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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**

[Redacted]

D2.

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **DEC 01 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
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 stated on the Form I-129 visa petition that it is a contract engineering firm. To employ the beneficiary in a position it designates as a senior piping designer, the petitioner endeavors to classify him 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish (1) that the petitioner will employ the beneficiary in a specialty occupation position and (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed. The director also found (3) that the petitioner had failed to provide required initial evidence, specifically, the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the independent grounds that he cited in his decision. While fully affirming the director's decision, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status is the first eligibility requirement that must be established and, without which, the remaining issues in this proceeding become moot. The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely 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 U.S. 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 alien will likely perform for the entity or entities ultimately determining the work's content.

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.

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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.

The LCA submitted to support the visa petition was certified for Houston, Texas. The petitioner’s address as stated on the LCA is [REDACTED]. On the Form I-129 visa petition the petitioner stated that the beneficiary would work at [REDACTED]. In Part 1 of that visa petition the petitioner listed counsel’s address as its own.

With the petition counsel provided a letter, dated August 5, 2008, from the petitioner’s president. That letter states that the beneficiary would provide services to the [REDACTED]. Although that letter contains a description of the ostensible duties of the proffered position, the AAO observes that the description was provided by the petitioner, rather than the end-user of the beneficiary’s services.

On March 25, 2009 the service center issued an RFE in this matter. That request noted that the petitioner indicated that the beneficiary would provide services to [REDACTED] and asked that the petitioner provide, *inter alia*, (1) a copy of the contract with the end-user for the beneficiary’s services addressing the specific duties of the beneficiary, and (2) evidence of the end-user’s requirements for the proffered position. The service center also requested that, if the beneficiary would work at multiple sites, the petitioner provide LCAs covering all of those sites.

In response, counsel provided an undated, unsigned Job Order; a Supplier Agreement; a letter from [REDACTED] and a letter from [REDACTED], a South Carolina Corporation.

¹ The president’s August 5, 2008 letter actually states that the beneficiary will provide services to the [REDACTED]. Based on subsequent submissions, however, the AAO believes that to have been a typographical error.

The undated, unsigned Job Order, on a form provided by [REDACTED] indicates that [REDACTED] wanted [REDACTED] to provide it with five principal/senior piping designers. That request describes the duties of the position as follows:

Be able to develop a plant, area or unit plot plan; responsible for development of any piping layout; responsible for development of any vessel orientation; supervise development of design model; responsible for checking of piping plan and isometric drawings; recognize and report problems on flow sheet; solve flexibility problems not requiring computer application; coordinate with other disciplines to insure compatibility of design; and travel, as required to assure successful execution of project & dept. goals.

*Responsible for understanding the entire Code of Conduct and complying with its requirements

*Other duties as assigned

The request indicated the duration of the job would be “approximately 36+ months” and that those who worked pursuant to that order would be “Based at the [REDACTED]” Whether all of the work would be performed there was not stated.

In the Supplier Agreement, which is dated January 24, 2007, the petitioner agreed to provide personnel to [REDACTED] to provide, in turn, “for specific assignment to [REDACTED] clients . . . on an as-needed basis.”

The letter from [REDACTED] which is dated September 4, 2007, states that [REDACTED] was then in the process of obtaining professional personnel from the petitioner, through [REDACTED]. It states that [REDACTED] address is [REDACTED]

The letter from [REDACTED] is dated April 23, 2009, and states that [REDACTED] is a wholly-owned subsidiary of the [REDACTED] Corporation. It further states that, although [REDACTED] provides personnel to other companies, [REDACTED] does not place any [of the petitioner’s] contractors with anyone other than [REDACTED]

In his own May 6, 2009 letter, counsel stated, “The Senior Piping Designer position as listed on the [undated, unsigned] job order meet [sic] the standards of 8 C.F.R. § 214.2(h)(4)(iii)(A) for an H-1B specialty occupation.”

The director denied the visa petition on May 12, 2009 for the reasons enumerated above. On appeal counsel asserted that no description of the duties of the proffered position is necessary, because a senior piping engineer is inherently a specialty occupation. Counsel further asserted that, as a previous petition was approved, the proffered position has already been determined to be a specialty occupation. He also asserted that, for the petitioner to provide the documents specified in the request for evidence, the beneficiary would necessarily need to be working for [REDACTED] already. Yet further, counsel asserted that, as the evidence demonstrates that the beneficiary would work for [REDACTED] for the entire period requested on the visa application, no further itinerary was necessary.

