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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 Date: SEP 08 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,

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.

On the Form I-129 visa petition, the petitioner stated that it is a software development and consulting firm. To employ the beneficiary in a position designated as a systems analyst, the petitioner 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed (1) to provide the itinerary that the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires when a proffered H-1B position is to be performed at more than one location; (2) to establish that the Labor Condition Application (LCA) filed with the petition corresponds to the petition by encompassing all of the locations where the beneficiary would work; and (3) to establish that the proffered position is a specialty occupation.

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.

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the independent grounds that he cited in his decision. While fully affirming the director's decision, the AAO will further address in detail only the specialty occupation basis of the director's decision, as establishing specialty occupation status (along with the requisite beneficiary qualifications and other statutory and regulatory requirements) is necessary for approval of an H-1B petition.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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.

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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not 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* (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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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, 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.

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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.

In a letter dated May 6, 2009 and provided with the visa petition, the petitioner’s senior vice president abstractly described the duties of the proffered position and stated that they require at least a bachelor’s degree or the equivalent in “Computer Science, Engineering, Electronics, Business Administration in Information Systems or a related field”

The petitioner’s senior vice president did not state whether the beneficiary would work on the petitioner’s own in-house projects or whether he would be placed with other firms to work on their projects. Further, that the petitioner is willing to employ systems analysts with degrees in such diverse fields does not support the proposition that it is a specialty occupation pursuant to the definition in 8 C.F.R. § 214.2(h)(4)(ii), above, which states that a specialty occupation requires the attainment of a bachelor's degree or its equivalent **in a specific specialty**.

The record contains contracts, showing that the petitioner has agreed to provide computer personnel to various other companies. The record contains other documents, including time sheets and billing statements, that show that the petitioner, through [REDACTED], a contractor, has provided the beneficiary’s services to [REDACTED]. A letter from the controller of [REDACTED] states that the beneficiary is working as a [REDACTED].

Although that letter asserts the beneficiary’s duties on the claimed current project at [REDACTED], it does not show that the project is expected to continue throughout the period during which the petitioner seeks to employ the beneficiary.

In a letter dated August 28, 2009 counsel stated that, as the beneficiary is working for [REDACTED] in [REDACTED] and as that location is within “commutable” distance of the petitioner’s location in [REDACTED], no new LCA is required. In a declaration submitted on appeal, the

petitioner's president also stated that, because the [REDACTED] worksite in [REDACTED] is within "commutable" distance of [REDACTED], no new LCA is required. The AAO notes that [REDACTED] is approximately 40 miles distant from [REDACTED]. Counsel and the president offered no further explanation of why a new LCA is not required for employment in [REDACTED].

The record contains documents pertinent to the operations of [REDACTED] and [REDACTED] and to some of their projects. In a declaration dated June 10, 2009, the petitioner's president stated that they are "Web Development project execution arm(s)" of the petitioner, but provided no evidence to support his assertion of their business association with the petitioner.

In the declaration provided on appeal, the petitioner's president stated that the petitioner places its employees to work at various other companies and also has its own in-house projects, and that it therefore has sufficient specialty occupation employment in which to place the beneficiary. The petitioner's president did not identify any specific work assigned to or reserved for the beneficiary on any future project, articulate whether it would be in-house or for a different end user, or note its location.

In a letter provided on appeal, CCR's controller again asserted generic duties of the claimed assignment to [REDACTED], but did not indicate whether the Prudential project was projected to continue through the end of the period during which the petitioner seeks to employ the beneficiary.

Further, in a letter dated August 28, 2009, counsel stated that [REDACTED] declined to provide any documentation pertinent to the beneficiary. The AAO observes that the record contains no evidence from Prudential, the asserted end-user of the beneficiary's services, relating the beneficiary's specific duties or the anticipated completion date of the beneficiary's work.

Most of the evidence in the instant case suggests that the petitioner does not intend to assign the beneficiary to specific duties. Rather, the evidence implies that the petitioner intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

To the extent that the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of the end user of the beneficiary's services.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

Thus, without such a job description, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation. Further, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work for the beneficiary with Prudential, or that it had secured any type of work 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).

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. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied.

Based upon its review of the entire record including the matters submitted on appeal, the AAO concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. The director correctly denied the visa petition on this basis, which has not been overcome on appeal. The appeal will be dismissed and the petition will be denied on this basis.

Another basis for the director's denial of the petitioner was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition" In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in [REDACTED]. The Form I-129 states that the petitioner's offices are in [REDACTED] h. The petitioner has implied that it might possibly employ the beneficiary on the petitioner's own projects at its own location, but has not directly asserted that it will. In any event, as was noted above, the predominant part of the evidence suggests that he would be employed, if at all, on other companies' projects. The petitioner has not, therefore, demonstrated that the LCA provided corresponds with

the instant visa petition. The petition was correctly denied on this additional basis, which has not been overcome on appeal. The appeal will be dismissed and the petition denied on this additional, independent, basis.

The final issue is the petitioner's failure to provide an itinerary of the locations at which the beneficiary would be employed. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed 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 petition is located

This provision's appearance under the subheading "Filing of petitions," and its content, particularly the use of the mandatory "must," indicate, *first*, that an itinerary is a material and necessary document that must be filed with any petition that would require the beneficiary's services in more than one location, and, *second*, that an H-1B petition may not be approved for any location other than that stated in the Form I-129 unless such location - and the dates of work there - are identified in an itinerary filed with the petition. In a request for evidence issued on August 5, 2009 the service center requested that the petitioner provide, "an itinerary of the beneficiary's proposed employment to include each client/engagement's name; location where the beneficiary will perform his proposed duties; and the begin and end date of each engagement." The petitioner has never provided such an itinerary.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition was correctly denied on this additional basis, which has not been overcome on appeal. The appeal will be dismissed and the petition denied on this additional, independent, basis.

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. The appeal will be dismissed and the petition denied.

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