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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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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 01 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:



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. 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,

for Michael T. Kelly
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 claims to be a software development company. It seeks to employ the beneficiary as a Java developer and to classify her 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 because the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form 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 with supporting materials. Counsel did not submit a brief on appeal. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on March 7, 2008, the petitioner described itself as being engaged in the business of software development. The petitioner listed 11 employees in the Form I-129 and claims to have \$1 million in gross annual income. In the Form I-129, the petitioner indicated that it wished to employ the beneficiary as a Java developer from April 1, 2008 through April 1, 2011, in Columbia, MD, at an annual salary of \$65,000.

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

- *Analysis, design, development, testing and maintenance of web based weight loss customer portal using J2EE Architecture, JavaScript, C/C++ and J2EE, Apache Tomcat server[.]*
- *Design and development of Inventory Tracking System for weight loss customers[.]*
- *Design and development of work flow management system using Java and J2EE technologies[.]*
- Participate in business requirements gathering and design scalable Internet applications using Object Oriented Design Concepts, UML and Design Patterns.
- Develop GUI components using Java and Swing. Incorporate open source frame works such as Struts and Hibernate in software applications.
- Analyzes software requirements and consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system.
- Develops and directs software system testing procedures, programming, and documentation.
- Consults with customer concerning maintenance of software system.

The petitioner breaks down the anticipated time the beneficiary will spend in her position as follows: software analysis and modification (35%); system integration, testing and quality assurance as well as deployment and maintenance of software applications (35%); system management, backup and recovery (10%); study of existing system (10%); and meetings and discussions (10%).

The petitioner also included copies of advertisements it ran for software engineers, programmer/analysts, and QA analysts, in which the stated requirement is at least a bachelor's degree in computer science or a related field. These advertisements do not list the proffered position of Java developer and, moreover, the minimum requirements listed are different from the requirements stated in the petitioner's support letter for the proffered position. Therefore, the advertisements are not probative for these proceedings.

The petitioner states that the proffered position requires a bachelor's degree in science, engineering, a related analytic or scientific discipline, or the equivalent. However, the AAO finds that neither the above-quoted list of duties nor any other duty descriptions in the record of proceeding are indicative that performance of the proffered position requires at least a bachelor's degree, or its equivalent, in a specific specialty, and, further, that the record of proceeding contains no documentary evidence to support the petitioner's assertions about the educational credentials required to perform the proffered position. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The submitted Labor Condition Application (LCA) was filed for a Java developer to work in Columbia, MD from April 1, 2008 to April 1, 2011. The LCA lists a prevailing wage of \$63,086.

The petitioner provided a copy of the employment contract it has with the beneficiary, which states the beneficiary will work as a Java developer.

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, however no education evaluation was provided.

On March 25, 2008, the director issued an RFE requesting, in part, additional evidence that the proffered position qualifies as a specialty occupation, including copies of contracts, as well as an organizational chart, tax returns, an itinerary, and documentary evidence of the petitioner's business activities.

Counsel for the petitioner responded to the RFE, providing, in pertinent part, the following documents:

- Copy of a 2007 tax return filed by the petitioner indicating that its gross income in 2007 was \$582,063, nearly half of the amount stated as the petitioner's gross income in the Form I-129.
- Copies of the petitioner's subcontractor service agreements provided as an example of the petitioner's contracts, which do not include a copy of the Service Agreement relevant to this petition. One of these

agreements indicates that third-party clients have the “unconditional right” to hire the petitioner’s employees.

- A copy of the Statement of Work (SOW) pertaining to the beneficiary, which is not signed by the petitioner. The SOW’s effective date is May 1, 2008 and its duration period ends on December 31, 2010. The SOW states that the beneficiary will be assigned as a Java developer to the Columbia Center for Medical Weight Loss (CCFMWL) in Columbia, MD and that the beneficiary will be engaged in “[d]evelopment of weight loss customer portal using Java, J2EE, Servlets, Apache Tomcat Server. Development of Inventory tracking system for weight loss customers and work flow management system using Java, J2EE technologies.”
- Documentation indicating that the petitioner has an office in McLean, VA.
- A list of the petitioner’s workers, which indicates there are ten workers assigned to work for various clients.

