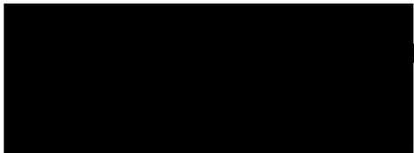


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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



82

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2011**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:  
[Redacted]

**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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. Kelley*  
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 with 40 employees. To employ the beneficiary in a position it designates as a programmer analyst position, 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). To support the visa petition, the petitioner provided a certified Labor Condition Application (LCA) that states that the beneficiary would work at the petitioner's offices in Fremont, California and in San Jose, California. The LCA is not approved for work at any other location.

The appeal is filed to contest each of the three independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the LCA in this case is valid for the location or locations where the beneficiary would work, and (3) that the petitioner has standing to file the visa petition as a United States employer within the meaning of within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent within the meaning of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

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.

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 (5<sup>th</sup> 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.

A letter from the petitioner’s president, dated March 29, 2009, accompanied the visa petition. It includes a list of the duties of the proffered position, as proposed by the petitioner, and also states, “The Beneficiary will be actively involved in various roles, including, but not limited to, providing services at Petitioner’s headquarters or when required at client locations.” What substantive work the proffered position would entail under the umbrella of providing services at the petitioner’s headquarters and providing them at client locations is unclear. Significantly, though, the letter explicitly states that the beneficiary would work at other locations, in addition to working at the petitioner’s offices.

On May 19, 2009 the service center issued a request for evidence that is unrelated to the subsequent bases for denial.

On June 30, 2009, because the evidence submitted did not demonstrate that the visa petition was approvable, the service center issued a second RFE in this matter. The service center requested, *inter alia*, (1) a floor plan of the petitioner’s offices, (2) copies of signed and valid work orders between the petitioner and end-users of the beneficiary’s services specifically stating that the beneficiary would work pursuant to that [REDACTED] and detailing his duties under that [REDACTED] and the qualifications required to perform those duties.

The service center also requested,

. . . an itinerary of services or engagements that specifies the dates of each service or engagement that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues or location where the services will be performed for the period of time requested.

In his response to the request for evidence, counsel stated that the petitioner would be the beneficiary’s employer, and not an agent. Counsel further stated:

. . . even though Beneficiary may temporarily be located at client sites, no contractual or employment relationship exists between Petitioner's clients and the Beneficiary. In sum, the Beneficiary will at all times remain the employee of the Petitioner and the Petitioner is committed to paying the Beneficiary's wages and other employee benefits.

Counsel also provided a letter, dated August 10, 2009, from the petitioner's president. That letter is headed Itinerary of Definite Employment, and states, "The Beneficiary may . . . be sent to various unanticipated client locations throughout the United States on projects as when required. [sic] During such times, the Beneficiary's direct supervisor will be [the petitioner's president]."

The AAO notes that the thrust of the service center's request for an itinerary was that it wanted a detailed explanation of where the beneficiary would work during what portions of the requested period of employment, what he would be doing, and for what end-user. Counsel's conclusory assertion that no employer/employee relationship would exist between the beneficiary and the end-user of his services was not responsive to that request, nor is the petitioner's president's admission that the beneficiary may be sent to various unknown locations throughout the United States.

A floor plan of the petitioner's business office shows that it has seven work stations. As was noted above, the petitioner claims to have 40 employees.

█ in the record describe work to be performed by the petitioner's employees for █ systems. Those █ describe the work to be performed, but not the end-user's requirements for personnel performing the work. They do not state that the beneficiary would be performing that work. They do state, "Substantially all of the Work shall be conducted by [the petitioner] at █ facility at: █."

Counsel also provided a contract, dated December 26, 2006, with █ for provision of services by the petitioner. That contract names the petitioner's employee who would perform services under that contract. That employee is not the beneficiary. That contract does not explicitly state where the work would be performed, but stipulates that, [the petitioner's worker] will assist █ in database support, engineering or programming, *as directed by* █ [Emphasis supplied.]

The director denied the visa petition on September 2, 2009, finding, based on the three grounds described above, that the evidence did not demonstrate that the visa petition was approvable.

On appeal, as to the specialty occupation issue, counsel stated that the petitioner had provided documentation demonstrating that it has clients and work opportunities, and cited the job description provided by the petitioner as proof that the duties the beneficiary would perform for end-users would qualify as a specialty occupation.

As to the issue of the location or locations where the beneficiary would work, counsel noted that the evidence of available work that the petitioner provided is for locations in █

Counsel further stated that the LCA submitted is valid for work locations within the same as either of those cities.

