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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:

Office: VERMONT SERVICE CENTER

Date: MAR 02 2011

IN RE:

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)

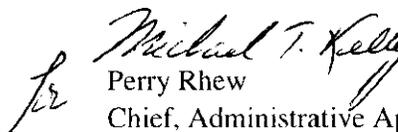
ON BEHALF OF PETITIONER:

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 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 a software development, consulting and e-Business solutions firm. It seeks to employ the beneficiary as a Software Programmer – Oracle Functional 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 on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to submit an itinerary; and (3) the petitioner failed to establish that the U.S. Department of Labor's Form ETA 9035E Labor Condition Application (LCA) corresponds to the petition.

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 and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

In the petition submitted on April 1, 2008, the petitioner claimed to have six employees and a gross annual income of \$482,160. The petitioner indicated that it wished to employ the beneficiary as a Software Programmer – Oracle Functional from October 1, 2008 to September 22, 2011 at an annual salary of \$42,000.

The support letter states that the person in the proffered position will be responsible for performing the following duties:

- Use knowledge of Oracle, C, SQL, PL/SQL, Toad, Windows, among other software technologies, to design, develop code and implement software applications;
- Evaluate maintain and support various online applications, including Client Server Systems and deploy Internet based applications;
- Convert data from project specifications and statements of problems and procedures to create, modify, and test computer programs;
- Analyze workflow charts and diagrams, apply knowledge of requirements analysis, design, test, and implement software applications, knowledge transfer/user training activities, computer capabilities, subject matter, and symbolic logic;
- Compile and write documentation regarding program development and subsequent revisions;
- Deploy program codes into computer system and client communication concerning new program codes;
- Observe and debug computer system to interpret software program operating codes;
- Correct program errors using methods such as modifying program or altering sequence of program steps; and
- Analyze, review, and rewrite programs to increase operating efficiency or to adapt programs to new requirements.

The petitioner estimated that the beneficiary would spend his time on a daily basis as follows:

- Analyze software requirements and programming (30% of time);
- Software system design (30% of time);
- Evaluate interface feasibility between hardware and software (15% of time);
- Unit and integration testing (10% of time);
- System installation (10% of time); and
- System maintenance (5% of time).

The petitioner states that it requires at least a bachelor's degree or the equivalent in computer science, computer information systems, engineering, science, or a related field for the proffered position.

The Form I-129 indicates that the beneficiary will work at the petitioner's offices [REDACTED]. The submitted LCA was filed for a Software Programmer – Oracle Functional to [REDACTED] from September 22, 2008 to September 22, 2011. The petitioner stated in the Form I-129 that the dates of intended employment are from October 1, 2008 to September 22, 2011.

The petitioner submitted the beneficiary's credentials, indicating that he has a foreign degree. The education evaluation submitted states that the beneficiary's education is equivalent to a U.S. bachelor of science degree in electronics engineering.

The petitioner also submitted a copy of its 2007 federal tax return in which it states it is in the business of consulting. The petitioner's address listed in the tax return is in Torrance, CA. Additionally, the petitioner submitted an Office Services Agreement. This Agreement is for the petitioner to lease virtual office space at the address it listed in Cary, NC. The Agreement notes that the notices and bills will be sent to the petitioner at its address in Torrance, CA. Further, the Agreement states that the petitioner is not allowed to put up any signs or placards identifying itself inside or outside of the premises. The petitioner submitted photos of its alleged office in Cary, NC, which appears to have one desk and three chairs.

On March 6, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit copies of contracts for computer consulting work plus any associated work orders and a letter from the client on whose project the beneficiary will work. The RFE also requested additional documentation regarding the beneficiary's qualifications. The director noted that if the petitioner intends to have the beneficiary work in-house, the petitioner should submit evidence describing the in-house project in detail along with copies of any client contracts regarding the in-house project.

Counsel responded to the RFE by stating that "[t]he [b]eneficiary will be working in-house as an [REDACTED] by being stationed at the petitioner's offices (not a client site). . . ." Counsel included a copy of an Agreement for Consulting Services dated March 12, 2009, nearly one year after the petition was filed. The Agreement is between the petitioner and [REDACTED] and states that the petitioner agrees to perform professional services for [REDACTED] which may include analysis, computer programming,

coding and other technical and professional services. According to the Agreement, both the petitioner and Thums are located in California.

Counsel also submitted a copy of a Work Order that was issued pursuant to the Agreement between the petitioner and [REDACTED]. The Work Order, which is dated March 18, 2009, states that the beneficiary will work as an Oracle Technical Consultant at the petitioner's office in Cary, NC. The duties listed in the Work Order include the following.

- Provide technical support for all issues pertaining to custom development; and
- Work with outside third party technical teams such as banks to get the data and test before migrating to production.

The dates that the beneficiary would work pursuant to the Work Order are March 25, 2009 to March 24, 2010.

Additionally, counsel submitted a letter from [REDACTED] which states "We have over 40 users using the system and our software support is [outsourced] to external vendor."

The director denied the petition on May 6, 2009.

