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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

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



D2

Date: **SEP 07 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
for *Michael T. Kelly*
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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

On the Form I-129 visa petition the petitioner stated that it is an information technology firm with 15 employees. To employ the beneficiary, in a position designated as a software engineer position, from August 5, 2009 to August 6, 2011, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the instant visa petition and may be used to support it. On appeal, counsel for the petitioner submitted Form I-290B accompanied by a brief and additional evidence.

As will be first discussed below, the AAO finds that the brief and additional documents submitted on appeal demonstrates that, in the particular circumstances of the petition that is the subject of this appeal, the petitioner's did not commit an error that was material to the proper processing and adjudication of the petition. Accordingly, the director's decision to deny the petition will be withdrawn.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(1) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed

The regulations require that before filing a Form I-129 visa petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the 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 an LCA with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the visa petition with USCIS on August 11, 2009. With the petition, the petitioner submitted an LCA certified on February 6, 2009, prior to the submission of

the visa petition, as required. On that LCA, however, the petitioner indicated that it was not H-1B dependent.

The regulation at 20 C.F.R. § 655.736 provides, in pertinent part, H-1B-dependent employer “. . . means an employer that has 25 or fewer . . . employees . . . and [e]mploys more than seven H-1B nonimmigrants”

The petitioner had indicated on the visa petition that it employed 15 people. On August 17, 2009 the service center issued an RFE in this matter. The service center noted that USCIS records indicate that the petitioner then had more than seven H-1B employees. The service center asked, *inter alia*, that if the petitioner is H-1B dependent within the meaning of 20 C.F.R. § 655.736, it “provide an amended or a new LCA certified by the Department of Labor that shows [it] is H-1B dependent.” In making that request, the service center did not, and could not, waive any of the requirements of the pertinent statutes and regulations.

In response, the petitioner submitted a new LCA. That LCA states that the petitioner is H-1B dependent. It was not then certified. The director denied the visa petition on April 1, 2010, finding, as was noted above, that the petitioner had failed to submit an LCA that corresponds to the instant visa petition and may be used to support it.¹

¹ 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].

As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, if an initially filed LCA does not correspond to the petition for which it was filed, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed.

On appeal, counsel submitted another copy of the new LCA, showing that it was certified on October 2, 2009, subsequent to the instant petition's filing date. Counsel asserted that because the service center requested a new LCA, the new LCA submitted must be accepted as valid support for the instant visa petition. Counsel also asserted that whether the petitioner is H-1B dependent is immaterial, because the wage proffered in this case exceeds \$60,000 and the beneficiary has a U.S. master's degree, either of which circumstances is sufficient to exempt the beneficiary from answering the LCA question pertinent to H-1B dependence.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the certified LCA submitted on appeal was certified almost two months after the petitioner filed the Form I-129 visa petition. The regulation at 8 C.F.R. § 103.2(b)(1) requires a petitioner to establish that it was eligible when it filed the visa petition. Establishing that it subsequently became eligible is insufficient. The petitioner is unable, therefore, to rely on the LCA that was certified on October 2, 2009 to support the visa petition submitted on August 11, 2009. The director was neither obliged nor permitted to accept the new LCA as valid support for the instant visa petition. Counsel asserts, however, that whether the petitioner is H-1B dependent is immaterial, and the petitioner may be permitted to rely on the LCA certified on February 6, 2009 and submitted with the visa petition.

Both the visa petition and the LCA certified on February 6, 2009 indicate that the petitioner would pay the beneficiary an annual salary of \$77,000. Further, evidence in the record shows that the beneficiary earned a Master's Degree in Computer Science at the University of Texas – Pan American.

Page three of the LCA contains section F-1, headed "Additional Employer Labor Condition Statements – H-1B Employers Only." That section contains the question pertinent to H-1B dependence, which the petitioner answered incorrectly on the LCA approved on February 6, 2009.

