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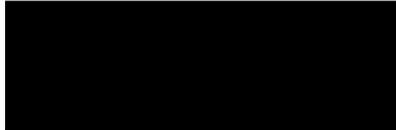
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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)

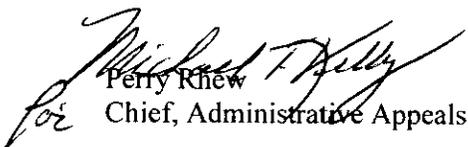
ON BEHALF OF PETITIONER:



**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*   
Perry Khew  
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 is an information technology business. It seeks to employ the beneficiary as a consultant and to classify him 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 following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to establish that the beneficiary is qualified to perform services in 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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

At the outset, the AAO withdraws the director's determination that the evidence of record does not establish that the beneficiary is qualified to perform services in a "specialty occupation," in that the director provides no discussion of the basis for this conclusion. *See* 8 C.F.R. § 103.3(a)(1) (a petition denial must explain specific reasons for the denial).

In the documentation submitted with the petition on April 18, 2008, the petitioner described itself as being engaged in the business of information technology. The petitioner listed 15 employees in the Form I-129. In the Form I-129, the petitioner indicated that it wished to employ the beneficiary as a consultant from October 1, 2008 through September 19, 2011 at its address in Aldie, VA, at an annual salary of \$61,000.

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:

As a consultant, [the beneficiary] will be responsible for ASIC verification, test bench development, automation and implementation of RTL Codes of verifying ASICs related to SONET/SDH using Verilog, System Verilog Assertions, Perl Scripting and Automation in Linux & Windows environment. [The beneficiary] will also be responsible for new development, deployment and application rollout.

The petitioner states that the proffered position requires at least a Bachelor's Degree in a technical science field of study or the equivalent professional work experience. The petitioner adds, "[s]uch degree programs as computer science, engineering, information technology, physics, mathematics or related disciplines are highly desirable since they provide an appropriate base of theoretical study in analysis principles and the electronic assisted computer technologies utilized in the business world. . . ."

The submitted Labor Condition Application (LCA) was filed for a consultant to work in Herndon, VA from

September 20, 2008 to September 19, 2011. The LCA lists a prevailing wage of \$60,674.

The beneficiary's education documents, indicating that he has a foreign degree, were submitted with the petition, along with a credential evaluation, which states that the beneficiary has the equivalent of a U.S. Bachelor of Science Degree in Electronics Engineering.

On April 28, 2008, the director issued an RFE requesting additional evidence to establish that the petitioner is capable of providing qualifying H-1B work to the beneficiary, including, in part: (1) a list of all employees; (2) a lease; (3) contracts regarding the work for the beneficiary, including a letter from any end-clients; (4) copies of the petitioner's last two quarterly wage reports; (5) copies of the 2007 Forms W-3 for all employees; (6) a copy of the petitioner's 2007 U.S. federal income tax return, and; (7) photographs of the petitioner's offices.

The petitioner responded to the RFE, stating that the beneficiary would work at the offices of the petitioner's client, Verizon, and not at the petitioner's address. The petitioner also stated that it has no lease and its employees either work at client sites or at their homes. The petitioner submitted copies of its quarterly wage reports for the fourth quarter of 2007 and the first quarter of 2008 as well as its Forms W-2 for 2007 and its 2007 U.S. federal income tax return. The petitioner did not submit a copy of its contract with Verizon, but instead submitted sample contracts that it has with other companies. None of the contracts pertain to the proffered assignment of the beneficiary.

The petitioner also submitted a letter from Verizon, located in Reston, VA, dated April 30, 2008 (after the petition was filed), which states that, "Verizon FIOS IT support team would like to hire [the beneficiary] as Software Engineer to our team in contract role [sic] for a crucial application development, which is schedule[d] to start in 20<sup>th</sup> October, 2008 and expected to finish in Q4, 2009. [The petitioner] is one of our prime vendor supplying IT services." The attached project description states that the beneficiary will be working at Verizon's offices in Reston, VA. Again, this job location conflicts with the information provided in the Form I-129 that the beneficiary would work at the petitioner's address in Aldie, VA. 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). Additionally, from this letter, it appears that Verizon, and not the petitioner, will employ the beneficiary and will direct and control his work. Moreover, the proposed assignment with Verizon does not cover the full duration of time requested in the petition.

The director denied the petition on May 6, 2008.

On appeal, counsel submits a copy of the petitioner's Employment Agreement with the beneficiary, which is dated January 31, 2008. The Employment Agreement states that the beneficiary will be hired as a "consultant." Counsel also submits an additional letter from Verizon, dated May 14, 2008, which states that the beneficiary will be assigned as a Software Engineer to Verizon pursuant to a contract agreement that will be issued 30 days before the proposed start date of October 20, 2008 and will be renewed every year. Therefore, the contract between the petitioner and Verizon was not in existence at the time the petition was

filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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). Counsel does not provide a copy of the contract on appeal, which is not surprising given that the contract was not yet in existence at the time the appeal was filed on June 5, 2008.