The petitioner did not include a copy of the Subcontractor Agreement dated March 3, 2008 between the petitioner and CCFMWL, even though the SOW (1) was created under the terms and conditions of that agreement, (2) explicitly states that, when executed, the SOW “shall constitute a binding agreement incorporating the terms and conditions of the Agreement,” and (3) therefore establishes that the Subcontractor Agreement is a material part of the contract with CCFMWL for the beneficiary’s services and is necessary to establish the full extent of the terms and conditions governing the beneficiary’s work for CCFMWL. Accordingly, the AAO further finds that the absence of that Subcontractor Agreement dated March 3, 2008 from the record of proceeding is in itself sufficient to render the evidentiary weight of the related SOW negligible and not probative that the beneficiary would be engaged in specialty occupation work for CCFMWL for the period cited in the SOW.

The petitioner also did not provide a copy of an itinerary (that is, the dates and locations where the beneficiary would be employed, as required at petition filing, by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), if a beneficiary is to be employed at more than one location), even though (1) the petitioner/CCFMWL SOW does not cover the duration of the approval period sought in the petition, and (2) the record of proceeding indicates that the beneficiary would likely be also assigned to locations other than CCFMWL.

On appeal, counsel submits another copy of the petitioner/CCFMWL SOW, which is signed by both parties. However, counsel did not submit a copy of the alleged Subcontractor Agreement on which the SOW is based. Counsel also submits a copy of a letter from CCFMWL, dated May 20, 2008, which states that the beneficiary will work as a Java developer on a weight loss customer portal, inventory tracking system, and work flow management center.

An unsigned and undated copy of the petitioner/CCFMWL SOW was submitted in response to the RFE on April 25, 2008. However, the signed copy of the SOW submitted with the appeal on May 29, 2008, is dated March 3, 2008. It therefore appears that, on a date subsequent to the petition being filed, the petitioner may have signed the SOW and backdated it to correspond with the petition’s filing date. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover,

regarding the copy of the dated and signed SOW now submitted for the first time on appeal, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Accordingly, the AAO will consider the undated and unsigned petitioner/CCFMWL SOW document before the director, but not the signed and dated version later submitted on appeal.

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 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.

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 her services, and therefore whether her services would actually be those of a Java developer.

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.

As mentioned above, the evidence indicates that the petitioner would subcontract the beneficiary to [REDACTED] in Columbia, MD. However, the petitioner did not provide a copy of the Subcontracting Agreement on which the SOW is based and, moreover, the SOW was not signed by the petitioner or dated. Additionally, the SOW provided by the petitioner indicates that the beneficiary’s assignment in Columbia, MD does not cover the duration of the petition. Further, the AAO finds that the “To Whom It May Concern Letter” letter from [REDACTED] submitted on appeal, neither specifies the terms and conditions of the aforementioned Subcontracting Agreement that was not submitted into the record nor establishes that the job duties it lists require the theoretical and practical application of at least a bachelor’s degree level of highly specialized knowledge in a specific specialty, as required by the H-1B statutes and regulations. Therefore, the petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or associated with the proffered position or that the petitioner had any specific employment designated for the beneficiary at the time the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is

filed. See 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, 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. *Id.* at 387-388. 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. As discussed above, because the petitioner did not submit a copy of the Subcontractor Agreement or evidence that it had a signed and dated SOW prior to the petition being filed that covers the duration of the petition, 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. Moreover, samples of other contracts the petitioner has submitted, which include a copy of a contract providing that a third-party client has the unconditional right to hire the petitioner's workers, indicate that the petitioner may not have sufficient control over the work the beneficiary will perform, or even her employment. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties that require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) that may be considered as the documentation was not dated or signed by the petitioner prior to the petition being filed.

The AAO also notes that, as discussed previously, the petitioner requires a bachelor's degree in science,

engineering, a related analytic or scientific discipline, or the equivalent for the proffered position. As the petitioner requires a bachelor's degree in a wide range of fields, this further demonstrates that the proffered position is not a specialty occupation as the petitioner does not require at least a bachelor's degree in a *specific specialty*.

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.

The AAO notes that the record indicates that the petitioner has another H-1B petition approved on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Beyond the decision of the director, the AAO finds that the petition must be denied for the additional reason that it 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 required initial evidence 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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.