As to the issue of whether the petitioner would be the beneficiary's employer, counsel asserted that the evidence demonstrates that the petitioner is qualified to be a U.S. employer, stating that the petitioner "retains the ability to pay, hire, fire, supervise or otherwise control the work the [beneficiary]." Counsel further cited the "Itinerary" for the proposition that, ". . . because [the petitioner] is a preferred vendor of Systems, there will be sufficient specialty occupation work to occupy [the beneficiary]."

That the petitioner "retains the ability" to supervise or fire" the beneficiary is insufficient. The petitioner must demonstrate not only that it has the contractual right and ability to maintain an employer/employee relationship with the beneficiary, but that such an employer/employee relationship is contemplated. As was noted above, the December 26, 2006 contract with indicates that would direct the beneficiary's performance of her duties.

The petitioner claims to have 40 employees and has seven workstations at its offices. Clearly, the majority of its employees work elsewhere. Agreements provided confirm that the petitioner's employees routinely work at other companies' facilities, and that those other companies assign duties to them. Although the petitioner's president stated that he would personally supervise the beneficiary's performance of whatever duties were assigned to the beneficiary by whatever company, the record contains no explanation of how his personal supervision of numerous employees at numerous locations of duties assigned by various end-users is even possible, let alone likely.

Evidence in the instant case shows that the petitioner will not determine and direct the specific work that the beneficiary will actually perform. Rather, it intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

Because 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 that client of the petitioner who will be the end user of the beneficiary's services that will generate and determine the substantive work that the beneficiary will perform.

In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.

The petitioner provided its own description of the prospective duties of the beneficiary, but no such description of the beneficiary's duties provided by the still unidentified end-user of the beneficiary's services and no statement pertinent to the qualifications required by the unidentified end-user for the performance of those duties. Without such a job description, and statement of the requisite education, 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 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)(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).

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. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition 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 used in the calculation of the minimum wage or salary that the petitioner must pay. Although counsel avers that the beneficiary's work would be performed exclusively in [REDACTED] or else restricted to their [REDACTED] no evidence in the record, nor even any assertion, other than counsel's, identifies the area to which the beneficiary's employment would be restricted.

Further, in his August 10, 2009 letter, the petitioner's president stated, "The Beneficiary may . . . be sent to various unanticipated client locations throughout the United States on projects as when required." [sic]

The evidence submitted is insufficient to show that the beneficiary would be employed exclusively in the areas for which the approved LCA submitted to support the visa petition is valid. The appeal will be dismissed and the petition denied for this additional reason.

The final basis stated for the denial of the visa petition was the director's finding that the petitioner had failed to demonstrate that it was the beneficiary's prospective employer. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf." However, counsel acknowledged, in two places on page 8 of the appeal brief, that the petitioner is not the beneficiary's agent.

To qualify as a United States employer, a petitioner must satisfy all three of the criteria at 8 C.F.R. § 214.2(h)(4)(ii). Further, the petitioner must satisfy the criteria at the time that the petition is filed. This is obvious in the plain reading of 8 C.F.R. § 214.2(h)(2)(i)(A). 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). 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). Therefore, the director correctly concentrated upon whatever evidence the record might contain of work existing for the beneficiary at the time the petition was filed.

The evidence does not demonstrate that the arrangement contemplated would constitute an employer/employee relationship between the petitioner and the beneficiary, that is, that the petitioner, rather than the end clients to which the beneficiary would be assigned, would exercise the right to control the substantive work of the beneficiary as it is being performed. Rather, it strongly suggests that the petitioner's clients, the end-users of the beneficiary's services, would assign duties to the beneficiary, supervise his performance, and determine whether to retain his services. The appeal will be dismissed and the petition will be denied on this additional basis.

The record suggests additional issues that were not raised in the decision of denial.

The petitioner is obliged, by 8 C.F.R. § 214.2(h)(2)(i)(B), to provide an itinerary as initial evidence submitted with the visa petition. Notwithstanding that the petitioner labeled one of its submissions an "Itinerary of Definite Employment," it does not show the dates during which the beneficiary would work at specific locations, and is not, in fact, an itinerary at all within the meaning of the regulation. The petitioner has not complied with the requirement of C.F.R. § 214.2(h)(2)(i)(B), and the appeal will be dismissed and the petition denied for this additional reason.

The petitioner's failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B). Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the May 15, 2009 request for evidence, that the petitioner submit:

. . . a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names of the addresses of the establishment, venues, or locations where the services will be performed for the period of time requested.

The petitioner did not comply with that request.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited

regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

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). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. The appeal will be dismissed and the petition denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed 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. The appeal will be dismissed and the petition denied.

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