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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: VERMONT SERVICE CENTER Date: MAR 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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 is an IT consulting business. It seeks to employ the beneficiary as a software engineer 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 establish that the beneficiary is qualified to perform the duties of a specialty occupation.

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 the petitioner's letter and supporting materials. 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 (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 duties of the position are described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

- Design, develop, customize and implement application software using SAP;

- ABAP, BDS, ALV Report and SAP Business Workflows;
- Write detailed descriptions of user needs, program function and steps required to develop or modify computer programs;
 - Interpret business procedures and problems to redefine data and convert it;
 - Perform studies to aid development of a new system;
 - Plan and prepare technical reports, memoranda and instruction manuals as documentation of program development; and
 - Work with reporting team and data owners to resolve any issues.

In the support letter, the petitioner goes on to state:

In order to perform these complex duties, the Software Engineer must have a theoretical knowledge of computer languages and advanced computer applications. He will be called upon to recognize potential data processing problems before they arise and analyze many potential computer systems for applicability to the client's needs. As such, our minimum education requirement for this position is a Bachelor's degree in Computer Science, Computer Engineering or equivalent.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in Old Bridge, NJ. The Form I-129 states that the beneficiary will work at the petitioner's offices in Old Bridge, NJ. The proffered salary is \$54,000 per year and the LCA lists a prevailing wage of \$54,000.

The petitioner submitted the beneficiary's resume and a letter from his employer in India, but the petitioner did not submit any education documents for the beneficiary.

On July 23, 2007, the director issued an RFE advising the petitioner to submit copies of federal tax returns, quarterly tax returns, and bank statements as well as copies of the petitioner's contracts for work and other evidence demonstrating that the proffered position is a specialty occupation. The RFE also requested that the petitioner provide information regarding the beneficiary's education, a list of individuals currently employed in the proffered position as well as their degrees and fields of study, and photographs of the petitioner's premises.

The 2005 U.S. Corporate Income Tax Return submitted by the petitioner indicates that the petitioner is a computer consulting business. The petitioner submitted copies of its bank statements and lease, but did not provide copies of its quarterly tax returns, photographs of the petitioner's premises, or information regarding the beneficiary's education as was requested in the RFE. The petitioner also provided copies of advertisements it previously ran, however none of these advertisements are for software engineers and, moreover, all but two of these advertisements are for short-term positions. Not one of the employees on the petitioner's list of active employees holds the job title of Software Engineer. As job descriptions for the petitioner's other employees were not provided, it is not clear whether these people are employed in positions sufficiently similar to the one proffered here.

The petitioner also provided copies of contracts with its clients, but none of these contracts or

work orders submitted appear to pertain to the beneficiary. Moreover, copies of the Work Orders attached to these contracts indicate that some of the project lengths are only six months.

For the first time on appeal, the petitioner submitted documentation regarding a project on which the beneficiary would allegedly work. Specifically, the petitioner has submitted a letter from its client, [REDACTED], which states that the beneficiary will work as a team member for the "Unicode, Upgrade and Maintenance of SAP system" project at Eastman Kodak Company's client facility in Rochester, NY. Therefore, the petitioner will assign the beneficiary to Eastman Kodak Company, which in turn will assign him to an unspecified third-party client facility. The project schedule indicates that the project will start in December 2007 and run through December 2009. The petitioner did not provide copies of any contracts or work orders for this project. The proposed duties for the project in Rochester, NY include requirements gathering and design, Unicode conversion, and SAP upgrade to ECC 6.0. The petitioner states that the beneficiary will report to the onsite project manager, but does not state which company employs the onsite project manager. Most importantly, the letter from Eastman Kodak Company not only indicates that the beneficiary will be employed in a different location than the one stated in the LCA and the Form I-129, but also the letter does not state the minimum requirements for the position. It is clear from the change in the position description and job location provided on appeal that the work the beneficiary will actually perform is different from the work proffered in the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner also submitted an education evaluation for the beneficiary finding that the beneficiary has the U.S. equivalent of a Bachelor's Degree in Electrical and Electronics Engineering, but did not submit copies of the beneficiary's transcripts or diploma.

All this evidence indicates that it is unlikely that the proffered position is a specialty occupation, that the petitioner has sufficient work for the beneficiary covering the requested period in the petition, that the petitioner will assign the beneficiary to work at the location listed in the Form I-129 and LCA, or that the beneficiary is qualified to perform the duties of a specialty occupation.

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 software engineer. Although the petitioner submitted a letter from its client for the first time on appeal, the petitioner provided no contracts indicating that it has sufficient work for the beneficiary in a specialty occupation as requested in the RFE. 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)). Moreover, the petitioner's characterization of the job duties on appeal indicates that the beneficiary will work as a computer systems analyst, a position that is not synonymous with a software engineer position. The petitioner therefore, at best, could only offer the possibility of speculative employment in a specialty occupation 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).

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 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. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In fact, the letter provided on appeal from the petitioner's client indicates that the beneficiary's work is not that of a software engineer or any position that requires highly specialized knowledge. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary. Additionally, the fact that the location and nature of the work provided on appeal is different from the information provided in the petition indicates that the petitioner did not know where the beneficiary would work or what duties the beneficiary would perform at the time the petition was filed.

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.

Next, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is qualified to perform in the duties of a specialty occupation because the petitioner has not provided copies of the beneficiary's degree(s) and transcripts. The AAO cannot therefore determine the veracity

of the submitted credential evaluation stating that the beneficiary has the U.S. equivalent of a Bachelor's Degree in Electrical and Electronics Engineering.

Beyond the decision of the director, the AAO also finds that the petitioner failed 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 Old Bridge, NJ, do not correspond with the information provided on appeal, which indicates that the beneficiary will work at a client site in Rochester, NY. 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 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.