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



U.S. Citizenship
and Immigration
Services

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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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner is in the software consulting and development business and seeks to employ the beneficiary as a computer systems analyst 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 on three separate and independent grounds, namely, her findings that: (1) the petitioner did not qualify as an "employer" or "agent"; (2) that the petitioner had failed to submit an appropriate and valid Labor Condition Application (LCA); and (3) that the proffered position was not in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

In the petition signed on June 16, 2009, the petitioner claimed to have 8 employees and a gross annual income of \$700,000. The petitioner indicated that it wished to employ the beneficiary as a computer systems analyst to work at an address in Englewood, Colorado from September 2, 2009 to September 1, 2012 at an annual salary of \$57,000.

The petition was accompanied, in relevant part, by a letter from the petitioner, the beneficiary's educational credentials, a copy of the LCA, a copy of the beneficiary's previous H-1B approval, and employee pay and tax documentation relating to the petitioner. The petitioner's letter indicates that the position offered is that of "software consultant/consultant" and the duties are described as follows:

- Provide documentation, detailed instructions, drawings or specifications to inform others about how structures are to be constructed, modified and maintained;
- Combine, evaluate, and reason with information and data to make decisions;
- Employ techniques such as structured analysis, data modeling, programming, and coordinate installation of software system;
- Be responsible for software aspects of systems design, development and maintenance of computer programs and applications custom tailored for each individual client;
- Prepare flow charts and diagrams; and
- Be responsible for integration and seamless blending of existing hardware, software, and information retrieval systems.

The petitioner indicates that the beneficiary holds a master's degree in e-commerce applications and a bachelor's degree in computer application. The petitioner states that the beneficiary's foreign degrees were evaluated and deemed to be at least equivalent to a U.S. bachelor's degree. The petition is not accompanied by an education credential evaluation.

The Form I-129 and the LCA indicate that the beneficiary will work in Englewood, Colorado.

On September 8, 2009, the director issued an RFE advising the petitioner, in part, to submit (1) evidence of the number of employees who work at the Colorado location where the beneficiary will work; (2) evidence to clarify the employer-employee relationship between the petitioner and beneficiary, including signed contracts between the petitioner and the beneficiary, an itinerary of beneficiary's proposed services, and signed contractual agreements, statements of work, work orders, etc. between the petitioner and end-clients requiring the services of the beneficiary; and (3) evidence of the beneficiary's non-immigrant status.

On October 2, 2009, the petitioner submitted a response to the director's RFE. The response includes, in relevant part, a sworn statement executed by the petitioner's company president, a 2008 document describing the petitioner's product and listing the petitioner's Ohio address as the work location and the beneficiary as "designer and architect," a work order from [REDACTED] dated March 2009, and a 2007 employment contract between the petitioner and the beneficiary. The petitioner also submitted a letter purporting to answer the director's concerns, including a new list of duties and an itinerary of services. Lastly, the response includes a work order and a letter from [REDACTED] verifying the beneficiary's employment and duties.

The director denied the petition on November 5, 2009.

On appeal, the petitioner, through counsel, submits a brief stating that it qualifies as a U.S. employer as evidenced by its employment agreement with the beneficiary, pay roll and insurance documentation and end-client agreement with [REDACTED]. The petitioner further states that the beneficiary will work at the [REDACTED] offices in Englewood, Colorado. Finally, the petitioner maintains that the proffered position is in a specialty occupation.

The AAO will first address whether the petitioner is a U.S. employer or agent.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations 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.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The AAO finds that the petitioner has failed to establish that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not demonstrated that it will have "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." 8 C.F.R. § 214.2(h)(4)(ii).

The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also* *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As such, while payroll contributions, insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien

beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. The evidence in the record indicates that the beneficiary's work will be performed at the offices of ██████████ in Englewood, Colorado and under the supervision of a project manager employed by ██████████. The AAO notes further that the duties to be performed are unclear at best, given that the duties listed in the letter in support of the petition differ from those listed subsequently and those listed in the statement of work and agreement with ██████████. The evidence submitted does not establish that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.¹ Therefore, the director's decision is affirmed in this regard.

The record also does not establish that the proffered position of computer systems analyst is in 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;

¹ The petitioner does not claim to be a "U.S. agent." Therefore, the AAO need not address the director's decision with respect to the petitioner's ability to establish that it qualifies as a "U.S. agent."

- (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 382, 387 (5th Cir. 2000) (hereinafter *Defensor*). 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, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such

evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The petitioner states in the Form I-290B that the beneficiary will work as a computer systems analyst. The AAO notes that the petitioner's support letter states that the beneficiary will be employed as software consultant. The record of proceeding includes, in relevant part, an agreement and statements of work between the petitioner and [REDACTED] purporting to contract the services of the petitioner as a consultant. The duties of the position described in the [REDACTED] documentation differ from those listed in the petitioner's support letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without a consistent and detailed description of the beneficiary's proposed duties from both the petitioner and the end-client, the petitioner cannot establish that the job it is proffering is a specialty occupation. For this reason, the petitioner has failed to meet its burden of establishing that it has specialty occupation work for the beneficiary. As the petitioner has not established that it will be the beneficiary's employer and that the proposed position is a specialty occupation, we shall not discuss the validity of the LCA.

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.