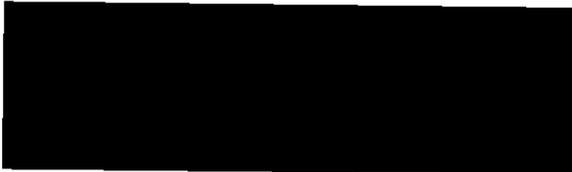


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



D2

FILE: EAC 09 074 50154 Office: VERMONT SERVICE CENTER Date: **APR 01 2011**

IN RE: Petitioner:
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:



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.

In a letter dated December 17, 2008 and submitted with the Form I-129 visa petition, the petitioner's manager stated that the petitioner is an information technology services company. To employ the beneficiary, from January 1, 2009 to December 31, 2011, in a position it designated as a systems analyst position, the petitioner endeavored 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) to support the visa petition as required by 8 C.F.R. § 214.2(h)(4)(i)(B), that the petitioner had failed to provide requested evidence, that the petitioner had failed to submit a required itinerary, and that the petitioner had failed to demonstrate that the proffered position qualifies as a specialty occupation. On appeal, counsel for the petitioner submitted a Form I-290B accompanied by a brief and additional evidence.

The AAO will first address whether the petition was supported by a corresponding LCA as required by 8 C.F.R. § 214.2(h)(4)(i)(B) when the Form I-129 visa petition was filed with 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 visa petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the Department of Labor 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, counsel filed the Form I-129 visa petition with USCIS on January 9, 2009. With the petition, counsel submitted an LCA that was certified on December 17, 2008. That LCA is valid for employment in Middlesex County, New Jersey and in New York, New York.

On June 16, 2009, the service center issued an RFE in this matter. The service center noted that the evidence submitted asserted that the beneficiary would work in Middlesex County, New Jersey and in New York, New York, but did not establish any more precisely where the work would be performed, the entity for which the beneficiary would perform his work, or for how long that entity would require the beneficiary's services.

The service center requested, *inter alia*, that the petitioner (1) provide an itinerary of the beneficiary's projected employment, as required by 8 C.F.R. § 214.2(h)(2)(i)(B), *including specific dates and locations* pertinent to the beneficiary's projected work; (2) submit a letter from each of the end-users of the petitioner's services identifying the beneficiary's supervisor at their location; (3) identify the succession of consulting or staffing businesses through which the beneficiary's services would be provided to each of the work sites identified.

In a letter dated July 10, 2009, and submitted in response to the RFE, the petitioner's manager stated: "[The beneficiary's] complete itinerary is Middlesex County, NJ and Moline [sic], IL."

Counsel provided a portion of a new LCA certified for employment in Moline, Illinois. According to the DOL, this new LCA was certified on July 16, 2009, a date subsequent to the January 9, 2009 filing date of the instant visa petition. This certification date is corroborated by the fact that it was signed the very next day on July 17, 2009 by the petitioner's senior manager. *See* General Instructions for the 9035 & 9035E (ETA Form 9035CP) (requiring that employers submitting the form electronically "sign and date the application immediately upon receipt of the certified application and before submission to USCIS").

Counsel submitted contracts and work orders between the petitioner and various other companies. Each of those documents shows that the petitioner's responsibility under them is limited to providing personnel to work on other companies' projects, generally through an intermediary. Some of those documents are with companies in New Jersey and New York and may evince prospective employment there. One group of documents pertains to employment in Illinois. The majority of the contracts and work orders provided are signed by a representative of the petitioner, but not signed by a representative of the company they purport to show entered into a business agreement with the petitioner. Those documents, because they were not apparently ratified by both parties, do not evince any agreement.

One of the documents submitted pertains to employment of the beneficiary at or for Deere and Co., a corporation located in Moline, Illinois. It indicates that the petitioner would assign the beneficiary to Seek InfoTech, which would assign him to Aquent LLC, which would assign him to work for Deere and Co. The last page of that document, however, indicates that it was signed by the petitioner's representative on March 27, 2007, but was not signed by a representative of Seek InfoTech. Further, it does not indicate that any of the petitioner's claimed employees would be assigned to the Illinois location to supervise the beneficiary's performance.

Counsel also submitted what purport to be E-mails to and from the beneficiary discussing various aspects of a project.

In the decision of denial, the director found that the LCA signed by the beneficiary's senior manager on July 17, 2009 may not be used to support the visa petition, which was submitted on January 9, 2009, and that the previous LCA is not valid for employment in Moline, Illinois, where the petitioner now claims the beneficiary would work. Because the petitioner had not submitted an LCA that corresponds to the instant visa petition and as it may not be used to support it as required by the visa petition instructions and 8 C.F.R. § 214.2(h)(4)(i)(B), the director found that the visa petition may not be approved. The director denied the visa petition on July 27, 2009.

On appeal, counsel reviewed the chronology of the case and stated that, because both LCAs were certified prior to the beginning of the period of requested employment, the petitioner had satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(i)(B).

