

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

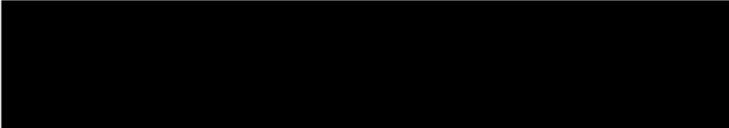
b2



DATE: NOV 23 2011 OFFICE: CALIFORNIA SERVICE CENTER

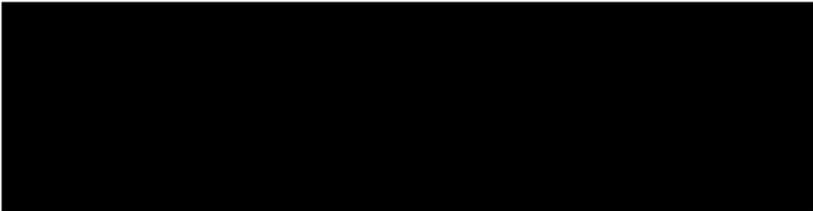
FILE:

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 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 remain denied.

The petitioner represented itself on the Form I-129 as a software product development company with five employees. It seeks to employ the beneficiary as a “computer software engineer consultant” 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 basis of her determination that the petitioner failed to demonstrate: (1) that it qualifies for classification as a United States employer or agent; and (2) that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director’s grounds for denying this petition. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate that the petition is supported by a certified labor condition application (LCA) which corresponds to it.

In its July 28, 2009 letter of support, the petitioner proposed the following duties for the beneficiary:

- Conducting client training related to product family methodologies and applications;
- Implementing problem-tracking mechanisms for internal and external product support;
- Implementing version control and code change tracking mechanisms for internal use;
- Refactoring product areas, including pervasive logging to track system behavior, audit feature extensions to report user actions, graphic plug-ins for data collection, results interpretation, and global administration and web-service exposure;
- Providing periodic reports on architecture, current technological choices, and possible product enhancements;
- Implementing unit tests and performing regression testing;
- Tracking core systems thread-safe issues; and
- Preparing for a major release of next generation product, including operational designs, technology research, security, and licensing schema.

The director issued a request for additional evidence (RFE) on August 12, 2009. The director notified the petitioner that if it engages in the practice of consulting, employment staffing, or job placement and contracts short-term employment for workers who are traditionally employed, in any way, it was to submit certain evidence including copies of signed contracts between the petitioner and the beneficiary, a complete itinerary of services or engagements, and copies of signed agreements, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate end-users of the beneficiary’s services.

In the alternative, if the beneficiary was to be working for the petitioner in-house, the petitioner was instructed to submit other evidence, depending upon whether the beneficiary was to be working in-house on a client project or in-house for the petitioner directly. If the beneficiary was to work in-

house on a client project, the petitioner was instructed to submit copies of signed and valid agreements between the petitioner and the authorized officials of the end-users of the beneficiary's services, and the petitioner was instructed further that such evidence was to provide a detailed description of the duties to be performed by the beneficiary, the qualifications necessary to perform such duties, the wages and benefits to be paid, the hours to be worked, and any other related information. If the beneficiary was to work in-house on projects for the petitioner, the petitioner was to submit a detailed description of the project and, if applicable, the names of the individuals with whom the beneficiary would be working, the expected duration of the project, an explanation as to how the project is unique and proprietary to the petitioner, and evidence that the petitioner markets its own software and/or hardware.

The director granted the petitioner six weeks during which to submit the requested evidence and specifically placed it on notice that "[m]erely stating that the beneficiary will be working on an in-house project may not be sufficient."

However, the petitioner elected not to provide the requested evidence. Although specifically warned that merely stating that the beneficiary would be working in-house may not be sufficient, the petitioner, through counsel's September 15, 2009 letter and its own letter dated the same, did just that. Rather than submitting the requested evidence, counsel asserted his belief that the RFE was issued in error because the petitioner is not an employment or staffing agency, and that the beneficiary would be a direct employee of the petitioner. In similar fashion, the petitioner stated that "[w]e believe there is a misunderstanding about what line of work [the petitioner] is in," that it is not a consulting, employment staffing, or job placement agency or business, and that the beneficiary would not be contracted out to its clients but work from its offices in St. Paul, Minnesota. However, as noted, the director had specifically set forth the evidence the petitioner was to submit under such a scenario, and warned the petitioner of the consequences of failing to support its assertions with such evidence. As neither counsel nor the petitioner provided the evidence specifically requested by the director, the director denied the petition on September 24, 2009.

