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

D2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 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:

[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,

for 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 healthcare staffing firm. To employ the beneficiary in a position it designates as a physical therapist 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).

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 Labor Condition Application (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 requests for additional evidence (RFEs); (3) the responses to the RFEs; (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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 U.S. Department of Labor's *Occupational Outlook (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.

On May 19, 2009 the service center issued a RFE in this matter. The subject matter of that RFE, however, has no bearing on the basis for the subsequent denial. On June 23, 2009, the service center issued another RFE. The service center requested, *inter alia*:

- copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists [the beneficiary] on the contract and provides a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence.

The service center added:

> NOTE: The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

Evidence submitted in response to that RFE is included in the list below, along with evidence initially submitted with the visa petition.

The LCA states that the prospective work location is Alma, Michigan. The visa petition states that the petitioner's is located [redacted], and that beneficiary would work at [redacted] A letter, dated March 10, 2009, from the petitioner's Vice President of Human Resources offering employment to the beneficiary does not state where the beneficiary would work. Another letter from the vice president, addressed to USCIS and also dated March 10, 2009, states "[The petitioner] provides travel, local contract and local per diem, temp-to-perm and permanent placement services across the country," but does not state where the beneficiary would work.

The record contains an employment contract ratified by both the petitioner and the beneficiary. As to the location where the beneficiary would work, that contract states, "Specifically, [the beneficiary] agrees to work . . . at such Client Facility as Employer shall designate."

The record contains a copy of a contract between the petitioner and [redacted] That contract contains the terms pursuant to which the petitioner proposes to provide services of licensed therapists to [redacted] "to work in various skilled nursing centers and other health care settings . . . which are owned by [redacted] or have contracted with or are affiliated with [redacted] Although that contract indicates that [redacted] provides therapists to sites in [redacted] it does not indicate that [redacted] provides any workers to any sites in Michigan. Further, the contract does not specifically mention the beneficiary.

In a letter dated August 3, 2009, counsel asserted that the petitioner was providing a copy of a contract with its end client. In so stating, counsel was referring to the contract between the petitioner and [redacted] The AAO notes that the visa petition makes clear that the beneficiary would work at [redacted] in Alma, Michigan, and that the June 23, 2009 RFE asked for contracts linking the petitioner to "the actual end-client company where the work will ultimately be performed," in this case, [redacted] Provision of the contract between the petitioner and [redacted] was not responsive to that request.

The director denied the petition, on August 19, 2009, on the three bases listed above.

On appeal, counsel provided an undated document on the petitioner's letterhead signed by a representative of [redacted] That document indicates that the petitioner will provide the beneficiary to [redacted] and that [redacted] will assign him to work at [redacted] in Alma, Michigan. That document further states, "The Corporate Service Agreement between [redacted] and [redacted] should cover all other arrangements."

Although the punctuation and emphasis in that sentence appears to imply that a close connection exists between [redacted] and [redacted] there is no other indication in the record of any such relationship, other than counsel's assertion that [redacted] is the end-client, and not a staffing company. Merely implying that the two entities are sufficiently closely-related to be treated as identical is insufficient to sustain the burden of proof in this matter. Further, the record does not contain a corporate service agreement or any other document ratified by [redacted] In particular, the AAO notes that, contrary to counsel's assertion on appeal, "a specific agreement between the petitioner and [redacted] has not been submitted.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503

(BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

In summation, although the service center requested, in the June 23, 2009 RFE, copies of signed contracts, statements of work, work orders, service agreement, and letters linking the petitioner to [redacted] no such documents are in the record.

Evidence in the instant case shows that the petitioner does not intend to assign the beneficiary to specific duties. Rather, it has stated that it intends to provide the beneficiary, through [redacted] to [redacted] to work for [redacted] at its location. The petitioner intends to charge [redacted] for the beneficiary's services, and [redacted] will presumably charge [redacted]

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. In this case, that end user appears to be [redacted] rather than, for instance, [redacted]

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.

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 in 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. The appeal will be dismissed and the petition will be 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 that sets the minimum wage or salary that the petitioner must pay. In this regard, the AAO finds that the record contains no contract or other documentary evidence establishing that any entity had agreed to hire the beneficiary as a physical therapist for the period of employment specified in the petition.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Alma, Michigan. The visa petition states that he would work at the facility of [redacted] in that town. The record, however, contains no evidence that [redacted] has agreed that the beneficiary may work at its facility. The record does not demonstrate that any job exists in Alma, Michigan for the beneficiary, and does not, therefore, demonstrate that the beneficiary would work there. The petitioner has not, therefore, demonstrated that the LCA provided is valid for the location in which the beneficiary would work. The appeal will be dismissed and the petition denied for this additional reason.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this reason also, the appeal will be dismissed and the petition denied.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), and failed to demonstrate that the LCA is valid for the location where the beneficiary would work, the director's decision shall not be disturbed. As this adverse determination of the specialty occupation and location issues are dispositive of the appeal, the AAO will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

The record suggests an additional issue that was not addressed in the decision of denial. In the June 23, 2009 RFE, the service center requested contracts and other documents linking petitioner and [redacted] where the petitioner asserts that the beneficiary, while ostensibly employed by the petitioner, would work. Those documents were relevant to various material issues in this case, including whether [redacted] has actually agreed that the beneficiary may work there, whether the petitioner would supervise the beneficiary's work, and whether any work at all is actually available to the beneficiary. The petitioner did not provide those documents, notwithstanding the service center's direct request.

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 dismissed and the visa petition denied on this additional basis.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only by showing that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.