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



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

[REDACTED]

D2

Date: Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

OCT 06 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:

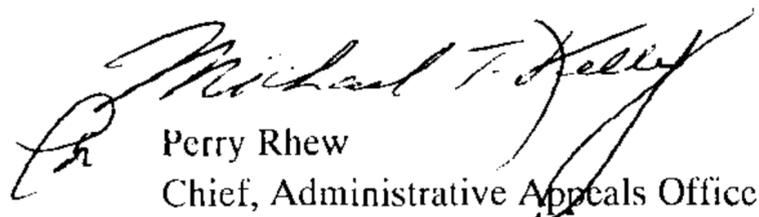
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**INSTRUCTIONS:**

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, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a software development and consulting company that employed the beneficiary as a software engineer 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 revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A), noting that an administrative site visit to the claimed work location of the beneficiary demonstrated that the beneficiary was no longer employed in the capacity specified in the petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR), dated April 1, 2010; (3) the petitioner's response to the NOIR dated April 23, 2010; (4) the director's September 13, 2010 notice of revocation; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On October 19, 2009, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) to employ the beneficiary in H-1B classification for the period of October 26, 2009 to October 26, 2012. The director initially approved the petition. On April 1, 2010, the director notified the petitioner of her intent to revoke approval of the H-1B petition based on evidence concluding that the beneficiary was no longer employed in the capacity claimed in the petition. The director subsequently revoked approval of the petition on September 13, 2010. The issue before the AAO therefore is whether the director appropriately revoked the approval of this H-1B petition.

The AAO turns first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which an H-1B Form I-129 petition's validity will be rescinded.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or

- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

It is first noted that the director has complied with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii)(B).

The next issue to be addressed is twofold: (1) whether the beneficiary is no longer employed by the petitioner in the capacity specified in the petition; and (2) whether the petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section.

The petitioner's I-129 petition and LCA both indicated that the beneficiary would provide services for the petitioner's end-client in St. Louis, Missouri for the requested validity period from October 26, 2009 to October 26, 2012. However, after an administrative site visit to Compass Performing Engineering, the end client, at 1 Express Way, St. Louis, MO 63121 on January 8, 2010, U.S. Citizenship and Immigration Services (USCIS) determined that the beneficiary was not working at this location as claimed in the petition. As stated above, the director issued a NOIR informing the petitioner of these findings and affording the opportunity to respond.

In response to the NOIR, former counsel for the petitioner acknowledged that the beneficiary's work location had changed. Specifically, counsel submitted documentation demonstrating that the beneficiary had been reassigned in December 2009 to a project with Keane, Inc. entitled EZDec, which was located in Chicago, Illinois. The petitioner submitted copies of a contract verification letter from EzDec attesting to this fact, as well as two certified LCAs for the work location of Chicago, Illinois (certified on December 21, 2009 and June 10, 2009, respectively). Counsel asserted that the job duties of both the original position and the new position were essentially the same; that there was, therefore, no material no material change in circumstances; and that, consequently, petition's approval should not be revoked.

The director disagreed, correctly, and on September 13, 2010, the director sent a decision revoking approval of the petition. The director found that, contrary to counsel's assertions, there was in fact a material change in the circumstances surrounding the beneficiary's employment, and further noted

that the change in assignment for the beneficiary resulted in a different set of duties and tasks that raised the issue of whether the beneficiary would be employed in a specialty occupation.

On appeal, newly-retained counsel for the petitioner mistakenly claims that, in the NOIR, the only issue to be discussed was whether there existed a reasonable and credible offer of employment for the beneficiary. Counsel further argues that the petitioner provided ample evidence in response to the NOIR and that, as the beneficiary continued to be employed by the petitioner after termination of the Express Scripts project, there was no material change in circumstances and thus the petition did not warrant revocation.

The AAO disagrees.

First, the petitioner and counsel acknowledged that the beneficiary was no longer working on the project for which the petition had been approved. Therefore, the director's revocation of the petition's approval under 8 C.F.R. § 214.2(h)(11)(iii)(A)(I) was appropriate.

Second, pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(4), an approved petition is revocable if the petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of 8 C.F.R. § 214.2.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) requires an amended or new petition and labor condition application whenever there is any material change in the terms and conditions of employment. It 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.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) states in relevant part as follows:

The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. **An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary.** If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. . . .

(Emphasis added).

Based on the evidence in the record, the petitioner still employs the beneficiary, and therefore should have filed an amended petition to reflect that the nature of the beneficiary's work assignment would change and that the beneficiary's work location would move from St. Louis, Missouri to Chicago, Illinois. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) requires that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment. Because the petitioner did not file an amended petition, it fails to overcome the ground for revocation under 8 C.F.R. § 214.2(h)(11)(B)(iii)(A)(4).

