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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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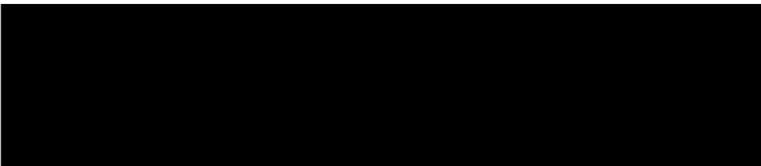
IN RE: Petitioner:
Beneficiary:



FEB 03 2010

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 in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 SAP services company. It seeks to employ the beneficiary as a computer software engineer (SAP systems) and 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 director denied the petition on the following grounds: (1) the petitioner does not qualify as a United States employer or agent; and (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form 1-129 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 petition submitted on September 11, 2008, the petitioner stated it has 28 employees and a gross annual income of \$5 million. The petitioner indicated that it wished to employ the beneficiary as a computer software engineer (SAP systems) from September 22, 2008 through September 22, 2011 at an annual salary of \$128,000.

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

Supervise and operate the organization's SAP Governance, Risk and Compliance (GRC) systems through implementation best practices. Installing, configuring, patching, upgrading, administering, and maintaining the company's SAP GRC systems. Responsible for planning and coordinating the change management of processes required for the support and maintenance of SAP GRC systems necessary for business operations. Participate, execute, and manage administration of the SAP GRC systems that extend the functionality or geographic use of the system in support of the business processes. Provide SAP GRC best practice guidance and solutions to business users, functional users and technical team members. Work effectively and efficiently with upper management. Leverage best practices in SAP GRC solution and service delivery. Ensure that SAP GRC technical activities maximize the use and adoption of standard SAP GRC solutions. Effectively work with service providers, determine implementation approaches and provide guidance to use SAP GRC best practices.

The petitioner describes the minimum degree requirements for the proffered position as follows:

In order to competently perform these duties, the Computer Software Engineer (SAP Systems) must have a Bachelors [sic] degree or higher in Computer Science,

Engineering, MIS or a related field. All employees working at the level of Computer Software Engineer (SAP Systems) in our company have a Bachelors [sic] degree or higher in Computer Science, Engineering, MIS or a related field. This experience level assures us that the Computer Software Engineer (SAP Systems) will have the working knowledge to function as resource for establishing strategic direction that will be faced on a daily basis on the job.

The submitted Labor Condition Application (LCA) was filed for a computer software engineer (SAP Systems) to work in Folsom, CA as well as Tualatin, OR and covers the period requested by the petitioner. The LCA lists a prevailing wage of \$83,470 for Folsom, CA and \$92,331 for Tualatin, OR.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter states that he will work "[a]t our facilities in Folsom, California and other client sites." The Form I-129 indicates that the beneficiary will work either at the petitioner's offices in Folsom, CA or at an address in Tualatin, OR. Part 3 of the Form I-129 also indicates that the beneficiary's current U.S. address is in Tualatin, OR.

The beneficiary's education documents and resume were submitted with the petition along with a credential evaluation that claims the beneficiary has the U.S. equivalent of a Bachelor of Science degree with a dual major in Management Information Systems and Business Administration, through a combination of education and experience. In addition, the evaluation found that the beneficiary has the U.S. equivalent of a Master of Business Administration degree through his education.

On December 29, 2008, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate whether the petitioner is the actual employer or acting as an agent, and whether a specialty occupation exists. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, which could include an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The petitioner was also advised to submit a more detailed description of the proffered position and additional evidence that the proffered position is a specialty occupation. The RFE specifically noted that "providing evidence of work to be performed for other consultants or employment agencies who provide consulting or employment services to other companies may not be sufficient. The evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed." The director also requested documentation evidencing the petitioner's business.

Counsel for the petitioner responded to the RFE, asserting that the petitioner is the actual employer of the beneficiary and that the proffered position is a specialty occupation. Among the documents counsel included were copies of the following:

- The section from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* on Computer Software Engineers;
- Job advertisements for Software Engineers from other companies;
- An offer letter from the petitioner to the beneficiary, which gives the beneficiary the title of "Senior

Consultant”;

- An Employment Agreement between the petitioner and the beneficiary stating that the beneficiary’s position is to serve as a “Senior Consultant” for the company;
- An Agreement to Protect Confidential Information between the petitioner and the beneficiary along with a Mutual Agreement to Arbitrate;
- A Statement of Work (SOW) between the petitioner and its client, NW Natural, which provides that the work is expected to be completed as of January 31, 2009 and that “[t]he program manager from [the petitioner] is not assigned 100% of the duration of the project but will assist in managing (along with the leads and Solution Architects) this engagement with the NWN Program Manager”;
- An Internal Addendum to Consultant, which states the beneficiary will work remotely from the petitioner’s corporate headquarters in Folsom, CA for its client and at the client site when needed (the client address is also listed as being in Folsom, CA); and
- Advertisements posted by the petitioner for a Computer Software Engineer (SAP Systems).