In the instant case, the petitioner now proposes that the beneficiary will work, pursuant to the instant petition, in Moline, Illinois. The petitioner is obliged, therefore, to provide a corresponding LCA to support the visa petition. The visa petition that the petitioner has submitted to support employment in Moline, Illinois, however, had not been certified when the visa petition was submitted.

USCIS regulations 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). Because the petitioner now intends for the beneficiary to work in Moline, Illinois, but did not have an LCA valid for employment in Moline, Illinois with which to support the visa petition when it was submitted, the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this basis.

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]. 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.

Furthermore, 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 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 director also found that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation. The AAO will now review that issue.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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 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 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’s business involves placing its employees with other companies to work for those other companies. As recognized by the court in *Defensor v. Meissner*, 201 F. 3d at 387 - 388, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* 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, without such end-user evidence pertinent to the nature of the beneficiary’s prospective duties, the petitioner cannot establish the existence of H-1B caliber work for the beneficiary.

Further, although counsel asserted that the beneficiary would work in Moline, Illinois throughout the period of requested employment, the evidence submitted does not demonstrate that the petitioner has

obtained work for him to perform in that location at all, and certainly not throughout the period of requested employment. In addition to having failed to demonstrate that the beneficiary would be employed in a specialty occupation in Moline, Illinois, the petitioner has not demonstrated that the beneficiary would be employed in a specialty occupation in other locations to which he might be assigned when his work in Moline, Illinois, if any, is completed.

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.

For both reasons, therefore, the petitioner has not demonstrated that the work to which the beneficiary would be assigned would qualify as work in a specialty occupation. The appeal will be dismissed and the visa petition will be denied for this additional basis.

Further still, as was noted above, the service center requested, in the June 16, 2009 RFE, that the petitioner provide a letter from each of the end-users of the beneficiary's services identifying the person who would supervise the beneficiary's performance at their location. The record contains no such letter or letters. That request was material to whether the petitioner would control the beneficiary's work in that it would have an employer/employee relationship with the beneficiary as *required to qualify as a United States employer with standing to file the visa petition in accordance with the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii).*

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). For this additional reason, the appeal will be dismissed and the visa petition will be denied.

In addition, the director denied the visa petition based on the finding that the petitioner had failed to provide an itinerary as required by 8 C.F.R. § 214.2(h)(2)(i)(B) and specifically requested in the RFE. The AAO notes that the petitioner's manager stated, in the July 10, 2009 letter submitted in response to the RFE, "[The beneficiary's] complete current itinerary is Middlesex County, NJ and Molin [sic], IL." That itinerary does not contain the dates the beneficiary would work at those locations, as required by 8 C.F.R. 214.2(h)(2)(i)(B) and as requested in the June 16, 2009 RFE. That requested evidence was relevant to whether the petitioner had any work for the beneficiary to perform, whether that work is in a specialty occupation, and whether it is in a location for which the petitioner has submitted an approved LCA that corresponds to and otherwise supports the visa petition.

Failure to provide the itinerary, initial evidence required by 8 C.F.R. 214.2(h)(2)(i)(B), is cause in itself to deny the visa petition. Furthermore, given that the itinerary was then requested, failure to submit this requested evidence that precluded a material line of inquiry, as was noted above, is also grounds for denying the petition, pursuant to 8 C.F.R. § 103.2(b)(14). For both of these additional reasons, the appeal will be dismissed and the visa petition will be denied.

The record suggests an additional issue that was not addressed in the decision of denial. 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 regulation does not accord standing to file an H-1B visa petition to anyone other than a beneficiary's prospective U.S. employer or agent. In the instant case, the petitioner and counsel have never asserted that the petitioner is the beneficiary's agent. To the contrary, they have asserted that, notwithstanding that the beneficiary might work at remote locations, the petitioner would be the beneficiary's actual employer. The AAO agrees that the evidence submitted does not demonstrate that the petitioner is the beneficiary's agent.

However, notwithstanding that the service center requested, in the June 16, 2009 RFE, that the petitioner submit a letter from the end-user of the beneficiary's services identifying the person who would supervise the beneficiary's work at remote end-user locations, that evidence is not in the record.

The record does not demonstrate who would assign the beneficiary's duties when the beneficiary works at the Moline, Illinois location or at any other location where the beneficiary might work. The nature of the petitioner's business, however, is assigning its workers to work at other companies' locations to work on those other companies' projects. That business model suggests that the beneficiary will likely not be supervised by an employee of the petitioner.

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.

That the petitioner would apparently not control the beneficiary's work suggests that the petitioner and the beneficiary would not have the employer/employee relationship required by 8 C.F.R. § 214.2(h)(4)(ii)(2). Because the petitioner has not demonstrated that it is the beneficiary's agent or his prospective United States employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R. § 214.2(h)(4)(ii) it has not demonstrated that it has standing to file the instant visa petition. For this additional reason, the appeal will be dismissed and the visa petition will be denied.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for all of the above stated reasons, with each considered as an independent and alternative basis for denial. 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.