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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: NOV 03 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 an information technology consulting firm that seeks to employ the beneficiary as a programmer analyst. Accordingly, the petitioner 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, determining that the petitioner had failed to: (1) submit a valid itinerary and Labor Condition Application (LCA) for all of the beneficiary's work locations in the United States; and (2) demonstrate that the proffered position was a specialty occupation.

On appeal, counsel for the petitioner submits a Notice of Appeal or Motion (Form I-290B) accompanied by a brief and additional evidence.

In a letter of support dated March 30, 2009, the petitioner stated that it is a leading information technology and management consulting firm and that it employed 30 persons. It claimed that "it provides high technology computer services for a wide range of hardware environments and software applications." With regard to the beneficiary, the petitioner stated that he would be employed as a programmer analyst, and would be assigned to the petitioner's client, [REDACTED] in Duluth, Georgia.

The director issued a request for evidence (RFE) on June 3, 2009, and specifically requested documentation supporting the petitioner's claim that a contractual agreement existed between the petitioner and [REDACTED]. The director requested copies of pertinent contracts and work orders that identified the duties of the beneficiary as well as the address and phone number of the intended work location.

In a response dated July 13, 2009, the petitioner stated that due to budget problems, its relationship with [REDACTED] ended abruptly and therefore no documentation attesting to their relationship was available. The petitioner claimed that since the relationship with [REDACTED] had been terminated, the beneficiary was now assigned to another project with [REDACTED] located in Tampa, Florida. In support of this contention, the petitioner submitted a work order between the petitioner and [REDACTED] dated May 29, 2009, as well as a copy of Form ETA 9035E, dated July 17, 2009, which was currently pending with the Department of Labor (DOL) for the beneficiary's new work location of Tampa, Florida.

The first 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):

Demonstrating eligibility at time of filing. 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. . . .

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 the 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) and 214.2(h)(4)(iii)(B)(I). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

Moreover, the regulation at 8 C.F.R. § 214.2(h)(i)(2)(B) provides, in relevant part:

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.

In the instant matter, the petitioner filed the Form I-129 with USCIS on April 8, 2009. As noted above, the LCA provided at the time of filing indicated the beneficiary's work location would be in Duluth, Georgia and was dated March 30, 2009. In response to the RFE, the petitioner amended the beneficiary's work location to Tampa, Florida, and submitted a copy of a pending LCA for this new location. On appeal, the petitioner submits an LCA for the Tampa, Florida location which was certified over three months after the filing of the petition.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Moreover, the language of the regulation at 8 C.F.R. § 214.2(h)(i)(2)(B), 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.

In this matter, while the petitioner did in fact submit a certified LCA for Duluth, Georgia, along with the location and duration of the beneficiary's proposed project, the facts under which the petitioner claimed eligibility changed subsequent to the filing of the petition. A 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).

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

(Emphasis added).

On appeal, counsel asserts that the petitioner "diligently and expeditiously" amended the H-1B petition to reflect the change in the location of the beneficiary's employment once its agreement with Vector ended, and claims that it has therefore satisfied the regulatory requirements. Counsel's assertions are misplaced.

As noted above, a petitioner cannot simply file a petition with a certified LCA for one location, then provide a new LCA in the event that it reassigns a beneficiary to another worksite during the course of his employment. Instead, a petitioner must file an amended petition, or in this case a new petition, to reflect this change. It is contrary to law to permit or imply that an amended petition need not be filed if an employment location changes such that it requires or necessitates the filing of a new LCA. In any situation where a new LCA is required, an amended petition must be filed. Specifically, according to the statutory and regulatory provisions cited above, it is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of a corresponding LCA supporting the period of work to be performed at the new location. USCIS policy confirms this reading of the law in stating that "[a]n amended H-1B petition must be filed in a situation where the beneficiary's place of employment changes subsequent to the approval of the petition and where the change invalidates the supporting labor condition application."

This policy statement

was again reiterated in the Federal Register at 63 Fed. Reg. 30419, 30420 (June 4, 1998) by reminding petitioners that they bear the responsibility "to file an amended petition . . . when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application." Absent the filing of an amended petition, USCIS cannot fulfill its regulatory duty to ensure a subsequently filed labor condition application corresponds with an H-1B petition filed on behalf of a beneficiary. *See* 20 C.F.R. § 655.705(b).