The letter from counsel in response to the RFE did not provide greater detail with respect to the position duties listed above, other than to provide a percentage breakdown for each (all were listed as being 15% of the beneficiary’s time, except for working with service providers, which would take 10% of the beneficiary’s time). The SOW between the petitioner and its client, which covers less than five months of the requested period of time in the petition and lists the project as being for SAP enhancements for resolving gaps, does not list the beneficiary by name. Moreover, it is not clear from the SOW what parts of the project would be performed by the beneficiary and what parts would be handled by the offshore developers or other functional consultants mentioned in the SOW. The generic and vague description of proposed duties provided by the petitioner does not indicate how these duties would be incorporated into the scope of the project or how they require specialized knowledge in their performance.

The Internal Addendum to the Consultant states that the beneficiary would be:

Working remotely from [the petitioner’s] corporate headquarters in Folsom, California for our client North West Natural and at client site when needed. Perform SAP MM, SD functional development services as assigned. Responsibilities include creating functional specifications, testing scenarios, training manuals, and conducting end user training in the areas of SAP MM, SD and Variant configuration.

This document is not signed or dated and states that the project duration would be for three years, which contradicts the SOW’s validity of less than five months. 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 director denied the petition on February 9, 2009. On appeal, counsel asserts that the petitioner maintains control of each employee whether or not that employee works at a client site. Counsel provides a chart of the petitioner’s reporting structure, which states that the petitioner’s consultants work directly for the petitioner and are managed by the Practice Director for their specialty. The chart also provides that the petitioner’s

Practice Directors manage all aspects of the consultants' employment, including Performance Management, Training and Development, and any assignment specific issues. The chart explains that if the client has any concerns, the client may not address the petitioner's consultant directly, but instead must contact the petitioner's Practice Director.

On appeal, Counsel also provides a copy of a new SOW between the petitioner and NW Natural, which extends the term of the project by only two weeks, to February 15, 2009.

Counsel also states on appeal, "[w]hen the beneficiary returns he is expected to work on an internal SAP project directly for [the petitioner]. The beneficiary's employment with [the petitioner] will continue until [the petitioner] has another suitable project for the beneficiary." Counsel does not provide any documentation from the petitioner regarding the internal SAP project, details about what the internal SAP project would entail, or information about the length of time the internal project is expected to take, even though the SOW provided on appeal covers less than five months of the proposed employment period requested in the Form I-129. 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 Obaighbena*, 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 will first focus this decision on 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.

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 U.S. Department of Labor’s *Occupational Outlook 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.

As stated above, the SOW provided on appeal covered less than five months of time requested in the petition. Counsel states that the beneficiary will work on an internal SAP project for the petitioner until another

suitable project for the beneficiary arises. No additional detail or documentation was submitted with respect to either the internal SAP project or other prospective third party clients that would have been probative in determining whether the proffered position justified the performance of duties normally associated with a specialty occupation. It appears that, beyond the short period covered by the SOW, at the time the petition was filed, the petitioner did not yet know to which projects the beneficiary would be assigned.

In this respect, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 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. *Id.* At 388. Such evidence must be sufficiently detailed and explained as 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.

As the beneficiary is not mentioned by name in any of the signed documents with the petitioner's client, there is no concrete evidence that the beneficiary would be assigned to the short-term project listed in the SOW. However, even if the beneficiary had been assigned to this project, as the record lacks documentary evidence of any work beyond the short-term project listed in the SOW, and as the project listed in the SOW is not described in sufficient detail to determine the beneficiary's day-to-day responsibilities and role in that project, the petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or associated with the proffered position or that the petitioner had any specific employment designated for the beneficiary at the time the petition was filed. 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) and 103.2(b)(12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.

Second, 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, 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 signed contracts listing the beneficiary by name that state 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. The SOW provided does not list the beneficiary by name and is valid for less than five months. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

With respect to the beneficiary's qualifications, the AAO notes that a 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, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. 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.