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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D₂

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 29 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of a Programmer Analyst as an H-1B nonimmigrant in a specialty occupation pursuant to § 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 petitioner is a computer programming and software development firm.

The petition was denied on two grounds: 1) the beneficiary is ineligible to continue previously approved employment without change with the same employer; and 2) the beneficiary does not qualify for an exemption from the general Fiscal Year 2008 (FY08) H-1B cap.¹

The petitioner had initially filed an H-1B petition and request for extension on behalf of the beneficiary that was approved with validity dates of May 2, 2005 to April 10, 2008. USCIS records indicate that this petition was revoked on July 11, 2006. The beneficiary also previously held H-1B status with a different petitioner through a petition that was valid from January 31, 2004 to December 15, 2006.

According to counsel's brief on appeal, the petitioner's prior H-1B petition was revoked when the petitioner withdrew the petition because of the beneficiary's departure from the United States in 2006. However, the petitioner filed the present petition because the petitioner wishes to again employ the beneficiary.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B, with counsel's brief and supporting documentation.

The AAO will first examine, as counsel asserts, whether the beneficiary is eligible to continue previously approved employment without change with the same employer even though the petitioner's prior petition was revoked. Counsel argues that because the petitioner only intended to notify the service of the beneficiary's departure from the United States, and not to revoke the petition, USCIS should not consider the first petition to be revoked. As evidence of the circumstances regarding the withdrawal of the petitioner's prior petition are not part of the record of proceeding, the AAO has insufficient information to discern the reason behind the revocation. However, USCIS records are clear that the prior H-1B petition filed by the petitioner on behalf of the beneficiary was automatically revoked as of July 11, 2006. This automatic revocation is not subject to appeal. *See* 8 C.F.R. §§ 214.2(h)(11)(ii) and (12)(ii). Therefore, the present petition extension is not legally permissible since the approval of the beneficiary's H-1B

¹ It is noted that, while the director consistently referenced the Fiscal Year 2009 (FY09) H-1B cap, it is clear that the applicable fiscal year is FY08, not FY09, given the petitioner's requested start date of April 11, 2008. This error by the director is deemed harmless, however, as the FY08 H-1B had likewise already been reached as of the filing date of the instant petition, *infra*. The AAO will hereby correct this error and only refer to the FY08 H-1B cap for the remainder of this decision.

classification ceased to exist by automatic revocation on July 11, 2006. Since the validity of the H-1B petition ceased as of July 11, 2006, there was no petition to extend, and the petitioner improperly requested that the previously approved employment be continued without change with the same employer. Title 8 C.F.R. § 214.2(h)(14) specifically states that “[a] request for a petition extension may be filed only if the validity of the original petition has not expired.” Here, as the validity of the automatically revoked petition ended on July 11, 2006 and as the petition extension was not filed until April 10, 2008, the requested petition extension may not be approved. The director’s basis for denial on this ground will therefore be affirmed.

Next, the AAO will consider whether the beneficiary qualifies for an exemption from the general FY08 H-1B cap.

As of April 2, 2007, U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the general H-1B cap for FY08, which covers employment dates starting on October 1, 2007 through September 30, 2008. In general, H-1B visas are numerically capped by statute. Pursuant to § 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. On the Form I-129, the petitioner requested a starting employment date of April 11, 2008. Because the petitioner indicated on the Form I-129 that the beneficiary had previously been in H-1B status, the petition was not initially rejected, even though the petition was filed on April 10, 2008.

On appeal, counsel argues that the director's decision was erroneous, and contends that because the beneficiary did not exhaust his maximum period of stay (six years) in H-1B status, he should be accorded H-1B status, even though the beneficiary left the United States for more than one year prior to filing this petition.

Counsel relies on a policy memorandum dated December 5, 2006 by Michael Aytes, Associate Director of Domestic Operations, entitled *Guidance on Determining Periods of Adjustment for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission Beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year* (hereinafter “Aytes Memo”). Specifically, counsel notes the following excerpt on appeal:

There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the “remainder” of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the remainder of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a “new” H-1B alien subject to the H-1B cap.

With respect to the Aytes memo, unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS as a matter of law. See 8 C.F.R. §

103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Service (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law").

Moreover, the Aytes memo states that:

The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, I-797 Approval notices and/or H-1B visa stamps.

The petitioner failed to provide copies of the beneficiary's Form I-94 arrival-departure records and/or passport and H-1B visa stamps to demonstrate the periods of time the beneficiary spent in the United States in H-1B status or to confirm the date the beneficiary most recently left the United States. Therefore, the petitioner failed to meet the burden of proof discussed in the Aytes memo. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regardless, the Aytes memo must not be interpreted as countermanding or contradicting section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), which provides in relevant part (emphasis added):

Any alien who has already been counted, within the six years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations *unless the alien would be eligible for a full six years of authorized admission at the time the petition was filed.*

Under the plain language of Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), this exemption to being H-1B cap-subject applies only if the beneficiary was not eligible for a full six years of authorized admission at the time the petition was filed. Even if counsel had provided supporting evidence to demonstrate that the beneficiary has been out of the United States since July 12, 2006, thereby demonstrating that the beneficiary was eligible for a full six years of authorized admission

at the time the petition was filed, the beneficiary would, therefore, not be exempt from the H-1B cap under section 214(g)(7) of the Act. Consequently, the AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7).

Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner failed to demonstrate that 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 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.

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 finds 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.

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.

According to the petitioner’s support letter, dated April 9, 2008, the petitioner’s employees “[m]ay perform part of their programming and software development at client sites” Additionally, “[i]t is estimated that a minimum of 75% of the Beneficiary’s time will be spent in performing user requirement analysis and [r]eporting and the remainder of the Beneficiary’s time will be spent in back end programming. . . .” Also, based on the description of the position’s duties, 20% of the beneficiary’s time will be spent consulting with clients. However, insufficient

evidence was provided with respect to the client(s) or the specific project(s) on which the beneficiary would allegedly work 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 copies of the contracts with the clients and a detailed description of the project to be performed as well as an explanation of how much work will be performed at the client site and the location of the worksite. 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 AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387-388, 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. *Id.* 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. *Id.* 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 - the AAO finds 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 conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 director's decision is affirmed. The petition is denied.