The petitioner, therefore, is advised that merely submitting a new LCA for a new work location will not suffice; an amended petition, or in this case a new petition, must be filed to reflect this change.

Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment period for the beneficiary's actual work location (Tampa, Florida), nor had an itinerary been submitted outlining all work locations for the beneficiary for the requested validity period. Therefore, as determined by the director, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B). For this reason, the petition may not be approved.

The next issue before the AAO is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Since the petitioner has failed to satisfy the filing requirements at 8 C.F.R. §§ 214.2(h)(4)(i)(B), 214.2(h)(4)(iii)(B)(*J*), and 214.2(h)(2)(i)(B), this basis for denial need not be examined in detail. However, for explanatory purposes, the AAO will briefly discuss the issue.

The crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties for the actual user of the beneficiary's services and whether those duties will comprise the duties of a specialty occupation.

Section 214(i)(1) of 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 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), 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 or higher 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, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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.

The petitioner in this matter provided a general overview of the beneficiary's proposed duties in its initial letter of support dated March 30, 2009. The petitioner also provided, in response to the RFE, a copy of its employment offer to the beneficiary and a work order with Kforce.

The documents provided by the petitioner in support of the contention that the proffered position is a specialty occupation are insufficient for two reasons. First, the documentation provided in response to the RFE constitutes a material change to the initial petition, since the project upon which the beneficiary will work is not the project described initially by the petitioner. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *See generally Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As discussed above, 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. Simply contending, as counsel did in this matter, that circumstances beyond the control of the petitioner required it to seek a new project for the beneficiary after the filing of the initial petition, is not justification for an amendment of the petition after it has been filed. As discussed previously, the remedy in this situation is to file an amended or new petition to reflect any material changes in the terms and conditions of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E); *see also* 8 C.F.R. § 103.2(b)(1) (requiring eligibility to be established at the time a petition is filed).

Second, even if the petitioner had not materially altered the petition by changing the project and work location for the beneficiary, the description of duties initially provided failed to adequately describe the project to which the beneficiary would be assigned and did not include information regarding the task specific instructions for any project to which the beneficiary would be assigned. The documents accompanying the initial petition provide no details regarding the nature of the beneficiary's proposed position or specific details regarding the accompanying duties. As discussed above, the reason for the RFE was to gather information on the Vector project, since the petitioner failed to submit sufficient supporting documentation with the petition.

The description of duties provided by the petitioner prior to the RFE is so general that it is unclear whether the beneficiary's work would include the duties of a programmer analyst, a systems analyst, or a software engineer. Moreover, the initial statement of duties was not described by the company that was to utilize the beneficiary's services (in this case, [REDACTED]). Finally, the description provided failed to demonstrate that the duties involved in the proffered position require more than a basic understanding of computer software, an understanding that could be attained through a lower-level degree or certifications in particular programs.

Generally, without evidence of contracts, work orders, or statements of work comprehensively describing the duties the beneficiary would perform, a petitioner cannot establish that the duties that the beneficiary would perform are those of a specialty occupation. USCIS must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that may appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide. 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 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.*

To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and a comprehensive description of the beneficiary's duties from the ultimate user of the beneficiary's services as those duties relate to specific projects. In this matter, the record demonstrates that the petitioner acts as an employment contractor, yet the petitioner has failed to provide the underlying documentation necessary to substantiate that the beneficiary would perform the claimed duties set out in the petitioner's letter of support. The AAO, therefore, is unable to analyze whether the beneficiary's duties 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 position meets any of the requirements for a specialty occupation set forth 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).

As discussed in detail above, the petitioner has made a material change to the petition by assigning the beneficiary to a new project in a new work location subsequent to the filing of the petition. As this amendment is not permitted, the AAO is thus precluded from examining whether the proffered position is a specialty occupation. A cursory review of the initial description of duties for the intended Vector project reveals that no specific discussion of the nature of the tasks the beneficiary would perform on this project was provided. Therefore, even if the petitioner's eligibility was not precluded by virtue of the identified material changes made after the filing of the petition, the initial supporting evidence failed to sufficiently describe the proffered position at that time. For this additional reason, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.