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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

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Date: **JUL 01 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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 director of the California Service Center 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.

The petitioner identifies itself as a software development and consultancy firm. It seeks to employ the beneficiary as a programmer analyst 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, concluding that the petitioner failed to establish that the proffered position is a specialty occupation and that the petitioner failed to submit an appropriate and valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The first issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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, 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 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 (5<sup>th</sup> 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 stated that it has five workers and a gross annual income of \$192,710. In the support letter, the petitioner stated that “[t]he beneficiary will be actively involved in various roles, including, but not limited to, providing services at Petitioner’s client locations.” The duties of the position, and the related percentage of the beneficiary’s work time, are described as

follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced. (20%)
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct. (20%)
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so that others can understand the program. (15%)
- Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment. (15%).
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes. (5%)
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements. (5%)
- Write, analyze, review and rewrite programs, using workflow chart and diagram, and applying knowledge of computer capabilities, subject matter, and symbolic logic. (5%)
- Write or contribute to instructions or manuals to guide end users. (5%);
- Investigate whether networks, workstations, the central processing unit of the system, or peripheral equipment are responding to a program's instructions. (5%); and
- Prepare detailed workflow charts and diagrams that describe input, output, and logical operations, and convert them into a series of instructions coded in a computer language. (5%)

In the support letter, the petitioner asserts that the proffered position requires at least a bachelor's degree in engineering, computer applications, science, or a related field.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Shakopee, MN. The Form I-129 states that the beneficiary will work at the petitioner's offices in Shakopee, MN. The proffered salary is \$47,000 per year and the LCA lists a prevailing wage of \$46,280.

The petitioner submitted the beneficiary's resume and foreign education documents, but the petitioner did not submit a credential evaluation finding that the beneficiary's education is equivalent to at least a U.S. bachelor's degree in any field.

On December 20, 2008, the director issued an RFE advising the petitioner to submit copies of the petitioner's contracts for work and other evidence demonstrating that the proffered position is a specialty occupation. The RFE also requested copies of any vacancy announcements placed by the petitioner and an itinerary.

Counsel for the petitioner responded that the beneficiary will work on an in-house project for the petitioner and will be directly supervised by the petitioner's Vice President.

The employment contract between the petitioner and beneficiary that was submitted in response to the RFE assigns the beneficiary the title of "Software Consultant" and states, in pertinent part, as follows: "Once started on a project, at the client site, you shall complete the project to the satisfaction of the client and [the petitioner]. . . ." Additionally, the part of the contract that the beneficiary agreed to states, "I agree to adhere to the codes of conduct set down by [the petitioner] as well as any codes mandated by the clients of [the petitioner] while I am at the client's site." Notably and in contrast to the petitioner's claim that the beneficiary would work in-house, there is no mention of the beneficiary working at the petitioner's location.

Also in response to the RFE, and as proof of the in-house project upon which the beneficiary would purportedly work, counsel for the petitioner submitted an undated Request for Proposal (RFP), which, by its terms, is a solicitation for formal proposals from individuals or firms outside the petitioner for the award of a contract by the petitioner for performance of the following services for the petitioner:

- Design and develop a user friendly tool using Elite's software toolset.
- Unit-test the developed tool with help of the end-users.
- Package the developed tool and get it approved by the managers.

As such, the AAO finds that the RFP has no probative value towards establishing that the beneficiary would be employed on an in-house project as asserted by counsel and, further, fatally undermines the credibility of the petition. The RFP does not mention the beneficiary by name or his role in the project. Further, the RFP is a request the petitioner put out to other companies to perform the work on its behalf. Therefore, if another company is to perform the proposed project, it is not clear what role, if any, the beneficiary would have in it. No evidence was provided to demonstrate that the petitioner is actually going to perform the work on this project in-house.

The AAO also finds that, as the nature of the RFP, as reflected in the comments above, does not support counsel's claim of an in-house project, it therefore renders his claim of the in-house project unworthy of any evidentiary weight. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)

The petitioner also submitted quarterly wage reports for its five employees.

The director denied the petition on February 13, 2009.

On appeal, counsel again argues that the beneficiary will be working at the petitioner's premises in Shakopee, MN, although counsel acknowledges that it is possible that the beneficiary will be sent to a client location at a future date.

In addressing whether the proposed position is a specialty occupation, the AAO finds that the record is devoid of documentary evidence as to whether the beneficiary's services would actually be those of a programmer analyst. Although counsel argues that the beneficiary will work on an

in-house project for the duration of the petition, the petitioner provided no evidence indicating that it has sufficient work for the beneficiary in a specialty occupation as requested in the RFE. As discussed previously, the petitioner's RFP sent out to other companies to perform the work of the proposed project is not concrete evidence of an ongoing project controlled by the petitioner in which the beneficiary will have an ongoing role in a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It appears that, at best, the petition was based upon the possibility of speculative employment that was not definite at the time the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Regarding counsel's assertion that the beneficiary will work at the petitioner's offices for the duration of the period specified in the petition, the AAO also notes that the petitioner's "offices" appear to be a private residence.<sup>1</sup> The petitioner has not explained how it has sufficient space to employ the beneficiary full-time in a private home for the duration of the petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Further, based on the evidence, which includes copies of the beneficiary's employment contract and the petitioner's own position description, together with the petitioner's location in a private residence, it appears more likely than not that the beneficiary would be employed, if at all, at as yet undetermined client sites, rather than at the address provided in the petition, and on assignments which have not been identified for clients whose requirements have not been specified.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely 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 (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 beneficiary will likely perform for the entity or entities ultimately determining the work's content.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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

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<sup>1</sup> See <http://www.trulia.com/homes/Minnesota/Shakopee/sold/21090960-3811-Whitetail-Dr-Shakopee-MN-55379> for details.

must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. This particular 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. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

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 AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

Next, the AAO finds that the record of proceeding supports the other independent ground upon which the director denied the petition, namely, the petitioner's failure to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) 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 addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

*Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, 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].

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being at the petitioner's offices in Shakopee, MN, do not correspond with the evidence provided, which indicates that the beneficiary is more likely than not to work at unidentified client sites. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot conclude that this LCA actually supports the H-1B petition. 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. at 248.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The appeal will be dismissed and the petition denied 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.

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