

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

SEP 02 2010

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,

Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and 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 company and seeks to employ the beneficiary in what the petitioner designates as a programmer analyst position. The petitioner, therefore, endeavors 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, finding that the petitioner failed to submit requested evidence pertaining to the nature and work locations of the beneficiary in the proposed position and therefore it could not be determined whether the beneficiary would be employed in a specialty occupation position. In addition, the director found that the petitioner had failed to submit a valid labor condition application (LCA) in support of the petitioner since the LCA failed to identify the petitioner as an H-1B dependent employer.

On appeal, counsel for the petitioner submits evidence in the form of service agreements with companies that provide contractual arrangements with the petitioner's employees, as well as an amended LCA reflecting the petitioner's H-1B dependent employer status. Based on the submission of this documentation, counsel asserts that the petitioner has satisfied its burden of proof in these proceedings.

The first issue on appeal is whether the director was correct in determining that the petitioner had not provided sufficient evidence to establish that it would be employing the beneficiary in a specialty occupation position.

The AAO finds that the director was correct in his determination that the record before him failed to establish a specialty occupation position, and it also finds that the matters submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed. The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

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

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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), 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.

The record of proceedings is fatally defective because it fails to include documentary evidence corroborating the H-1B petition’s claim that for the period requested the beneficiary would be employed on matters requiring him to apply the theoretical and practical application of a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty.

The petitioner’s Form I-129 identifies the Job Title as “Programmer Analyst.” The petitioner’s March 27, 2008 letter of support filed with the Form I-129 describes the proffered position as follows:

The Programmer Analyst analyzes the company’s data processing requirements to determine the computer software which will best serve those needs, then designs a computer system using that software which will process the client’s data in the most timely and inexpensive manner and implements that design by overseeing the installation of the necessary system software and its customization to the client’s unique requirements. The actual computer programming itself [is] performed with the assistance of Programmer Analyst.

Throughout this process, the Programmer Analyst must constantly interact with the client’s management, explaining each phase of the system development process, responding to its questions, comments and criticisms and modifying the system so that the concerns rose by the client are adequately addressed.

Consequently, the Programmer Analyst must revise and revamp the system as it is being created, not only to meet client requirements, but also to respond to unanticipated software anomalies here to fore undiscovered, to the extent that occasionally the system finally created bears seemingly little resemblance to that which was initially proposed.

Regarding the breakdown of the duties of the proposed position, the petitioner stated:

Essential duties and responsibilities include the following.

- System Analysis and Design – 40% (16 hours per week)
- Write code and Develop programs – 40% (16 hours per week)
- Unit and System Testing and attending meetings – 20% (8 hours per week)

Finally, the petitioner claimed that it has never placed an individual in the proffered position with less than a baccalaureate degree in science, commerce, engineering, mathematics, computer science, or economics.

On April 24, 2008, the director requested additional evidence. Specifically, the director requested additional details pertaining to the petitioner's business activities, as well as a detailed itinerary outlining the dates and locations of the services the beneficiary would perform in the proffered position. The director indicated that acceptable evidence would include evidence of in-house projects upon which the beneficiary would work, or copies of letters or agreements from end-clients outlining the nature and duration of the project(s) upon which the beneficiary would work. The director also requested additional evidence establishing that the proffered position was a specialty occupation.

In a response dated May 22, 2008, the petitioner addressed the director's queries. The petitioner stated that the beneficiary would work for the petitioner at the petitioner's worksite in Tampa, Florida. The petitioner further provided additional details regarding the proffered position, indicating that the beneficiary would employ technologies such as UML, MS-Visio, VB.NET, ADO.NET, DataSet and DataReader.

The petitioner also provided an organizational chart, demonstrating that the petitioner employed a president, who oversaw two office administrators, who in turn supervised a project coordinator and an accounting officer. Regarding other employees, the petitioner indicated it was an H-1B dependent employer, and stated that it currently employed approximately 25 persons in the position of programmer analyst. A list of these employees was provided in support of the response to the request for evidence.

