identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

[redacted]

A2

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 01 2011

IN RE: Petitioner: [redacted]
Beneficiary:

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:

SELF-REPRESENTED

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,

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 computer consulting firm. To employ the beneficiary in a position designated as a programmer 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 director denied the petition, finding that the petitioner failed to submit a valid Labor Condition Application (LCA) valid for all of the beneficiary's intended work locations in the United States. On appeal, the petitioner submitted a Form I-290B accompanied by a brief and additional evidence.

The 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), which states in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the

Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on November 14, 2008. With the petition, the petitioner submitted an LCA certified on November 11, 2008, which indicated that the beneficiary's work location would be [redacted]

On April 13, 2009, the service center issued an RFE in this matter. The service center noted that the petitioner's business involves placing its workers at other companies' locations to work on their projects. The service center requested, *inter alia*, (1) an itinerary of the beneficiary's proposed employment showing specific dates, locations, and clients; (2) a copy of the contract with the end-user(s) of the beneficiary's services or a letter from the end-user(s) of the beneficiary's services indicating that the beneficiary will work for them and specifically describing his duties; and (3) evidence from the end-user of the beneficiary's services pertinent to their requirements for the person performing those duties.

In response, the petitioner submitted a revised LCA, certified on April 16, 2009, valid for employment in [redacted], and a letter, dated April 21, 2009, from the petitioner's "President-Technology." That letter states that the beneficiary would work "on the technologies involved in Data Integration" at the [redacted] in [redacted] pursuant to a contract awarded to [redacted]

The petitioner also provided a copy of an Independent Contractor Agreement, dated February 6, 2009, between the petitioner and [redacted] Pursuant to that contract the petitioner agreed to provide the beneficiary to [redacted] to work as a DI Expert for a period of one year beginning on April 23, 2009. The AAO notes that the visa petition in this matter was submitted on November 14, 2008, prior to the petitioner entering into that agreement. Further, the period of requested employment is from April 19, 2009 to April 18, 2012, and that contractor agreement accounts for only one year of that three year period.

Although that contractor agreement states that the beneficiary would be working pursuant to a contract [redacted] has with [redacted] no such contract was submitted. Further, the petitioner did not submit a letter from [redacted] specifically describing the beneficiary's duties or evidence from [redacted] pertinent to their requirements for the person performing those duties. Finally, the petitioner did not provide the requested itinerary, or any other evidence of where the beneficiary would work.

The director denied the visa petition on April 30, 2009, finding, as was noted above, that the petitioner had failed to submit an LCA that may validly be used to support the instant visa petition.

On appeal, the petitioner's president submitted a brief in which he asserted that the instant beneficiary and its other workers are assigned to worksites until the work is complete and then assigned to other worksites, including the petitioner's own offices in [redacted] The

petitioner also provided another description of the beneficiary's duties. The record contains no indication that the description of those duties was provided to the petitioner by one of the prospective end-users of the beneficiary's services.

The petitioner's president also stated that originally it planned for the beneficiary to work at its [redacted] office, but that it had changed its plans and expected the beneficiary to work in [redacted] The petitioner indicated that it had therefore obtained the revised certified LCA.

The petitioner also submitted some additional contracts. Some of those contracts are between the petitioner and [redacted] some are between the petitioner and [redacted] some are between the petitioner and [redacted] for work to be performed for [redacted] and some are between the petitioner and [redacted] Although some of those contracts were in effect during some portion of the period of requested employment, none appears to have been in effect after October 31, 2009. Further, none indicate where the beneficiary would perform his services, except that an agreement with [redacted] dated December 16, 2004, indicates that some of the petitioner's workers might perform their services at their own homes, the location of which is otherwise unspecified. None of those contracts or associated documents mentions the beneficiary.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the LCA submitted in response to the RFE identifying [redacted] as the work location, was certified approximately five months after the petitioner filed the Form I-129. A 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). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

The record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the claimed occupational specialty for the intended work locations and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).[1] The appeal will be dismissed and the visa petition denied for this reason.

---

[1] 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.

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

The contract pursuant to which the petitioner now states that the beneficiary would work in [redacted] was secured on February 6, 2009, after the visa petition was submitted on November 14, 2008. This suggests that, when the petitioner submitted the visa petition, work was not available to the beneficiary. Pursuant to 8 C.F.R. § 103.2(b)(1) and *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, however, the petitioner is obliged to demonstrate that, when it submitted the visa petition, it had non-speculative specialty occupation employment to occupy the beneficiary throughout the period of requested employment.[2] A contract secured on February 6, 2009 does nothing to support such a proposition for a visa petition filed prior to that date.

[Italics added]. As 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, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and for USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended H-1B petition with USCIS whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

[2] To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is

Further, even if the contract pursuant to which the beneficiary would work had been secured prior to the submission of the petition, and even if the work to be performed under it had been demonstrated to be specialty occupation employment, the term of that contract is from April 23, 2009 to April 22, 2010, whereas the period of requested employment is from April 19, 2009 to April 18, 2012. Even pursuant to that hypothetical, the contract of February 6, 2009 could not demonstrate sufficient specialty occupation employment to occupy the beneficiary throughout the period of requested employment.

Regardless, the failure to demonstrate that non-speculative specialty occupation work had been secured as of the petition's filing date is sufficient reason, in itself, to dismiss the appeal and deny the visa petition. The AAO will, nevertheless, further address the specialty occupation issue.

In order for the instant petition to be approved, the petitioner is obliged to demonstrate that the duties the beneficiary would perform qualify the proffered position as a position in a specialty occupation. In addition to the statutory and regulatory definition of specialty occupation, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), the position must also meet one of the following criteria to qualify as a specialty occupation:

(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

---

unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner is in the business of supplying its workers to other companies to work on their projects. Absent sufficient evidence to the contrary, the petitioner is unlikely, pursuant to that scenario, to assign specific tasks to the beneficiary and to supervise his performance.

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 proceeding 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.

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.

The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition will be denied for this additional reason.

Further, 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.

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."

The petitioner has never claimed to have an agency relationship with the beneficiary, and the AAO agrees that no agency relationship exists. In order to demonstrate that it has standing to file the visa petition, therefore, the petitioner must demonstrate that it would be the beneficiary's employer.

As was noted above, the petitioner is in the business of providing its employees to other companies to work on their projects and, upon providing the beneficiary to another company, is unlikely either to assign specific duties to him or to supervise his performance.

In addition, absent evidence to the contrary, it appears that the beneficiary will work at another company's location; as such, that company will likely provide the instrumentalities and tools necessary to perform any assigned duties, and the actual work performed will be related to that company, as opposed to that of the petitioner.

Under these circumstances, the AAO finds that the petitioner has not demonstrated that the petitioner would have an employer/employee relationship with the beneficiary. As it has not satisfied this requirement of the definition of U.S. employer found at 8 C.F.R. § 214.2(h)(4)(ii), and has not demonstrated that it would be the beneficiary's agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), the petitioner has not demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the petition denied on this additional basis.

Further still, as was noted above, the petitioner was asked, in the April 13, 2009 RFE, to provide an itinerary of the beneficiary's proposed employment showing specific dates, locations, and clients, as well as evidence from the end-user of the beneficiary's services pertinent to their requirements for the person performing those duties. In addition to being initial required evidence, those requests were relevant to whether the petitioner had secured work for the beneficiary to perform in a specialty occupation and whether it had obtained work for him to perform at all. *See* 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary with the dates and locations of the employment when services are to be provided in more than one location). The petitioner did not comply with those requests. 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 appeal will be denied and the visa petition will be dismissed 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 (9th 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).

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.