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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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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JUL 01 2011**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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. The fee for a Form I-290B is currently \$630, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 firm with nine employees. To employ the beneficiary in what it designates as a programmer analyst position, the petitioner endeavors to classify her 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 establish that the petitioner intends to comply with the labor condition application (LCA) as certified. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The primary rules governing an [REDACTED] petitioner's wage obligations appear in the Department of Labor (DOL) regulations at 20 C.F.R. § 655.731. Based upon the excerpts below, the AAO finds that this regulation generally requires that the [REDACTED] employer fully pay the LCA-specified [REDACTED] annual salary (1) in prorated installments to be disbursed no less than once a month, (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly, and (3) within the work year to which the salary applies.

The pertinent part of 20 C.F.R. § 655.731(c) reads:

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .

(2) "Cash wages paid," for purposes of satisfying the [REDACTED] required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the [REDACTED]

nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

\* \* \*

(4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .

(5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

In the decision of denial the director noted that the petitioner claimed nine employees, and although some are due proffered wages of \$60,000 to \$70,000, the petitioner stated, on its 2008 Form 1120S U.S. Income Tax Return for an S Corporation, that it paid Line 8 Salary and wages of only \$137,369 during that year. The director further stated that the petitioner has filed a large number of petitions when compared to the number of employees it claims. The AAO notes that the petitioner has filed at least 38 petitions [REDACTED] petitions during 2008, 2009, and 2010 and, as noted above, it claimed nine employees on the instant visa petition, filed on April 1, 2009. The director observed that few of the beneficiaries whose petitions were granted appear to be working for the petitioner.

That decision included a table of [REDACTED] workers petitioned for by the instant petitioner whose petitions were approved. It contains the annual salary due those workers and the amounts that California Form DE-6 quarterly wage reports show that they received during the four quarters of 2008. Those quarterly reports suggest that the petitioner did not pay its [REDACTED] employees in accordance with the wages proffered in their visa petitions.

The director noted, for instance, that although the wage proffered in [REDACTED] visa petition [REDACTED] was \$68,890, which equals a quarterly wage of \$17,222.50, the petitioner paid the beneficiary of that petition only \$8,750.01 during the first quarter of 2008, and \$14,583.35 during the third and fourth quarters of 2008.<sup>1</sup>

The director noted that, although the wage proffered in [REDACTED] visa petition [REDACTED] was \$70,000 annually, which equals \$17,500 per quarter, the petitioner paid the beneficiary of that petition only \$9,126.01 during the first quarter and \$14,583.35 during the third quarter of that year.

The director stated that, although the wage proffered in [REDACTED] visa petition [REDACTED] was \$70,000 annually, which equals \$17,500 per quarter, the petitioner paid the beneficiary of that petition nothing during the first three quarters of 2008, and only \$14,583.35 during the final quarter of that year. Reference to the petitioner's 2008 quarterly wage reports indicates that the director misstated the amount the petitioner paid to that beneficiary during the final quarter of 2008. Those wage reports show that the petitioner paid no wages to that beneficiary during any quarter of 2008.

The director noted that, although the wage proffered in [REDACTED] visa petition [REDACTED] was \$60,000 annually, which equals \$15,000 quarterly, the petitioner paid the beneficiary of that petition nothing during the first three quarters of 2008 and only \$888 during the final quarter. Again, the quarterly wage reports indicate that the director misstated the payments they show. The petitioner paid the beneficiary of that visa petition no wages during any quarter of 2008.

From those apparent discrepancies, the director found that the petitioner has failed to comply with the terms and conditions of [REDACTED] visa petitions by failing to pay the full amount of the wage proffered.

Reference to USCIS computer records, however, reduces the number of inconsistencies. The visa petition in [REDACTED] was approved on April 30, 2008. Again, the petitioner is not obliged, therefore, to show that it paid the beneficiary of that petition the proffered wage during the first quarter of 2008. The remaining discrepancy in that case is the petitioner's payment of only \$14,583.35 during the third and fourth quarters of that year.

The visa petition in [REDACTED] was approved April 17, 2008. The petitioner is not obliged to show that it paid the beneficiary of that petition the full amount of the proffered wage during the

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<sup>1</sup> During the quarters not listed here, the payments by the petitioner to these various beneficiaries equaled or exceeded the amounts due.

first quarter of that petition. The remaining discrepancy in that case is the petitioner's payment of only \$14,583.35 during the third quarter of that year.

The visa petition in [REDACTED] was approved on January 12, 2009. Until that date, the petitioner was not obliged to pay the beneficiary of that petition the wage proffered in that petition. No discrepancy appears as to that visa petition.

The visa petition in [REDACTED] was approved on March 19, 2009. Until that date, the petitioner was not obliged to pay the beneficiary of that petition the wage proffered in that petition. No discrepancy appears as to that visa petition.

In sum, then, the remaining discrepancies in those cases are the petitioner's payment of only \$14,583.35 to the beneficiary of [REDACTED] during the third and fourth quarters of 2008 and the petitioner's payment of that same amount to the beneficiary of [REDACTED] during the third quarter of that same year.

