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



U.S. Citizenship
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FILE: WAC 07 146 54513 Office: CALIFORNIA SERVICE CENTER Date: **JAN 08 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:

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 Director, California Service Center, denied the nonimmigrant visa petition and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development company that seeks to employ the beneficiary as a senior 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, finding that the petitioner failed to submit a certified labor condition application (LCA) from the Department of Labor (DOL) demonstrating that it was an H-1B-dependent employer.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for evidence (RFEs); (3) documentation submitted in response to the director's RFEs; and (4) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on April 2, 2007. Although it provided a certified LCA with the petition, the LCA indicated in section F-1 that it was not H-1B dependent. In response to the director's first RFE, issued on May 17, 2007, The petitioner provided a list of ten employees for which it had filed H-1B nonimmigrant petitions, along with approval notices for nine of those beneficiaries valid through the time of filing of the instant petition.

Consequently, the director issued a second request for evidence on August 28, 2007, noting that the petitioner had at least nine active H-1B employees according to the documentation submitted in response to the first request for evidence. The director provided the petitioner with two options: (1) submit an amended LCA demonstrating that it was an H-1B dependent employer; or (2) provide documentation, in the form of a list of all of its employees with their names, an identifier, their immigration status and proof of that status, and quarterly wages reports for all employees for the past eight quarters to establish that it was not an H-1B dependent employer.

In response, the petitioner claimed in its letter dated October 23, 2007 that it only employed seven persons, six of whom were in H-1B status, and was therefore not an H-1B dependent employer. In support of this contention, the petitioner submitted a list of its seven employees, indicating that six held H-1B status and one had a green card. The petitioner also submitted payroll records and wage reports in support of its contentions.

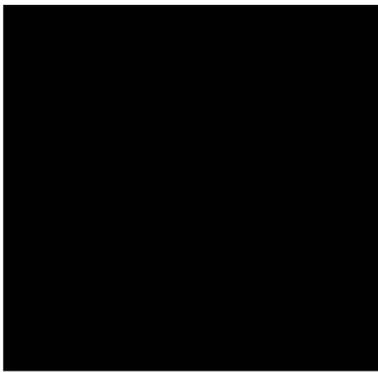
Upon review of the record, the director denied the petition, noting that the evidence submitted in response to the second request for evidence contradicted the petitioner's claims in the initial petition as well as that submitted in response to the first request for evidence. The director further noted that the petitioner offered no explanation with regard to why the initial response to the request for evidence listed nine employees in approved H-1B status and the updated response claimed only six employees in such status. The director concluded that the petitioner had failed to sufficiently establish that it was not an H-1B-dependent employer and therefore denied the petition.

On appeal, counsel contends that the director arbitrarily and capriciously denied the petition, and contends that the director failed to consider all evidence submitted. Specifically, counsel contends that in response to the director's first RFE, the petitioner submitted a list of all H-1B petitions filed and approved. Counsel asserts that the director's conclusion that all employees who received an approval notice were employed by the petitioner was incorrect, since two employees had left the petitioner's employment and two had not yet entered the United States. Counsel contends that the petitioner was unfairly prejudiced for not submitting withdrawal letters for the employees with H-1B approvals that were not employed by the petitioner, and asserts that it was not informed such documentation was necessary.

The regulation at 20 C.F.R. § 655.736(a)(1), in relevant part, provides that an H-1B-dependent employer is an employer that has 25 or fewer full-time equivalent employees who are employed in the U.S.; and employs

more than seven H-1B nonimmigrants. *See* 20 C.F.R. § 655.736(a)(1)(i)(A)-(B). In this matter, the director found that since the petitioner submitted a list of ten H-1B petitions, nine of which had been approved, the petitioner's H-1B employees exceeded the maximum of seven as set forth by the regulation, making it an H-1B dependent employer. Noting that the petitioner failed to file an LCA to reflect its H-1B-dependent status, the director denied the petition.

Upon review, the AAO concurs with the director's findings. A review of USCIS records indicates that contrary to the petitioner's contentions, it employed eight persons in H-1B status at the time the petition was filed. According to the petitioner's employee list submitted in response to the request for evidence, the petitioner employed the following persons in H-1B status:



A review of USCIS records, however, indicates that two additional employees, namely [REDACTED] (LIN-05-255-50625) and [REDACTED] (LIN-05-202-52099) were employed in H-1B status with the petitioner as of April 2, 2007.

The petitioner's extensive payroll records indicated that wages were paid to only six H-1B employees at the time of filing, and the petitioner contends that [REDACTED] and [REDACTED] left the petitioner's employment in December 2006 and November 2006, respectively. The AAO notes that the petitioner's payroll records for the first quarter of 2007 do not list these employees. However, a list of the petitioner's consultants, submitted as Exhibit 8 in response to the request for evidence, lists both of these persons and identifies them as Oracle developers.

