

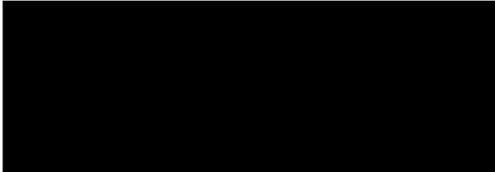
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

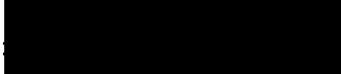
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Date: **MAY 07 2012**

Office: VERMONT 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: SELF-REPRESENTED

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 of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is a software development and consulting company and seeks to continue to employ the beneficiary as a programmer/analyst. The petitioner, therefore, endeavors to classify the beneficiary 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 had (1) failed to submit a Labor Condition Application (LCA) that corresponded with the petition; and (2) failed to establish that the proffered position was a specialty occupation.

On appeal, the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) documentation submitted in response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting documentation.

In a letter of support dated December 17, 2009, the petitioner stated that it provides quality consultants for multi-skill project requirements. It claimed to require the temporary services of the beneficiary as a programmer analyst, and stated:

[The beneficiary] will be placed in areas and/or systems that are significant to the continued development and expansion of our business, to assure that [the petitioner] continues to offer clients the most up-to-date technological advances in computer systems and support services and therefore remains competitive in the field.

The petitioner continued by providing a list of the proposed duties of the beneficiary on a daily basis, and concluded that it would comply with the terms and conditions of the LCA for the duration of the beneficiary's authorized period of stay. It is noted that the LCA submitted with the petition was certified for the work location of Dulles, Virginia.

In an RFE dated January 29, 2010, the director requested additional evidence pertaining to the beneficiary's employment. Specifically, the director noted that, while the petition as filed indicated that the beneficiary would work for the petitioner in Virginia, the record indicated that the petitioner was a consulting company that assigned personnel to client projects as necessary. The director requested evidence clarifying the physical work location(s) of the beneficiary, and requested documentation outlining each project to which he would be assigned along with corresponding purchase orders, vendor agreements, and documents outlining the duration and the duties required for each project.

In a response dated March 8, 2010, the petitioner addressed the director's queries. The petitioner claimed that since October 2009, the beneficiary was working at a client site in Andover, Massachusetts for Smith & Nephew on a project entitled "Belgium Loaner with Sterina." An itinerary included in the response indicated that the project would continue until December of 2010. The petitioner also submitted a new LCA for the location of Andover, Massachusetts, certified on February 24, 2010.

The first issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

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

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

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.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) 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 petition on behalf of an H-1B employee, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B nonimmigrant will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B).

In this case, the petitioner filed the instant petition on Form I-129 with USCIS on December 30, 2009, indicating that the beneficiary would work in Dulles, Virginia. The petitioner also submitted a copy of an LCA (I-200-09336-885088) certified on December 8, 2009 for this location.

In response to the RFE, the petitioner claimed that, contrary to the claims set forth on the petition, the beneficiary had been working on a client site in Andover, Massachusetts since October 2009, and submitted documentation demonstrating that the beneficiary would continue working on this project until December 2010. A new LCA (I-200-10049-093480), certified for Andover, Massachusetts on February 24, 2010, was submitted in support of this claim.

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 case, after acknowledging that the beneficiary's worksite differed from that claimed in the initial petition, the petitioner attempted to submit an LCA that was both filed and certified after the instant petition was filed with USCIS. Additionally, the petitioner contends on appeal that at the time of filing, the beneficiary was working in Dulles, Virginia, but was ultimately transferred to the client site in Andover, Massachusetts. The petitioner further stated that the beneficiary had since been transferred back to the Dulles, Virginia location and thereby satisfies the regulatory requirements. The AAO disagrees.

In response to the RFE, the petitioner submitted a letter from [REDACTED] dated February 12, 2010, which confirmed that the beneficiary has been working on this project since October 2009. The petitioner also clarified in a March 8, 2010 letter from its president that the beneficiary was working in Andover, Massachusetts. Finally, the Form I-129 and the two paystubs for the beneficiary for August and September of 2009 indicate that the beneficiary is maintaining an address in Andover, Massachusetts.

The petitioner's contradictory statements do not resolve the issue raised by the director in the denial; rather, they raise further questions regarding the validity of the petition and statements set forth therein. 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).