The director denied the visa petition on May 7, 2009 based, as was noted above, on the finding that the petitioner has not demonstrated that it intends to comply with certified labor condition application submitted in support of the instant visa petition.

On appeal, counsel argued that, in failing to inform the petitioner that its compliance with the terms and conditions of approved [REDACTED] petitions was in question and to accord the petitioner an opportunity to address that issue, the director committed reversible error. The AAO notes that the petitioner has been accorded an opportunity to respond on appeal, and the director's failure to accord the petitioner a previous opportunity, if error, has thus been rendered harmless.

In a list of employees the petitioner provided with the appeal in this matter, the petitioner stated that it still employs the beneficiaries of [REDACTED] and [REDACTED]. Therefore, those two beneficiaries apparently worked for the petitioner since their petitions were approved on April 30, 2008 and April 17, 2008, respectively.

Counsel contested the finding that the petitioner has failed to pay its [REDACTED] beneficiaries the full amount of the wage proffered to them in their visa petitions. In support of that assertion, counsel provided two "leave" letters from the beneficiary of [REDACTED], both asking for approximately two weeks of leave. One of those requests covered the period from August 30, 2008 to September 15, 2008. The other covered the period from September 16, 2008 through October 5, 2008.

The AAO notes that all four weeks of the leave requested was within the third and fourth quarters of 2008. The wages lost by taking that leave would have been missing from the wages paid to the beneficiary of [REDACTED] during those quarters. Given that the wage proffered to that

beneficiary was \$68,890 annually, four weeks of work missed would have resulted in a subtraction of approximately \$5,300 from the amount that would otherwise have been due.<sup>2</sup>

The quarterly amount of the wage proffered to that beneficiary is \$17,222.50. The total due during the third and fourth quarters of 2008, therefore, was \$34,445. The quarterly reports for those quarters shows that the total petitioner actually paid to the beneficiary of [REDACTED] during those quarters was \$29,166.70. The difference between those two amounts is \$5,278.30. The leave requests submitted, if taken as authentic, would account for the amount by which the proffered wage in that other case was diminished during the third and fourth quarters of 2008.

The AAO finds suspicious, however, that the petitioner paid the same exact amount, \$14,583.35, to the beneficiary of [REDACTED] during each of two quarters, and that same amount, \$14,835.35, to another of its employees in one quarter. Although counsel attributes that diminution in the pay of the beneficiary of [REDACTED] to his taking leave, that exact amount is unlikely to recur on the petitioner's quarterly reports on three different occasions by pure chance. The petitioner appears to have, on occasion, reduced the annual amount of the wages it was paying to some of its [REDACTED] employees to \$59,341.40 per year, an amount less than was proffered to them in their [REDACTED] petitions.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner has not provided any explanation for its payment of only \$14,583.35, an amount less than the pro-rata portion of the proffered wage, to the beneficiary of [REDACTED] during the third quarter of 2008.

Based upon its review of the entire record of proceedings as expanded upon by the documents submitted on appeal, the AAO finds that the quarterly wage reports submitted indicate that the petitioner has not complied with its wage obligations with regard to some of its [REDACTED] beneficiaries.

The AAO further finds that the director did not err in her determination that the record before her failed to establish that the petitioner would more likely than not comply with the terms of the certified LCA, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed. The appeal will be dismissed and the visa petition will be denied on this basis.

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<sup>2</sup> The exact amount cannot be computed without knowing which of those days the beneficiary was scheduled to work. However, \$68,890 per year divided by 52 weeks equals approximately \$1,325 per week, which, when multiplied by four weeks, equals \$5,300.

The record contains another issue that was not discussed in the decision of denial.

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. The AAO questions whether the petitioner has demonstrated that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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

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 requires [1] 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 [2] 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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). 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 [REDACTED] 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 [REDACTED] visa category.

In a letter dated [REDACTED] 2009 and submitted with the visa petition, the petitioner’s president described the duties of the proffered position as follows:

The [proffered position] requires an overall perspective and analytical understanding of computer needs with respect to both hardware and software. Knowledge of procedures to create and/or modify computer programs, and mathematical aptitude leading to recommendations in terms of development, implementation, and maintenance of computer systems to enhance efficiency of said systems is also demanded.

The petitioner’s president asserted, with little explanation or analysis, that the performance of those duties requires a minimum of a bachelor’s degree or the equivalent in computer science.

A description so abstract is difficult to analyze. In any event, however, the petitioner’s president did not indicate which of the duties described cannot be performed by a person without a minimum of a bachelor’s degree or the equivalent in a specific specialty. The AAO sees no indication that the duties as described could not be performed by a computer professional with less than a bachelor’s degree in a specific specialty or the equivalent, and the record contains no other evidence or argument to support the proposition that the proffered position requires such a degree.

The AAO finds that the petitioner has not demonstrated that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The appeal will be dismissed and the petition will be denied on this additional basis.

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

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.