Addressing that portion of the LCA, however, the regulation at 20 C.F.R. § 655.737(a) states that "these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of 'exempt' H-1B nonimmigrants (through petitions and/or extensions of status) as described in this section."

An exempt H-1B nonimmigrant is defined in 20 C.F.R. § 655.737(b) as an alien who either (1) receives wages in excess of \$60,000 annually or (2) has attained a master's or higher degree in a specialty related to the intended employment. The beneficiary need only qualify pursuant to either one of those two tests. The instant beneficiary qualifies pursuant to both tests. Counsel is correct that the petitioner was not obliged to answer the question pertinent to H-1B dependence and that the incorrect answer to that question was immaterial and did not preclude the petitioner from relying on the LCA certified on February 6, 2009 to support the instant visa petition.

For the reasons discussed above, the director's finding that the visa petition was not supported by a corresponding LCA will be withdrawn. However, the AAO's review of the record of proceeding indicated two issues, not addressed in the director's decision, either of which, if decided adversely to

the petitioner, would preclude approval of the petition. These issues are (1) whether the petitioner has established the proffered position as a specialty occupation, and (2) whether the petitioner has established standing to file this H-1B petition, that is, (a) by meeting the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) by meeting the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F). Accordingly, the AAO is remanding the petition for a decision on the merits that addresses each of these two issues, and any additional issues that the director may deem appropriate.

The AAO will now offer some limited observations about the record of proceeding which reflect why the AAO is remanding the petition for additional adjudication. As such, these observations are neither a complete or decisive analysis of the evidence of record with regard to the bases of the remand, nor a substitute for such. Further, as the AAO has not itself adjudicated the merits of the petition with regard to the issues that it is specifying for consideration upon remand, the AAO’s observation should not be taken as instructions regarding the ultimate decision to be rendered by the director.

In a letter dated August 5, 2009, submitted with the visa petition, counsel stated,

The Job duties [of the proffered position] comprise the following:

- Complex data modeling;
- Design and development of software applications;
- System Requirements Analysis;
- Workflow engine design and implementation;
- Testing software applications;
- Revising and updating existing software applications;
- Writing system documentation as needed;
- Integrating hardware and software needs to assigned development projects;
- Assist users in troubleshooting operating problems;
- Design and implementation of software architectures for software applications using appropriate Software tools.
- All of the above job duties will be performed under supervision by the Team Leader.

Counsel did not reveal his basis for asserting that those are the duties of the proffered position.

Counsel further stated:

To perform the above[-]mentioned duties, a strong background in courses taught in Computer Science, Engineering, Business Management, or related area is required because the Software Engineer must understand the user systems in order to analyze the problem before a solution can be designed and implemented. For this professional position of Computer Programmer, [the petitioner] requires, at a

minimum, a Bachelor's degree with a concentration in Computer Science/Engineering/Information Systems/Business Administration/related field.

It appears that counsel did not provide a factual foundation for his assertion as to the educational requirements for the proffered position. In this regard, the AAO observes that 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)). Further, 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).

With the response to the RFE, counsel provided documents showing a relationship between the petitioner and Unison Systems, Inc. of Greenwood Village, Colorado. Those documents, taken together, indicate that the petitioner agreed to assign the beneficiary to perform work for Unison Systems.

Another document submitted in response to the RFE is a statement of work (SOW). It purports to be an agreement between Unison Systems and Comcast Cable that Unison would provide the beneficiary to work for the petitioner on a project, the name of which was redacted, at an Englewood, Colorado address. That SOW reiterates the job duties asserted by counsel and added the following:

- Reports Development (Hyperion) to support deliverables(s) related to the [REDACTED] project.
- Brio/Hyperion report Design
- Complex data modeling;
- Design and development of software applications;
- [and]
- System Requirements Analysis;

From counsel's initial list of duties, the SOW also deleted "All of the above job duties will be performed under supervision by the Team Leader."