On appeal, counsel submits copies of its notices of withdrawal to the California Service Center dated December 11, 2007, requesting that the H-1B status of [REDACTED] and [REDACTED] be withdrawn. This evidence, however, is insufficient to demonstrate that the petitioner is not an H-1B dependent employer. As noted previously in this decision, counsel contends that the petitioner was unfairly prejudiced for not submitting withdrawal letters for the employees with H-1B approvals that were not employed by the petitioner, and asserts that it was not informed such documentation was necessary. However, the regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) specifically requires the petitioner to notify the director who approved the petition if a petitioner no longer employs the beneficiary.

In addition, the record reflects that both [REDACTED] and [REDACTED] were employed in H-1B status at the time the petition was filed. Although the petitioner claims that these beneficiaries had left the company in 2006, it fails to provide sufficient corroborating evidence to support this claim. 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 pay records alone are insufficient, as the beneficiaries could have simply been benched or paid directly as 1099 contractors during the first quarter of 2007. Regardless, in addition to the petitioner's initial response indicating that it employed more than seven H-1B workers, USCIS records verify that on April 2, 2007, the date this petition was filed, the petitioner employed eight persons, including [REDACTED] and [REDACTED], as H-1B nonimmigrant workers, and the petitioner had not, as of that date, informed USCIS that it no longer employed these individuals. Benching or otherwise not paying wages to beneficiaries, which in and of itself constitutes a violation of the terms and conditions of employment, does not absolve the petitioner from being an H-1B dependent employer. Moreover, submitting withdrawal letters dated December 11, 2007, eight months after the filing of the petition, will not serve as credible evidence in support of the petitioner's claim that it is not an H-1B dependent employer. 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).

Therefore, upon comparing the payroll records and the supporting documentation submitted by counsel both in response to the requests for evidence and on appeal to USCIS records, the AAO finds that the petitioner employed eight H-1B employees at the time the petition was filed, and therefore was an H-1B-dependent employer at the time the LCA was filed with the U.S. Department of Labor. For the reasons set forth above, the AAO will affirm the director's denial of the petition.

A related issue not addressed by the director is whether the LCA as certified covers all of the intended worksites for the beneficiary during his proposed employment in the United States, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA listed the beneficiary's work location as Hilliard, Ohio. In reviewing the petitioner's supporting documentation, the AAO notes that an itinerary for the beneficiary, submitted as Exhibit 4 in response to the first request for evidence, indicates that he will work on an internal project for the petitioner at its Hilliard, Ohio offices. However, Exhibit 5 of this response includes copies of client contracts, which the petitioner states in its letter of August 7, 2007 represent contracts "to which the beneficiary could be assigned to if his first project lasts less than the full three years."

Upon review, the AAO also finds the LCA deficient because it fails to identify all potential work locations for the beneficiary during the validity period. The representative client contracts submitted in response to the first request for evidence indicate that the petitioner assigns personnel to various locations throughout the United States. Specifically, some of the locations of the clients represented in the submitted contracts are in Edison, New Jersey; Dearborn, Michigan; and Manchester, Connecticut. Absent end-agreements with clients that specifically pertain to the beneficiary, the duration and location of worksites to which the beneficiary may be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

A final issue not addressed by the director is whether the beneficiary will be employed in a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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, 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.

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 at 387. 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 proffered position is a specialty occupation, the record is devoid of any documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a programmer analyst.

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.

The petitioner’s letter of support dated March 26, 2007 provided a vague overview of the beneficiary’s proposed duties. The petitioner stated, in relevant part:

Specifically, as a Sr. Programmer Analyst, the beneficiary will analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company’s ability to deliver more efficient and effective technological and computer related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Sr. Programmer Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry’s already existing technological resources to additional operations that will streamline our clients’ business processes. This process of developing new computer systems will include the design or addition of hardware or software

applications that will better harness the power and usefulness of our clients' business processes.

However, no independent documentation to further explain the nature and scope of these duties was submitted.

The petitioner is engaged in an industry that typically outsources its personnel to client sites to work on particular projects. Therefore, documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite is appropriate to establish eligibility for H-1B status in this matter.

Upon review of the evidence, the AAO finds that the petitioner failed to submit sufficient evidence outlining the nature of the services that the beneficiary will provide during the validity period. As previously noted, the petitioner submitted an itinerary contending that the beneficiary will work on an internal project for the petitioner. However, in its letter dated August 7, 2007, the petitioner contends that the beneficiary could be assigned to any number of clients should this particular project be completed prior to the end of the validity period. Based on this statement alone, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this statement renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

As discussed above, the record contains simply the letter of support which outlines the proposed duties of the beneficiary, and the deficient itinerary which provides no information regarding the end-clients and their requirements for the beneficiary. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* 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.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that in addition to working on an internal project, the beneficiary will be working on client projects and will be assigned to various clients worksites as necessary. The AAO, therefore, cannot analyze whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

For the reasons set forth above, even if the other stated grounds of ineligibility were overcome on appeal, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this 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.

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