On appeal, the petitioner submits much of the evidence requested by the director in her RFE. For example, the petitioner submits, *inter alia*, evidence regarding a pending trademark application, two documents entitled "Product Sheet[s]" describing its products, and copies of three customer agreements and accompanying product order forms. Although counsel contends in his appellate brief that "the entire premise of the [RFE] was and is incorrect," in his October 26, 2009 letter submitted on appeal he acknowledges that the petitioner did not respond to the RFE fully, stating that "the undersigned takes full responsibility for not providing the requested evidence in full at that time." However, in that same letter counsel asserts again that "the RFE was premised on the notion that [the petitioner] was a consulting or staffing agency."

Counsel's assertions that the RFE was premised on the notion that the petitioner is an employment or staffing agency are not supported by the record. The text of the RFE, which was summarized

above, was clear and concise.¹ Again, the director set forth the evidence the petitioner was to submit if the beneficiary was to work in-house or, in the alternative, the evidence the petitioner was to submit if the beneficiary would work at other sites pursuant to contractual agreements. The director also warned the petitioner not to simply assert that the beneficiary would work in-house absent the evidence she requested from the petitioner to support that employment scenario.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8),(12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and will not, consider the sufficiency of the evidence submitted on appeal.

Having made that determination, we turn next to the second ground of the director's denial of the petition – that the petitioner failed to demonstrate that the proposed position qualifies for classification 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 [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

¹ The text of the director's August 12, 2009 RFE was less than two pages long and consisted, in total, of 12 brief paragraphs.

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 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 proposed 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 set forth the duties of the proposed position in its initial letter of support, and supplemented them with additional duties in response to the director's RFE. However, the petitioner did not identify any particular project upon which the beneficiary would work, despite being specifically instructed to do so. Nor did it submit any of the other evidence specifically requested by the director in her RFE. Upon review, we find that the record before the director lacked documentary evidence regarding where, and for whom, the beneficiary would be providing services, for the period of requested employment, and therefore whether his services would actually be those of a computer software engineer consultant for that period of time.

The duties outlined for the beneficiary by the petitioner in its letter of support and RFE response were vague, overly broad, and generic. The petitioner also failed to describe the beneficiary's duties in specific relation to the petitioner's business. Therefore, based upon the evidence before the director, we are unable to assess whether an actual position exists for the beneficiary. Providing a generic job description that speculates what the beneficiary may or may not do is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proposed 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 proposed position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner 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.

Accordingly, we agree with the director's determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

Having made that determination, we will briefly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. As detailed above, the record of proceeding before the director² lacked sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a

² Again, we will not consider the evidence submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. at 764.

bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer” and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As previously discussed, there was insufficient evidence before the director detailing where the beneficiary would work, the specific projects to be performed by the beneficiary, or for whom the beneficiary would ultimately perform services.

Beyond the decision of the director, we find that the petition may not be approved for an additional reason. We note that the certified LCA provided in support of the instant petition lists a Level I prevailing wage level for “Computer Specialists – All Others” in the Minneapolis-St. Paul-Bloomington, Minnesota metropolitan statistical area.³ This indicates that the LCA, which is certified for an entry-level position, is at odds with the statements by counsel and the petitioner regarding the complexity of the duties to be performed by the beneficiary. Given that the LCA submitted in support of the petition is for a Level I wage,⁴ it must therefore be concluded that either (1) the position is a low-level, entry position relative to other computer software engineer consultants; or that (2) the LCA does not correspond to the proposed petition.

While the 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, the following:

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

³ The Level I prevailing wage for this position in the Minneapolis-St. Paul-Bloomington, Minnesota metropolitan statistical area was \$50,315 at the time the LCA was certified. The Level II prevailing wage was \$62,837; the Level III prevailing wage was \$75,338; and the Level IV prevailing wage was \$87,859. See Foreign Labor Certification Data Center, Online Wage Library, available at <http://www.flcdatcenter.com> (accessed November 10, 2011).

⁴ According to guidance regarding wage level determination issued by the DOL in 2009 entitled *Prevailing Wage Determination Policy Guidance*, at page 7, Level I wage rates, which are labeled as “entry” rates, “are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.”

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 regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has not demonstrated that the petition is supported by an LCA which corresponds to the petition, and the petition must be denied for this additional reason.

The petitioner has failed to demonstrate that it qualifies for classification as a United States employer or agent and that its proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, the petitioner has also failed to demonstrate that the petition is supported by an LCA which corresponds to the petition.⁵ Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The petition will remain 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁵ 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).