

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: **JAN 09 2012** 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 Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner provides technology consulting services. It was established in 2006 and claims to employ 25 personnel and to have had a gross annual income of \$6,700,000 when the petition was filed. It seeks to employ the beneficiary as a computer consultant and 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 determining that the petitioner: (1) failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) failed to provide a Labor Condition Application (LCA) that complied with the information in the record; and (3) failed to respond completely to the director's request for evidence (RFE).

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with counsel's supplemental brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

In the petitioner's November 18, 2009 letter submitted in support of the petition, the petitioner stated that it wished to employ the beneficiary as a computer consultant and that he would be responsible for performing the following duties:

- Work closely with project team to deliver superior solutions for our customers;
- Lead architecture and design sessions;
- Perform highly visible, complex proof of concept engagements;
- Work with project team to gather appropriate requirements;
- Model and document complex business processes;
- Architect complex data and object models;
- Design and document human based workflow processes;
- Evangelize company solutions around BPM and SOA;
- Mentor team members and perform code reviews on a regular basis;
- Assist in all aspects of solution testing and testing documentation.

The petitioner indicated that the proffered position required at least a bachelor's degree in computer science or a related field. The LCA accompanying the petition listed the job title of the proffered position as consultant and identified the SOC title as computer software engineer, applications. The LCA indicated the beneficiary would be working at the petitioner's office location in Chicago, Illinois. It was certified on November 23, 2009 for a validity period from January 1, 2010 until January 1, 2013.

On December 22, 2009, the director issued an RFE advising the petitioner, in part, that as it appeared to be engaged in the business of consulting, staffing, or job placement, the petitioner must identify the end client user of the beneficiary's services, the name of the project to which

the beneficiary would be assigned, and the title and duties of the beneficiary's position, his supervisor, and the dates of employment, among other items. The director also requested a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity as well as a complete itinerary of services or engagements that specified the dates of each service or engagement. The director requested additional detail and documentation relating to the petitioner and the nature of its business.

In response, the petitioner provided: a signed confidentiality and non-compete agreement between the beneficiary and [REDACTED] a company with the same address as the petitioner; an unsigned August 8, 2008 master service agreement between the petitioner and [REDACTED] client data sheets that listed the beneficiary's name and start and end dates; and an October 8, 2009 statement of work prepared by the petitioner for Geomentum which described a project. The project information indicated five occupations would work on the project, but did not identify the individuals in any of the occupations. The petitioner also provided copies of its 2007 and 2008 federal tax returns, a business license issued to SPRI Partners LLC doing business as SPR, Inc., and a list of employees.

The director denied the petition on January 26, 2010.

On appeal, counsel for the petitioner explained that the petitioner was its own entity but that [REDACTED] owned a 19 percent interest in the petitioner, owned the building where the petitioner's offices were located, and had entered into an operation and subscription agreement with the petitioner. Counsel asserted, however, that the petitioner hired, paid, and supervised the beneficiary and conducted his performance appraisals. Counsel indicated that the nature of the petitioner's business was to have its employees work on multiple projects throughout their employment with the petitioner, and that they remained at the client site for a short duration of time and when they were not at a client's site, the employees performed work on in-house projects. Counsel indicated that the beneficiary had worked [REDACTED] from August 31, 2009 until October 2, 2009 and [REDACTED] from October 20, 2009 until December 31, 2009. Counsel also listed four different projects the beneficiary had worked on in-house at the petitioner's offices. Counsel further noted that the beneficiary was now involved in a project for [REDACTED] located in Deerfield, Illinois and counsel recited the beneficiary's proposed duties for [REDACTED]. The record on appeal included the petitioner's proposal to [REDACTED] and listed the titles of positions that would work on the project but did not identify specific employees. Counsel noted that the end date of the Takeda contract as March 31, 2010.

Preliminarily, the AAO observes that the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence 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) and (12) and that 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). The AAO affirms the director's determination that the petitioner failed to adequately respond to the director's RFE. Further, 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). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Moreover, in this matter, we also note that the petitioner has still not provided the requested itinerary setting out the beneficiary's duties for each particular client and providing the duration of the beneficiary's assignment to each company for the three-year period of the requested H-1B classification.

Based upon the evidence in the record before the director, the petitioner has not established the proffered position as 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] 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 [(2)] 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, a proposed 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 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), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The 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. The petitioner in this matter quite clearly hires a variety of information technology professionals; however, not all computer programmers or information technology occupations are specialty occupations. Thus, the petitioner must provide such evidence that is sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform the particular work. In this matter, the petitioner provided a broad overview of the duties of the proffered position. In response to the director’s RFE, the petitioner did not specifically identify the beneficiary and the specific nature of his work for each third party to which he had been or would be assigned during the validity of the requested H-1B classification. Thus, the record lacks detailed evidence demonstrating that the beneficiary’s

day-to-day work requires highly specialized knowledge in a specific discipline such that the specific position to which the beneficiary would be assigned is a specialty occupation. It is not possible to discern from the overview of the information provided by the petitioner that the beneficiary's assignment and actual day-to-day duties entail primarily H-1B caliber work for the duration of the requested H-1B classification.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary for the duration of the requested validity period 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 normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next the AAO addresses the issue of whether 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.

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.

As the director determined, the record of proceeding does not include the necessary evidence establishing where and for whom the beneficiary would work and the length of time the beneficiary would work for the duration of the petition. The evidence does not demonstrate conclusively that the beneficiary will work only in Chicago, Illinois for the entire duration of the petition. In light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Thus, the director's decision regarding the lack of validity of the LCA submitted is also affirmed.

Beyond the decision of the director, the petitioner failed to provide an itinerary although requested to do so by the director. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

*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 itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. The nature of the petitioner's business is to provide consulting services to other companies. The petitioner acknowledged through counsel, that it placed the beneficiary at multiple work sites for different companies and planned to continue to do so. The record does not include information identifying the projects to which the beneficiary would be assigned throughout the validity period of the H-1B classification. The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the RFE request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Although the petitioner provided a response to the director's RFE, as noted above, the petitioner did not provide an itinerary with documentation addressing the beneficiary's employment for the duration of the requested H-1B classification. The purpose of the itinerary is not to substantiate that the petitioner will just "employ" the beneficiary but to establish that the beneficiary will be

employed in a position that entails H-1B caliber work throughout the duration of the visa classification. In this matter, the petitioner has failed to provide that evidence.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition remains denied.