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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: EAC 08 061 51028 Office: VERMONT SERVICE CENTER Date: **JAN 12 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)

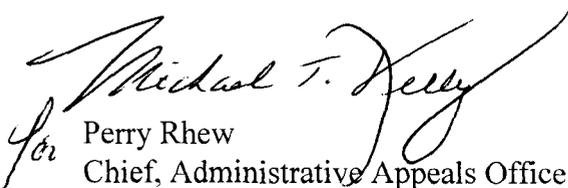
ON BEHALF OF PETITIONER:



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).


For 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 describes itself as a company that engages in software training, development and consulting services 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 grounds that: (1) the record failed to establish that the beneficiary will be employed in a specialty occupation; (2) the petitioner did not submit an itinerary for the dates and locations of the beneficiary's services, and (3) a valid Labor Condition Application (LCA) was not filed to cover the location(s) where the services are to be performed by the beneficiary.

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. Counsel for the petitioner indicated on the Form I-290B that a brief and/or additional evidence would be submitted to the AAO within 30 days. However, no brief or other additional documentation was received by the AAO from either counsel or the petitioner after the Form I-290B was filed. Pursuant to the pertinent regulations governing appeals, no additional time will be allowed. *See* 8 C.F.R. §§ 103.3(a)(2)(i) and (a)(2)(vii). Accordingly, the record of proceeding is ripe for the AAO's review and decision.

In the documentation submitted with the petition, the petitioner described itself as a company located in Clearwater, FL that engages in software training, development and consulting services with 240 employees¹ and a gross annual income of \$15 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from December 20, 2007 to October 26, 2010, at an annual salary of \$65,000.

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

- Analyzing the communications, informational and programming requirements of clients [p]lanning, developing and designing business programs and computer systems;
- Designing, programming and implementing software applications and packages customized to meet specific client needs;
- Reviewing, repairing and modifying software programs to ensure

¹ In the petition support letter, the petitioner states that it employs 211 workers.

- technical accuracy and [r]eliability of programs;
• Training of clients on the use of [s]oftware applications and providing trouble shooting and debugging support.

The LCA was filed for the beneficiary to work as a programmer analyst in Alexandria, VA (with a prevailing wage of \$64,834) and Clearwater, FL (with a prevailing wage of \$51,730). The LCA submitted by the petitioner covers the validity dates requested by the petitioner in the Form I-129 request for H-1B extension on behalf of the beneficiary. The petitioner did not explain the reason for assigning the beneficiary to Alexandria, VA in the supporting documents submitted with the petition.

In the RFE, the director indicated that the evidence was insufficient to determine the scope of the petitioner's business in order to establish that the beneficiary will perform the duties of a specialty occupation. The petitioner was advised to submit numerous documents, including copies of end-user contracts detailing the beneficiary's proposed employment including details regarding the project name, location, supervisor, exact job duties and requirements necessary to be qualified for the position.

In response to the RFE, the petitioner submitted copies of a Professional Services Agreement (PSA) between the petitioner and a company called Quality Matrix, located in Mahwah, NJ, along with a work order listing the beneficiary by name. The PSA, signed on January 17, 2008, indicates that Quality Matrix will utilize the services of the petitioner in order to fulfill PSAs with other third-party clients of Quality Matrix. In other words, Quality Matrix contracted for the petitioner to provide workers to third-party client sites. The PSA between the petitioner and Quality Matrix expired automatically on January 16, 2009.

The work order provided by the petitioner in response to the RFE is dated December 20, 2007 (prior to the date that the PSA was signed) and indicates that the beneficiary will work at an address in Alexandria, VA through January 31, 2010, with an option to renew for 180 days. The work order does not provide the name of Quality Matrix's client at this address, nor does it give a description of the project for which the beneficiary's services are required or a justification as to why the beneficiary's services are required. All it states is that the beneficiary will: "Build Java stored procedures and SQL. Queries for the report data. [A]lso develop and design the technical documentation for the reports." These duties, as compared to the duties provided in the position description submitted with the petition, are different as they entail developing technical documentation for reports rather than software programs.

In the statement articulating the beneficiary's duties provided by the petitioner in response to the RFE, the petitioner reiterated the duty description provided in the support letter submitted with the petition and elaborated as follows:

The beneficiary will interact with business users, engineering, technical personnel and any other organizations to gather requirements. The beneficiary will then convert the requirements into symbolic formulations, using techniques such as flow-charting,

block diagrams. The results of which are then encoded for processing as modules and subroutines, which require a thorough understanding of the limitations of the computer systems and associated languages. He will then test and analyze the results with the end users for further tuning/modifications of the formulations, which might result in a repeat/expansion of the above process steps.

* * *

The Programmer Analyst will also have a range of responsibilities with respect to Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program. The beneficiary must be able to conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct. She [sic] will also consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes.

As part of these duties the employee will investigate whether networks, workstations, the central processing unit of the system, and/or peripheral equipment are responding to a program's instructions. The Programmer Analyst will then correct errors by making appropriate changes and then rechecking the program to ensure that the desired results are produced.

The petitioner does not provide information about the third-party company to which the beneficiary will be assigned or the project to be worked on for that company that justifies the performance of duties in a specialty occupation. No contract between either the petitioner or Quality Matrix and the third-party client in Alexandria, VA was provided despite the request in the RFE for copies of contracts with end-user companies.

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 his services, and therefore whether his services would actually be those 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)(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 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.

No documentation was submitted with respect to the third-party client that would have been probative in determining whether the proffered position justified the performance of duties normally associated with a specialty occupation. For example, such evidence might have included a copy of the contract with the third-party client and a detailed description of the project to be performed for that client that explains why the proffered position is required at the third-party client site. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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 AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third-party client, the AAO cannot analyze whether his placement would be in a specialty occupation position. Applying the analysis of the Court in *Defensor* - which is appropriate in an H-1B context like this one, where USCIS has determined that an unidentified third-party entity will generate and ultimately determine the substantive work of the beneficiary - USCIS has correctly found that the record does not contain documentation from the end user client(s) for which the beneficiary will provide services that establishes the substantive nature of the duties that the beneficiary would perform. Without such evidence, the AAO cannot determine that 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 also confirms the director's determination that the petition was filed without an itinerary of the dates and locations where the beneficiary would work, as required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations.

However, the AAO disagrees with the director's determination that the petitioner failed to submit a valid LCA under 8 C.F.R. § 214.2(h)(2)(i)(B)(1). Section 8 C.F.R. § 214.2(h)(2)(i)(B)(1) states:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Even though the petitioner did not establish that the beneficiary will be performing the duties of a specialty occupation or that the petitioner has sufficient work in a specialty occupation to employ the beneficiary for the period requested in the petition, the LCA submitted was obtained and certified prior to the date the petition was filed and covers the locations requested by the petitioner in the petition for the proffered position. Consequently, the director's decision, with respect to this issue only, shall be withdrawn.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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