In response to the RFE and again on appeal, in an attempt to overcome the director's basis for denial, the petitioner alters its original claims regarding the intended employment of the beneficiary. The petitioner cannot make material changes to a petition after filing; rather it must establish eligibility at the time of filing. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner's amendment of the beneficiary's work location and submission of a new LCA after the filing of the petition warrants a material change and does not establish eligibility in this matter. The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B), and the appeal must be dismissed and the petition denied for this reason.

The next issue before the AAO is whether the petitioner established that the proffered position is a

specialty occupation.

Section 214(i)(1) of 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 which [(2)] 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 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

In its letter of support dated December 17, 2009, the petitioner stated that it required the temporary services of the beneficiary as a programmer analyst. Specifically, the petitioner stated that the beneficiary “will be placed in areas and/or systems that are significant to the continued development and expansion of our business, to assure that [the petitioner] continues to offer clients the most up-to-date technological advances in computer systems and support services and therefore remains competitive in the field.”

Additionally, the petitioner stated:

The specific duties to be undertaken by [the beneficiary] as a programmer analyst will include the following: Convert business ideas to actual working implementation in the IT organization which will require analytical knowledge for performing functions such as: Research and ideas for converting the business idea to actual IT

Implementation, do the feasibility study involving system study, system design, language preference, database selection and process automation. On completion of the feasibility study, the analyst will start doing the project planning to monitor the step-by-step progress of execution of the project. Since the demands of the [sic] today's business need the different processing machines to be independent the programmer will implement the system as an n-tier application architecture system. The programmer will write programs to interact with the user of the web site visitor and this will be in the Graphical User Interface method.

After the development and deployment of the business application the programmer will analyze the performance of the system and then make the necessary changes to improve the performance of the system to maximize on the capacity of the hardware that the business has invested in. The programmer analyst will also make changes to the IT system as and when business rules change.

The petitioner also provided the following list of the proposed day-to-day duties of the beneficiary:

Tasks	Percentage
Requirement Analysis	10%
Function design	10%
Software Development	30%
Software Testing	20%
Software Implementation	5%
Software Maintenance	15%
Software Performance	10%

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite.

As discussed above, the petitioner claimed in response to the RFE that the beneficiary would work on the [redacted] at the client's worksite in Andover, Massachusetts, contrary to the petitioner's initial claims that it would work in house at the petitioner's offices in Dulles, Virginia. It is further noted that the [redacted] was scheduled to continue until December 2010. The director found the petitioner's evidence regarding the beneficiary's work assignments insufficient to establish that the proffered position qualified as a specialty occupation.

Upon review of the evidence, the AAO concurs with the director's findings. Although the petitioner submitted evidence in support of the contention that the beneficiary would work on the Belgium

[REDACTED] through December 2010, the evidence submitted is insufficient to demonstrate that the beneficiary will be performing the duties of a specialty occupation. Specifically, the record contains no contracts or work orders between the petitioner and [REDACTED] the entity allegedly receiving the beneficiary's services, or between the petitioner and [REDACTED] the vendor the beneficiary allegedly represents on behalf of the petitioner. Although a statement of duties was provided in response to the RFE by the beneficiary's alleged project manager, no additional evidence outlining the terms and conditions of the beneficiary's assignment were submitted. Moreover, based on the petitioner's claim that it has regional and national clients in various industries, it is clear that had the petition been approvable on the previous grounds, the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Since the beneficiary's claimed assignment with the [REDACTED] will end in December of 2010, it is presumed that the beneficiary will be assigned to one or more client projects until February 20, 2013, the end of the requested validity period. 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.

As discussed above, the record contains no substantiated evidence regarding the end-clients and their requirements for the beneficiary. Without evidence of valid contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. In addition, the brief statement provided by [REDACTED] is simply too generic and not supported by evidence that a work order or other agreement exists for the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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.*

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects for clients based throughout the nation. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to fully comply with this request. Moreover, 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 throughout the requested validity period.

Therefore, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary 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 4.¹

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). For this additional reason, the petition must be denied.

¹ It is noted that, even if the proffered position were established as being that of a programmer analyst, 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 programmer analyst. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 Edition, "Computer Systems Analysts," <<http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm>> (accessed April 10, 2012). As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

Finally, the AAO will quickly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As previously discussed, there is insufficient evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

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

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