That SOW was signed by the president of Unison Systems on May 21, 2009. The copy submitted into the record does not appear to have been ratified by a representative of Comcast. It states, "This SOW is subject to the terms and conditions contained in the Agreements amended on [REDACTED]. It did not state when the work would begin. As to the termination of that work, the SOW states, "The period of work for this [SOW] shall not extend beyond previously defined termination date unless otherwise approved and agreed by [Comcast]." No previous agreement between Comcast and Unison Systems was provided.

The documentation in the record of proceeding does not appear to establish that the work to which Unison Systems would assign the beneficiary would encompass any part of the period of employment specified in the Form I-129. The record contains no other statement from Comcast or any other end-user of the beneficiary of the duties to which the beneficiary would be assigned. Further, even if that document purported to encompass the entire period of requested employment, that it bears no signature of an authorized representative of Comcast leaves unestablished whether it represents an obligation to which Comcast agreed.

The AAO also notes that, as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, 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 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 and explained as 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 proceedings appears to lack 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. Upon remand the director should, of course, apply her independent consideration to this aspect of the record, as well, in determining whether the petitioner has established that, at the petition's filing, it had secured H-1B caliber work for the beneficiary.

The director should, of course, analyze whether the petitioner's has provided sufficient evidence to establish the substantive nature and attendant educational requirements of the work to be assigned to the beneficiary. Also, at a more basic level, director should consider whether the record contains credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. In this regard, the AAO notes that the record of proceeding seems to contain no documentary evidence that the SOW provided by the petitioner encompasses any portion of the period of employment specified in the petition. The SOW does not appear to purport to cover any portion of the period of requested employment, and it appears that Comcast did not ratify the SOW.

The AAO also notes that counsel asserted, in his August 5, 2009 letter, that the proffered position requires a minimum of a bachelor's degree in computer science, engineering, information systems, business administration or a related field. Such a broad range of acceptable degrees does not appear to be indicative of the proffered position's requiring a body of highly specialized knowledge in a specific specialty.² Not only does the record suggest that counsel and the petitioner failed to

² Even a requirement for just a generalized degree in business administration, with no further specification would not be indicative of a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish a position as a specialty occupation.

demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, it suggests that they have failed even to allege that it does.

Another issue raised by the record is whether the petitioner has standing to file an H-1B visa petition for the beneficiary. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

In his August 5, 2009 letter, counsel stated that the petitioner is not an agent, and the AAO concurs that the evidence demonstrates that it is not. The remaining relationship that would confer standing on the petitioner to file the instant visa petition is an employer/employee relationship.

Counsel further stated, in part:

See Matter of Michael Hertz Associates, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Similarly, a requirement of an engineering degree, without further specification, would not qualify a position for specialty occupation treatment, as the term "engineering" encompasses a wide-ranging number of engineering specialties, each with a particular academic emphasis differentiating it from other engineering specialties.

While [the beneficiary] may be temporarily located at a project site, no contractual or employment relationship exists between the client and the consultant. Each systems professional remains at all time [sic] a full[-]time employee of the company.

Counsel did not reveal any other basis or reasoning to support the assertion that the beneficiary would be an employee of the petitioner.

Although counsel's letter and other documents provided explicitly state that the beneficiary would remain an employee of the petitioner, they indicate that the petitioner would assign him to work for Unison Systems, which would, in turn, assign him to work for Comcast or another end-user. Under these circumstances, whether the petitioner would directly determine and control the actual work to be performed by the beneficiary appears questionable. This raises the issue of whether the petitioner would be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R. § 214.2(h)(4)(ii), and has standing to file the instant visa petition.

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director is free to determine whether a need exists to issue a request for evidence prior to adjudicating the visa petition and may raise any issues pertinent to the approvability of the instant petition including, but not limited to, whether the petitioner has demonstrated that it would employ the beneficiary in a specialty occupation and whether it has demonstrated that it has standing to file the visa petition. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 1, 2010 decision is withdrawn. The petition is remanded to the director for entry of a new decision.