On appeal, counsel argues that the petitioner will perform the duties as described previously and that the documentation submitted indicates that the beneficiary will work pursuant to the Work Order and Agreement with Thums at the petitioner's premises in Cary, North Carolina. Counsel maintains that, "[w]hile the Petitioner does have an office [REDACTED] it also maintains an office in the East Coast located in Cary, North Carolina for business strategic reasons. . . ." Counsel further maintains that because the beneficiary will work for the petitioner in Cary, North Carolina for the duration of the petition, there was no requirement for the petitioner to submit an itinerary and the LCA covers the location where the beneficiary will work.

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.

Although the petitioner submitted a copy of its Agreement and Work Order with [REDACTED] in response to the RFE, these documents were dated nearly one year after the petition was filed. The petitioner failed to submit any evidence to demonstrate that the petitioner knew, at the time of filing, on which project the beneficiary would work, or whether it even had work available for the beneficiary. 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. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). A petitioner must establish eligibility at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). Accordingly, the [REDACTED] documents are not probative, as they are not evidence of definite, non-speculative work that had been secured for the beneficiary at the petition's filing.

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. *Id.* at 387-388. 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.

As discussed above, the record of proceedings lacks substantive evidence of contractual commitments from any end-user entities that existed on or prior to the date the petition was filed 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. Further, the Thums work order is only valid for one year and the position description provided in the work order does not establish that the performance of the duties of the Oracle Technical Consultant requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The AAO further notes that Thums does not state its minimum requirements for the Oracle Technical Consultant; and the minimum requirements of the petitioner is for at least a bachelor's degree or the equivalent in a wide range of fields, including computers, engineering, and science, rather than a specific specialty. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts valid at the time the petition was filed and covering the dates requested in the petition that 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.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot conclude that his placement is related to the provision of a product or service that requires the performance of the duties of a computer programmer.¹ Applying the analysis established by the court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, the AAO has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform and that covers the duration of the petition. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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.

Second, the AAO affirms the director's finding that the petitioner failed to submit an itinerary, as required under 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

¹ Even if the AAO could find that the proffered position would indeed be that of a computer programmer, such a position does not by its very nature qualify as a specialty occupation. According to the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*):

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

Therefore, the *Handbook* does not state that at least a bachelor's degree in a specific specialty is a normal, minimum entry requirement for a programmer position.

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is material and required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii).

Although counsel argues that the beneficiary will work at the petitioner's offices in Cary, NC, counsel did not provide any evidence to substantiate this claim. The documentation that the petitioner provided indicates that the petitioner has only an agreement for a virtual office in Cary, NC. The copy of the Agreement is for Office Services only and is very clear that the Agreement is not intended to be a lease. There is no indication that the petitioner has an office space designated for its sole use and the petitioner is not allowed to put its name up anywhere in the office, which means that it is likely that the petitioner shares this office with other businesses. Also, the Agreement does not indicate how large the office space is. The photos that the petitioner submitted of the office space nowhere identify the petitioner and could be photos of an office that the petitioner shares with other companies. There are no identifying factors in the photos that indicate that the petitioner has sole use of the office such that the beneficiary could work there on a full-time basis. 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. 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). Therefore, the petitioner has failed to demonstrate that the beneficiary will actually work at the street address listed in Part 5 of the Form I-129 for the duration of the petition.

Given that the petitioner is a contractor and, further, given the lack of any substantiating evidence that the beneficiary will work at the address in Part 5 of the Form I-129 for the duration of the petition, the AAO concludes that the beneficiary is more likely than not to work at other locations besides Cary, NC. Additionally, the AAO notes that even if the Work Order were probative, the Work Order is valid only for one year and does not cover the duration of the petition. Also, some of the duties in the Work Order include providing technical support and working with third-party technical teams. The petitioner did not establish that the beneficiary could perform these duties while working in a virtual office in Cary, NC. The AAO therefore finds that the petitioner failed to provide an itinerary of the dates and locations of the services to be provided as required by 8 C.F.R. § 214.2(h)(2)(i)(B) and thereby affirms the director's denial of the petition for this additional reason.

Third, the AAO also affirms the director's finding that the petitioner failed to establish that the LCA corresponds to the petition. 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 and at what will likely be a new wage rate.

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.*

(Emphasis added).

The LCA and Form I-129 in this matter, which state the proffered position's location as being in Cary, NC for the duration of the petition, do not correspond with the documentation provided by the petitioner indicating that the office space in Cary, NC is a virtual office, which the petitioner presumably shares with other tenants. Additionally, the Agreement for the virtual office is only for one year. In light of the fact that the petitioner failed to establish that the petitioner has an office space in Cary, NC designated for its sole use with the necessary equipment for the beneficiary to perform the proffered duties there on a full-time basis, it is likely that the beneficiary will work at locations not identified in the Form I-129 and the LCA filed with it. Therefore, USCIS cannot ascertain that this LCA actually supports and corresponds to the H-1B petition. *See id.* As discussed above, 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. 248.

Therefore, the director's conclusion 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 is affirmed.

The petition will be denied and the appeal dismissed 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.