Counsel also argues that the petitioner has paid its H-1B employees their proffered wages as stated in the Forms I-129 and provides copies of the petitioner's Forms 1099 along with an ADP printout of wages paid covering the period of December 1, 2007 to December 15, 2007. On appeal, counsel resubmits the 2007 Forms W-2 and the petitioner's quarterly wage reports that were provided in response to the RFE.

Additionally, counsel provides information regarding the immigration status of its workers.

Counsel also submits a copy of the petitioner's lease, which is dated May 14, 2008, after the petition was filed, for premises in Herndon, VA. Therefore, the petitioner has not demonstrated that it had a business address where employees could work once their temporary assignments at client sites end at the time the petition was filed. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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.

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 finds 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 consultant/software engineer.

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, despite the statement made in the Form I-129 that the beneficiary would work at the petitioner's offices (which appears to be a residence) in Aldie, VA, in actuality, the petitioner would contract the beneficiary to Verizon in Reston, VA. However, the petitioner never provided a copy of the contract with Verizon, presumably because the contract was not yet in existence. The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed and there must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, if any, to an ultimate end-client.

Additionally, the letters provided from Verizon indicate that the beneficiary's assignment would only be for approximately one year, which does not cover the duration of the petition. Moreover, the letters from Verizon are dated after the petition was filed and therefore are not probative for determining the length of the beneficiary's proposed assignment. However, even if the beneficiary were assigned to Verizon's project, as the record lacks documentary evidence of any work beyond this short-term project listed in the SOW, and as the project listed is not described in sufficient detail to determine the beneficiary's day-to-day responsibilities, role in that project, as well as which company would be responsible for overseeing the beneficiary's work, 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.

In addition to failing to provide sufficient documentary evidence that the proffered position is a specialty occupation, the petitioner made conflicting statements in the support letter with respect to the location of the work to be performed, further supporting the conclusion that the petitioner had not secured specific employment 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; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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, 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.

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 his placement is related to the provision of a product or service that requires the performance of the duties of a consultant/software engineer. 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 a contract with the end-user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform, or even that the assignment was in place prior to the petition being filed. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Therefore, the advertisements provided by counsel on appeal are irrelevant to these proceedings as the AAO cannot analyze whether they are sufficiently similar to the proffered position to determine whether or not the proffered position is a specialty occupation.

Moreover, the AAO notes that the petitioner states in the support letter that at least a bachelor's degree in a wide range of fields, including computer science, engineering, information technology, physics, mathematics or related disciplines, is required for the position. Therefore, it appears that the petitioner does not require at least a bachelor's degree in a *specific specialty*, further demonstrating that the proffered position is not a specialty occupation.

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.

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.

Also beyond the decision of the director, the AAO finds that the petitioner failed to establish that it has sufficient work for the beneficiary to be employed in a specialty occupation. As mentioned above, the conflicting evidence provided indicates that the petitioner did not intend to employ the beneficiary at the address stated in the Form I-129 and, moreover, counsel states on appeal that the petitioner's offices were at a residential home at the time the petition was filed. Although counsel states that the petitioner was registered and licensed to conduct business from a residential address, counsel only submits a copy of the petitioner's certificate of incorporation, which does not provide an address. Counsel does not provide a license to do business from a residential address. 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).

Additionally, the letter from Verizon indicates that Verizon, and not the petitioner, will oversee and control the beneficiary's work as Verizon states it will "hire" the beneficiary to work on its (not the petitioner's) large team for a project that was unconfirmed at the time the petition was filed and, moreover, Verizon does not intend to hire the beneficiary for the duration of the petition. Therefore, it does not appear that the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). The AAO thereby finds that the petitioner failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship on a full-time basis as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii).

Finally, beyond the decision of the director, the AAO finds that even if the petitioner could demonstrate, which it did not do, that an employer-employee relationship would be established with the beneficiary, the petitioner has failed to demonstrate an ability or willingness to comply with the terms and conditions of employment. In his denial, the director notes that it appears that the petitioner has not paid proffered wages to the majority of its H-1B workers in 2007. On appeal, counsel notes that the two workers named by the director had absences in 2008. However, counsel does not address the director's concerns regarding wages paid in 2007 to the petitioner's employees. According to USCIS records, [REDACTED] was supposed to be paid \$71,000 per year (prorated for 2007 due to his start date with the petitioner on August 29, 2007). [REDACTED] should have earned \$5,917 per month, but in 2007, according to his Form W-2 for that year, he only earned approximately \$4,556 per month, for just over four months of employment. Again, 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. at 591-92.

Upon review of the information submitted by counsel, the wage inconsistencies have not been resolved. Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. The record does

not establish that the petitioner has complied with the terms and conditions of previously filed LCAs. The petitioner has not established with consistent evidence that it will comply with the terms and conditions of the current LCA. *Matter of Ho*, 19 I&N Dec. at 591. For this additional reason, the petition may not be approved.

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.