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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 144 50842

Office: CALIFORNIA SERVICE CENTER

Date: FEB 01 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 is an information technology services and consulting company. It seeks to employ the beneficiary as a quality assurance engineer and to classify her 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 grounds that the record failed to establish: that the proffered position is a specialty occupation; that the LCA is valid for all work locations; that the petitioner does not qualify as either an employer or agent and therefore is not qualified to file H-1B petitions; and that the beneficiary is qualified to perform the duties of 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 an information technology services and consulting company. The petitioner indicated that it wished to employ the beneficiary as a quality assurance engineer from October 1, 2008 through October 1, 2011, at an hourly wage of \$27.27.

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

Will be responsible for interacting with developers to analyze the user requirements, functional specifications to understand product and its features. Perform object oriented analysis, design and development of software for client server platforms using computer skills. Analyzing users' data, general modes of operation, existing operation procedures, and problems and devising methods and approaches to meet the users' need based upon knowledge of supply chain management, products, operation research, data processing techniques, management information, and statistical, audit, and control systems. The position involves extensive use of modern computer languages such as C/C++, Visual Basic, Matlab, and high-end databases. The incumbent creates new solutions and algorithms to manage and implement those solutions.

The Labor Condition Application (LCA) was filed for a quality assurance engineer to work in Fremont, CA, and lists a prevailing wage of \$27.27 per hour. The LCA also lists an additional work location, Sunnyvale, CA, at a prevailing wage of \$23.38 per hour. The LCA submitted by the petitioner is valid from September 18, 2008 to September 18, 2011.

With respect to the proposed worksite where the beneficiary will be assigned, the support letter does not provide this information, but the Form I-129 and LCA indicate that the beneficiary will work either at the

petitioner's offices in Fremont, CA or at another location in Sunnyvale, CA (the petitioner does not explain why it has listed a location in Sunnyvale, CA on the LCA).

The petitioner also submitted a copy of a work order on the petitioner's letterhead, dated March 20, 2008, which lists the beneficiary by name. The work order states that the beneficiary will work as a quality assurance engineer pursuant to the services agreement between the petitioner and another company called Trianz starting January 22, 2008, for 18 months (which would be through July 22, 2009), with the possibility of an extension. This work order is signed by the petitioner only and is not signed by Trianz. The work order does not state at what address the beneficiary would be assigned.

The petitioner provided copies of the beneficiary's degrees and transcripts, which indicate that the beneficiary has a Master of Engineering (Agricultural and Biological) from Cornell University in the United States.

In her RFE issued on August 18, 2008, the director indicated that the evidence was insufficient to establish that a specialty occupation exists for the beneficiary and that there was a bona fide job offer at the time of filing. The director also indicated that the beneficiary's educational credentials do not appear to be related to the proposed specialty occupation. The petitioner was advised to submit an itinerary of definite employment, listing the organization(s) and location(s) where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that "the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed." Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client."

In response to the RFE, the petitioner submitted an itinerary of employment for the beneficiary listing six different assignments the beneficiary would allegedly perform between October 1, 2008 and March 30, 2010. The itinerary provides the duties the beneficiary would perform on each assignment, although it does not list the projects that require the performance of these duties. With respect to the proposed worksite(s), the itinerary provides conflicting information. On the one hand, the itinerary states that the beneficiary will work at the petitioner's offices in Fremont, CA for all of these assignments through March 30, 2010. On the other hand, the petitioner states as follows with respect to the beneficiary's proposed job duties: "Assist Business Users in conducting User Acceptance Testing of the application **on site** as well as remote assistance during implementation." (Emphasis added.)

The petitioner did not submit any copies of contracts with Trianz or any other third party clients either with the initial petition or in response to the RFE, despite the director's specific request for this documentation, nor did the petitioner provide any justification either in response to the RFE or on appeal as to why this documentation was not provided. Moreover, despite the petitioner's claim that the beneficiary will be assigned to work at the petitioner's offices, the work order stated that the beneficiary would be assigned to work on a project for a third party client, the LCA listed yet another worksite location heretofore

unexplained, and the petitioner's response to the RFE stated that the beneficiary would perform duties for business users on site, although it is not explained at what locations. These inconsistencies make it impossible to determine where and for which entity the beneficiary will perform the proposed duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

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 her services, and therefore whether her services would actually be those of a quality assurance engineer.

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 that will determine the duties 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.

On appeal, counsel for the petitioner claims that the beneficiary will be working in-house at the petitioner’s offices. However, in its response to the RFE and in support of the appeal, the petitioner does not provide any information about what projects the beneficiary will work on requiring the performance of the proposed duties or copies of contracts with client orders for work to be done that covers the period of employment requested in the petition. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

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 proceedings lacks such substantive evidence from any end-user entities 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.

The petitioner is seeking the beneficiary's services as a quality assurance engineer. Counsel argues in his appeal brief that the position of quality assurance engineer is always a specialty occupation. In this matter, however, the AAO need not address the issue of whether the position of quality assurance engineer is always a specialty occupation, because the issue that must be addressed first is whether sufficient evidence was provided that demonstrates whether the work to be completed by the beneficiary entails the performance of duties that correspond with the description of a quality assurance engineer. As the record does not contain sufficient evidence with respect to the projects to which the beneficiary would be assigned for the petitioner's client(s), the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a quality assurance engineer. 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.

Next, the AAO agrees with the director that USCIS is unable to determine whether the petitioner has submitted a valid LCA covering all the locations where the beneficiary will be employed. The LCA and

Form I-129, which list the proffered position's locations as being either at the petitioner's offices in Fremont, CA or at another worksite in Sunnyvale, CA, do not correspond with the work order provided by the petitioner stating that the beneficiary will work at the location of another company, Trianz, which will then likely place the beneficiary at other, multiple worksites. If the petitioner does not yet know where the beneficiary will perform the work, it cannot be found that a valid and certified LCA has been submitted by the petitioner for the geographical area(s) where the beneficiary will ultimately be employed. As such, the petitioner cannot establish that it has complied or will comply with the requirements of § 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), as of the time the petition was filed. The 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). For this additional reason, the petition cannot be approved.

Third, the AAO will address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. As the director notes in her denial, issued October 7, 2008, by not submitting any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition, the petitioner has not established who has actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As discussed above, there are no contracts stating where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

Finally, the AAO will consider the director's decision that the beneficiary is not qualified to perform the duties of the specialty occupation. For the first time on appeal, in support of its argument that the beneficiary is qualified to perform the duties of the proffered position, the petitioner provides a project plan, listing the beneficiary by name, for a software solution for modeling and data analysis designed for applications in bioengineering and biomedical engineering using finite element modeling and other mathematical and statistical tools. This project was not previously mentioned in the petition or in response to the RFE. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

However, in any event, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant

only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

The appeal will be dismissed and the petition denied 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.