On appeal, counsel argues that there was no material change in the terms and conditions of employment, and specifically focuses on the director's failure to consider the LCA certified for the Chicago, Illinois location on June 10, 2009. The AAO notes that by their very prominence in the Form I-129 their critical roles in deciding the nature and required pay for a proffered position, both the worksite and the evidence of the particular work to be performed for the particular entities to whom the beneficiary will be assigned are basic terms of a beneficiary's employment and critical aspects of the conditions under which the beneficiary is to be employed. As such, the AAO concludes that they are material, and that changes in these elements from those specified in the petition as filed are material, and, as such, require the filing of an amended petition, with the appropriate fees, and a new LCA.

The regulation at 8 C.F.R. § 103.2(b)(1) states:

Demonstrating eligibility at time of filing. 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. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

*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.

In the instant case, the petitioner indicated that the beneficiary would work in St. Louis, Missouri for the entire requested validity period, and submitted a certified LCA for said location. Counsel asserts that, since the petitioner had also obtained a certified LCA for Chicago, Illinois on June 10, 2009 for the same requested validity period, this LCA should have been accepted by the director when submitted in response to the NOIR.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. The LCA submitted with the petition was certified for St. Louis, Missouri, the claimed work location for the beneficiary. Counsel asserts that, since a certified LCA existed for Chicago, Illinois at the time of filing and since the petitioner subsequently transferred the beneficiary to a worksite in Chicago, Illinois, the petitioner had complied with the terms and conditions of employment.

The AAO does not concur with counsel's contentions. 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 (Reg. Comm. 1978). While the petitioner may have obtained a certified LCA for a software engineer for the work location of Chicago, Illinois, prior to the filing of the instant petition, the petitioner did not claim that the beneficiary would work in Chicago, Illinois, nor did the petitioner submit a copy of that LCA with the petition. Even if it had submitted a copy of the LCA, the LCA would not have corresponded with the petition, which indicated that the beneficiary would work exclusively in St. Louis, Missouri for the entire requested validity period.

Therefore, based on the above discussion, the director properly revoked the petition under 8 C.F.R. §§ 214.2(h)(11)(B)(iii)(A)(I) and (4).

The AAO will also address the issue of whether the proffered position is a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. The petitioner failed to provide sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means 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 at 387. 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.

In addressing whether the proffered position is a specialty occupation, the record is devoid of substantial documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a software engineer.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

As discussed by the director, the initial petition was approved based upon the evidence submitted in support of the beneficiary’s job duties and work assignment for the Express Scripts project in St. Louis, Missouri. On appeal, counsel contends that the job duties and work assignment for the beneficiary for the new client at the new location in Chicago, Illinois are essentially the same, and therefore do not warrant a material change in the terms and conditions of employment. The AAO disagrees.

The petitioner is engaged in an industry that typically outsources its personnel to client sites to work on particular projects. The evidence submitted in response to the NOIR with respect to the new work assignment and duties of the beneficiary is vague and fails to specifically describe the beneficiary’s intended employment with this client. Consequently, even if the petition had not been revocable based on the reasons discussed earlier, it is evident that the beneficiary’s duties could potentially vary widely based on the requirements of a client at any given time. This possibility renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary’s duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another, particularly if they varied from one industry sector to another.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought

foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* 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.* In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

As discussed above, the record contains a generic job description that speculates what the beneficiary may or may not do at each worksite, as well as documents pertaining to the new EzDec assignment which likewise provide a vague overview of the beneficiary’s duties. The job description provided by the petitioner, as well as various statements from the petitioner both in response to the NOIR and on appeal, indicate that the beneficiary will be working on client projects for clients based throughout the nation. The petitioner’s failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

It is noted that, even if the proffered position were established as being that of a software engineer, a review of the U.S. Department of Labor’s *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor’s or higher degree in a specific specialty or its equivalent for entry into the occupation of software programmer. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, “Computer Software Engineers and Computer Programmers,” <<http://www.bls.gov/oco/ocos303.htm>> (last accessed on July 27, 2011). As such, absent evidence that the position of software engineer qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition’s approval should be revoked for this additional reason, under the provision of 8 C.F.R. § 214.2(h)(1)(B)(iii)(A)(5) (approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2 or involved gross error).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to sustain that burden and the appeal shall accordingly be dismissed.

**ORDER:** The appeal is dismissed. The petition's approval is revoked.