulting services with 245 employees and a gross annual income of \$18 million. The petitioner indicated that it wished to continue to employ the beneficiary as a programmer analyst from April 8, 2008 through April 7, 2011, at an annual salary of \$58,000.

The duties of the position were described as follows in the support letter the petitioner submitted with the H-1B extension petition on behalf of the beneficiary:

- Analyzing the communications, informational and programming requirements of clients [p]lanning, developing and designing business programs and computer systems;
- Designing, programming and implementing software applications and packages customized to meet specific client needs;
- Reviewing, repairing and modifying software programs to ensure technical accuracy and [r]liability of programs;
- Training of clients on the use of [s]oftware applications and providing trouble shooting and debugging support.

The Labor Condition Application (LCA) was filed for the beneficiary to work as a programmer analyst in Minneapolis, MN and lists a prevailing wage of \$57,886. The LCA submitted by the petitioner covers the validity dates requested by the petitioner in the Form I-129 request for H-1B extension on behalf of the beneficiary. The petitioner did not explain the reason for assigning the beneficiary to Minneapolis, MN in the supporting documents submitted with the petition.

In his RFE, the director indicated that the petitioner appears to be a contractor intending to employ the beneficiary in more than one location. The petitioner was advised to submit an itinerary of definite employment as well as copies of its contractual agreements with companies for which the beneficiary would

be providing consulting services, listing the beneficiary by name. The director also requested a detailed statement of the beneficiary's proposed duties as well as additional evidence establishing that the proffered position is a specialty occupation. In addition, the director requested documentation evidencing that the petitioner has sufficient work and resources available to employ the beneficiary.

In response to the RFE, the petitioner submitted copies of a Professional Services Agreement (PSA) between the petitioner and a company called [REDACTED] located in Mahwah, NJ, along with a work order listing the beneficiary by name and an itinerary. The PSA, signed on January 17, 2008, indicates that [REDACTED] will utilize the services of the petitioner in order to fulfill PSAs with other third-party clients of [REDACTED]. In other words, [REDACTED] contracted for the petitioner to provide workers to third-party client sites. The PSA between the petitioner and [REDACTED] expired automatically on January 16, 2009.

The work order provided by the petitioner in response to the RFE is dated April 7, 2008 and indicates that the beneficiary will work at an address in Minneapolis, MN through April 30, 2010, with an option to renew for 180 days. The work order does not provide the name of [REDACTED] client at this address, nor does it give a description of the project for which the beneficiary's services are required or a justification as to why the beneficiary's services are required. All it states is that the beneficiary will: "Develop Web services using ASP Net, Implement Web services, Coding ASPX files and code behind files using ASP .NET and C#." These duties, as compared to the duties provided in the position description submitted with the petition, are different as they entail developing web services rather than software programs. In the statement articulating the beneficiary's duties provided by the petitioner in response to the RFE, the petitioner reiterated the duty description provided in the support letter submitted with the petition, without responding to the RFE's request for a more detailed description of the proposed duties and additional evidence establishing the proffered position is a specialty occupation.

The itinerary provided by the petitioner in response to the RFE states, "At present we have identified the need for the professional services of some programmer's/Analyst's [sic] for one of *our* projects we do for [REDACTED]. . . We have made necessary arrangements in having him report to *our* clients [sic] work location at [REDACTED] (Emphasis added.) These statements contradict the wording of the contract that the petitioner has with [REDACTED] which indicates that the petitioner will be providing services to [REDACTED] on behalf of [REDACTED] clients, not the petitioner's clients. Additionally, as discussed above, the petitioner does not explain to which third-party company the beneficiary will be assigned or the project to be worked on for that company that justifies the performance of duties in a specialty occupation. No contract between either the petitioner or [REDACTED] and the third-party client in Minneapolis, MN was provided.

The petitioner's brief on appeal states, in part, that the petitioner "will be the direct employer of [the beneficiary] even when she [sic] is assigned to work at a client site," that the petitioner has "successfully designed, developed and deployed several applications for well-respected clients," and that "many projects have been effectively developed off-site from our clients at our Software Development Center." The brief also states:

In deciding on whether to assign an employee to an in-house project or a client project, priority is given to in-house and on site projects. We hire our employees based upon our

business projection and forecast. When individuals join our company, they begin work either for in-house or on site projects. This provides them with familiarity with our systems, procedures, policies, and culture. At an appropriate future date, as needed, the individuals are scheduled to work on a client project. At the end of a client project, the employees are either [sic] scheduled to work on an in-house based upon the needs at that time. . . .

[A]t any given time, we always have some consultants working on those projects. Such is the situation in underlying case. Thereafter when it decided to send the beneficiary to another client site, it will file a new LCA and amended H-1B petition.

* * *

[W]hile some employees, such as the beneficiary, may perform part of their programming and software development duties at client sites, the petitioner is the only actual employer. Whether the employee is designing and developing computer applications at our Headquarters or implementing the project at a client site, we retain complete control over all employees. . . .

Therefore, according to the petitioner's statements on appeal, the beneficiary will be assigned to various client sites in addition to working at the petitioner's offices. This does not correspond with the information provided in the Form I-129 and the LCA, which indicate that the beneficiary's work will be performed at only one address, in Minneapolis, Minnesota.¹

The AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

¹ The Personal Services Agreement (PSA) and Work Order submitted in response to the RFE indicate that, at the Minneapolis location, the beneficiary will perform such work as determined by a work order submitted to the firm [REDACTED] by a client of [REDACTED] that is not identified in the record.

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 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.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a programmer/analyst.

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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

No documentation was submitted with respect to the third-party client that would have been probative in determining whether actual performance of the proffered position would require the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty, in accordance with the statutory and regulatory requirements for an H-1B specialty occupation. For example, such evidence might have included a copy of the contract with the third-party client and a detailed description of the project to be performed for the third-party client that explains why the proffered position is required at the third-party client site. 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)).

The LCA and itinerary document submitted by the petitioner indicate that the beneficiary will be assigned to a third-party client site – to perform work for an unnamed client of [REDACTED] - in Minneapolis, MN for approximately 18 months, while the related work order states that the beneficiary will be assigned there for two years (though this proffered employment is based on a PSA that expires nine months after the proposed start date of the beneficiary’s employment). However, on appeal, the petitioner states that the beneficiary will be working at its offices or at various client sites. These contradictory statements made by the petitioner as well as the absence of a contract with the third-party client in Minneapolis, MN that covers the entire period of proposed employment precludes the AAO from determining at which location, for what period of time, and on what project the beneficiary will work. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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 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 proceeding lacks such substantive evidence from any end-user entity that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on

a day-to-day basis. In short, 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 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's 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.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third-party client, the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis established by the Court in *Defensor* - which is appropriate in an H-1B context like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services- USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Beyond the decision of the director, the AAO also finds that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the 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:

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 or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being at a third-party client site in Minneapolis, MN, do not correspond with the contract provided by the petitioner, which was only valid for nine months beyond the proposed start date of the petition, or the statements by the petitioner on appeal that the beneficiary will perform duties at the petitioner's offices or at various client sites. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot ascertain that this LCA actually supports the H-1B petition. 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).

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

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(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 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.