The director denied the petition, noting that the petitioner had failed to supplement the record with a complete itinerary for the beneficiary as requested. On appeal, counsel for the petitioner for the first time submits copies of three service agreements with companies as a representation of the types of projects upon which the beneficiary would work. Counsel further noted that none of the documents name the beneficiary. However, counsel asserts that once the beneficiary is outsourced, the petitioner could provide the requested documentation.

Upon review, the AAO concurs with the director's basis for denial.

The AAO recognizes the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The AAO notes that the above duty descriptions comport with generalized descriptions of the work of programmer analysts as discussed in the "Computer Systems Analysts" chapter of the *Handbook*.

The *Handbook's* "Computer Systems Analysts" chapter indicates that a bachelor's degree in a specific specialty may be necessary for the performance of some computer systems analyst jobs, but it does not indicate that computer systems analysts constitute an occupational class normally requiring such a degree. Specifically, the *Handbook* states:

Education and training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment,

employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the 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 *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 alien will likely perform for the entity or entities ultimately determining the work's content. On appeal, counsel claims that the petitioner will be working in-house until outsourced to customers. However, despite the director's request in the April 24, 2008 request for evidence, the petitioner provided no documentary evidence about any particular project that the petitioner has generated for the period requested for the beneficiary's employment. 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 Obaighena*, 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).

In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, 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 and explained as 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, as noted by director, 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 finding 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.

While counsel on appeal submits three service agreements representing the type of assignments to which the beneficiary would be assigned, these documents will not be considered. 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. As these agreements fall within the general scope of the types of evidence requested in the RFE, but were not presented in response to the RFE, they will not now be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533. The appeal will be adjudicated based on the record of proceeding before the director.

Even if the service agreements had been timely submitted in response to the RFE, they would not satisfy the petitioner's burden of proof. As noted by counsel on appeal, these documents do not name the beneficiary as a contractor and do not specifically identify the nature and scope of work the beneficiary would perform during his tenure. Merely claiming that specific documentation would be submitted once the beneficiary was outsourced in the United States is not acceptable. Moreover, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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)(12). 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). For this reason also, the appeal will be denied.

For the reasons discussed above, the director did not err in denying the petition for failure to establish the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied.

The second 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):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

The petitioner is required to submit a valid LCA for all work locations, as set forth by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA lists the beneficiary's work location as [REDACTED]. However, the petitioner indicates that the beneficiary would ultimately be outsourced to various client sites. On appeal, counsel submits copies of agreements which represent some of the petitioner's clients, and the AAO notes that these clients are located in [REDACTED] and [REDACTED]. As previously discussed, absent end-agreements with clients, the duration and location of work sites to which the beneficiary would be sent during the course of his employment cannot be determined. Since the petitioner's clients are clearly spread across the United States, the LCA submitted with the petition is not valid for the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

The AAO also finds that the petition must be denied on the additional basis that the LCA filed with the Form I-129 contains the material misrepresentation, at subsection 1 of section F-1 of the LCA (Form 9035-E), that the petitioner is not H-1B dependent.¹ As this is a material misrepresentation about the nature of the petitioner and its associated obligations under the H-1B program, the AAO finds that the LCA filed with the petition does not correspond with the petition.

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.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the petition, and the petition must be denied for this additional reason.

The AAO additionally finds that the aforementioned misrepresentation of material fact in the LCA invalidates the petition and precludes its approval, as validity of an H-1B petition for consideration for approval requires that the petition's material assertions be true and correct. This fact is clearly indicated in the required certification at Part 6 of the Form I-129 - which the petitioner signed, under penalty of perjury - "that this

¹ In the RFE response and on appeal, the petitioner acknowledges that, contrary to the petitioner's entry at section F-1 of the Form 9035-E, it is H-1B dependent.

petition and the evidence presented with it is all true and correct.” For this reason also, the petition must be denied.

It is noted that counsel submits a new LCA on appeal indicating that the petitioner is in fact an H-1B dependent employer. The AAO notes that the new LCA was certified on September 25, 2008. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing, which in this case was April 18, 2008. 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). Moreover, even if the petitioner had disclosed its H-1B dependent status at the time of filing, the new LCA submitted on appeal fails to cover all potential worksites for the beneficiary. Consequently, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

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

Therefore, for the reasons discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director’s denial of the petition.

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