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



U.S. Citizenship  
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Services

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JAN 06 2010

FILE: WAC 08 149 50260 Office: CALIFORNIA SERVICE CENTER Date:

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 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 immigrant 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 is a software and technical consulting services company that seeks to employ the beneficiary as a programmer-analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had submitted inconsistent evidence to U.S. Citizenship and Immigration Services (USCIS).

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner filed the instant petition on April 14, 2008, and stated on the Form I-129 that it had a gross annual income of \$200,000 and two employees. In her June 25, 2008 request for additional evidence the director requested, among other items, copies of the petitioner's income tax filings for tax years 2006 and 2007. The petitioner submitted its tax returns on July 30, 2008.

Although the petitioner had claimed a gross annual income of \$200,000 on the Form I-129, it reported no gross income in either 2006 or 2007, and net losses of \$9,428 in 2006 and \$3,495 in 2007. Although the petitioner had claimed to employ two individuals on the Form I-129, it reported that it had paid no salaries or wages to any employees in either 2006 or 2007. Although this information conflicted with the petitioner's assertions on the Form I-129, it submitted no information to resolve such inconsistencies.

In her August 21, 2008 decision, the director cited to Part 6 of the Form I-129 which states, in pertinent part, the following:

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct.

Citing to *Matter of Ho*, 19 I&N Dec. 582, the director stated that doubt cast upon any aspect submitted by the petitioner could lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition and that, furthermore, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and that any attempt to explain or reconcile such inconsistencies would not suffice unless the petitioner submitted competent objective evidence pointing to where the truth lies. The director found that the petitioner had submitted inconsistent evidence to USCIS and that, as such, the petition could not be approved.

On appeal, counsel states that the petitioner is a bona fide organization and that, although it was incorporated in 2006, it conducted no business in 2006 or 2007, and only began operations in 2008 and has an aggressive expansion plan. With regard to the difference between the \$200,000 in gross annual revenue claimed on the Form I-129 and the actual figure, which was zero, counsel argues that there was no inconsistency because the petitioner did not submit its tax returns at the time it made its assertions on the Form I-129. Counsel does not explain why the petitioner claimed it earned \$200,000 in gross annual revenue.

The AAO finds counsel's explanation unconvincing. The petitioner claimed \$200,000 in gross annual revenue at the time it filed the petition. When the director reviewed the petitioner's tax returns, she discovered that the petitioner had no gross annual revenue in the two years preceding the filing of the petition. Contrary to counsel's assertion this is, in fact, an inconsistency, regardless of when the discrepancies were discovered by the director. Furthermore, counsel has offered no explanation as to why the petitioner certified, under penalty of perjury, that it had a gross annual income of \$200,000 when it in fact had had no gross annual income to that point. The AAO, therefore, agrees with the director's finding in this regard.

Beyond the decision of the director, the AAO finds further that the record of proceeding does not demonstrate that the proposed position qualifies for classification as 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 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 (5<sup>th</sup> 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), 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.

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)(I) 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.

In its March 31, 2008 letter of support, the petitioner stated that the beneficiary would be responsible for the design, development, testing, deployment, monitoring, and support of new applications “for all kinds of industry sectors.” He would also confer with the petitioner’s clients’ technical and management personnel so as to analyze their current operational procedures, identify problems, and learn specific requirements.

The director found the petitioner’s initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence on June 25, 2008. The director requested, among other items, documentation regarding the end-user of the beneficiary’s services to establish that a specialty occupation exists for the beneficiary. Specifically, the director instructed the petitioner to submit documentation from the ultimate end-client companies for whom the beneficiary’s services would be performed.

In response to the director’s request, the petitioner amended the duties of the proposed position. While the beneficiary was to initially design, develop, test, deploy, monitor, and support new applications “for all kinds of industry sectors” and confer with the technical and management staff of the petitioner’s clients, the beneficiary would now spend all of his time working on an in-house project for the petitioner, under the supervision of a project manager. The petitioner also submitted a description of the petitioner’s Enterprise Custom Accounting System (ECAS) plan. According to counsel’s July 25, 2008 letter, this description constituted an itinerary for the beneficiary, indicating this would be the only project upon which he would work during the period of requested employment.

As a preliminary matter, the AAO notes the evolution in the nature of the duties proposed for the beneficiary between the time the petition was filed and the petitioner’s response to the director’s request for additional evidence. The duties as described by the petitioner at the time the petition was filed were summarized previously, and the AAO notes again that no mention was made of the ECAS project. However, by the time the petitioner responded to the director’s request for additional evidence, the beneficiary was to spend all of his time working on that project. The AAO finds this change in the nature of the beneficiary’s duties by the petitioner to be a material alteration to, rather than a mere clarification or further description of, the beneficiary’s proposed duties. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. As such, the AAO’s analysis will be based upon on the job description contained

in the petitioner's March 31, 2008 letter, which was the first time the petitioner described the job duties proposed for the beneficiary.<sup>1</sup>

The specific duties proposed for the beneficiary in the petitioner's March 31, 2008 letter indicated that he would be performing such duties for the petitioner's clients. However, no substantive evidence was submitted regarding any particular substantive work that he would perform while pursuing such duties. 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)). In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, 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 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 proceeding 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 finding 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. For this additional reason, the petition may not be approved.

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<sup>1</sup> Even if the AAO were to consider the evidence submitted regarding the ECAS project, it would still find such evidence insufficient to demonstrate the existence of a specialty occupation. The list of duties described in the project outline was vague and generic, and provided very little idea of what the beneficiary would actually be doing on a day-to-day basis. The generic nature of the duties described by the petitioner makes it impossible for the AAO to assess whether performance of the beneficiary's duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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)(12). 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 reason also, the appeal will be denied.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.