What evidence may have been provided with the previously approved petition is unknown to the AAO, but, in any event, a prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). The director's decision does not indicate whether he reviewed the prior approval. If the previous nonimmigrant petition was approved based on the same evidence contained in the current record, however, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In any event, whether the beneficiary would be working for [REDACTED] at its offices, or working for [REDACTED] at other companies' locations, or working for the other companies directly, the petitioner would apparently not be assigning the beneficiary's duties itself. The petitioner is obliged, therefore, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of the end-user of the beneficiary's services. Counsel asserted that this is impossible unless the beneficiary is already working for that end-user. The reasoning behind that assertion escapes the AAO. In any event, the petitioner has failed to provide documentary evidence establishing the nature and educational requirements of whatever specific work the beneficiary would perform for [REDACTED].

The petitioner was obliged to provide evidence from this claimed end-user showing (1) that it intends to employ the beneficiary, and (2) that the beneficiary would be performing duties that would constitute employment in a specialty occupation.² The service center requested that evidence, which should, actually, have been initially provided with the visa petition, and the petitioner failed to provide it.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require

² The director also requested that the petitioner demonstrate that the end user of the beneficiary's services requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position. The only evidence that the petitioner provided is the Job Order that states that Fluor requires "Bachelors Degree / 10+ years of applicable design experience (petrochemical/refinery). Even if [REDACTED] were demonstrated to be the end user of the beneficiary's services, that statement would only demonstrate that the petitioner requires a minimum of a bachelor's degree or the equivalent in a specific specialty if one accepts that "10+ years" of experience is equivalent to a bachelor's degree. However, because the instant case is so ripe with issues, each of which is individually sufficient to dismiss the appeal and to deny the visa petition, the AAO will not rely on that additional basis in today's decision.

a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

Counsel asserted that *Defensor* is inapplicable here, as the job title demonstrates that the position is in a specialty occupation. The AAO does not agree. As was noted above, to determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely on the job title. The petitioner's failure to establish, by a statement from a company that the petitioner can demonstrate would be the end-user of the beneficiary's services, 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. Thus, the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation. The appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition" In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Houston, Texas. The Form I-129 specifies that the beneficiary would work at the petitioner's offices in Sugar Land, Texas. Other evidence indicates that the beneficiary would work at [REDACTED] location in Sugar Land, Texas. It appears that both specified locations are encompassed by the Houston, Texas location specified in the approved LCA. That the position requires travel suggests that some unquantified portion of the duties of the proffered position would be performed at some remote location. In this regard, the AAO notes in particular that the September 4, 2007 letter from [REDACTED] states that it is using the petitioner, through [REDACTED], "in the process of supporting the staffing of qualified resources in Venezuela," and that, in the absence of documentary evidence from [REDACTED] establishing exactly what duties the beneficiary would perform and where, the petitioner has not demonstrated that the LCA provided corresponds with and can be used to support the instant visa petition. The appeal will be dismissed and the petition denied on this additional basis.

The final basis for the director's decision of denial was the asserted failure of the petitioner to provide an itinerary of the places where the beneficiary would work and his duties at that location. The petitioner now claims that the beneficiary would work exclusively at the location of [REDACTED], and provided an undated, unsigned job order to demonstrate that [REDACTED] at one point needed Principal/Senior Piping Designers for "approximately 36+ months." However, the assertion of the petitioner on the LCA that the beneficiary would work in Houston, the assertion on the visa petition that the beneficiary would work at the petitioner's location, and the fact that the petitioner's January 24, 2007 agreement with [REDACTED] provides for assignment of the petitioner's workers to end-users to be determined later, taken together, suggest that, contrary to the petitioner's current assertion, the number of end-users for whom the beneficiary would work, and the locations where the beneficiary would work, is unsettled. The petitioner has not, therefore, provided the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B). The appeal will be dismissed and the petition denied for this additional reason.

The record suggests an issue that was not addressed in the decision of denial. The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf." Nothing in the instant case suggests that the petitioner filed the visa petition as an agent. The issue is narrowed, therefore, to whether the petitioner qualifies as a U.S. employer.

"United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

To qualify as a United States employer, a petitioner must satisfy all three of the criteria at 8 C.F.R. § 214.2(h)(4)(ii). Further, the petitioner must satisfy the criteria at the time that the petition is filed. This is obvious in the plain reading of 8 C.F.R. § 214.2(h)(2)(i)(A). 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)(1).

The petitioner's current assertion is that the beneficiary would work exclusively for [REDACTED] own location. Evidence, however, suggests that the actual place of employment would be more distant, and the beneficiary's contact with the petitioner more attenuated. In either event, although counsel asserted that the petitioner would be the beneficiary's employer, the nature of the arrangement counsel now describes, and the nature of the arrangement implied by the evidence, both suggest that the petitioner would not be controlling or supervising the beneficiary's work. The AAO therefore finds that the petitioner would not, in fact, be the beneficiary's employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) pursuant to the scenario now claimed. The AAO further finds that the petitioner does not appear, and does not claim, to be filing as an agent pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F). The petitioner has not demonstrated that it has standing to file a visa petition for the beneficiary. The appeal will be dismissed and the petition will be denied for this additional 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. The appeal will be dismissed and the petition denied.

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