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



U.S. Citizenship
and Immigration
Services

DATE: **DEC 05 2013**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an "Information Technology" firm. To continue to employ the beneficiary in what it designates as a programmer analyst position, 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 establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue before the AAO is whether the petitioner has demonstrated that the proffered position qualifies as 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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. See *Defensor v. Meissner*, 201 F.3d at 387-388. 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 384. 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a programmer analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1131, Computer Programmers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree from [REDACTED] in India and a master of computer applications degree from Punjabi University, also in India. An evaluation in the record states that the beneficiary has the equivalent of a U.S. master's degree in computer science.

Although the petitioner is located in New Jersey, the petitioner claims on the Form I-129 and in supporting documentation that the beneficiary would work at the Minneapolis, Minnesota location of [REDACTED]. A document headed [REDACTED] states that the beneficiary would work at that location throughout the period of requested employment, i.e., October 1, 2012 through September 30, 2015. Neither the itinerary nor the Form I-129 visa petition mention any other work location.

The AAO observes that the Form I-129 visa petition and the LCA both state that the petitioner would pay the beneficiary \$91,080 per year. The itinerary, however, states that the petitioner would pay the beneficiary only \$60,000 per year. This discrepancy has never been reconciled.

Counsel also submitted, *inter alia*: (1) two Work Orders, both dated July 12, 2012; (2) a letter, dated September 6, 2012, from the Manager – HR & Contracts, of [REDACTED] of North [REDACTED] New Jersey; (3) a September 21, 2012 letter from the petitioner's HR administrator to the beneficiary, offering to continue his employment; (4) a September 24, 2012 letter from the petitioner's vice president; and (5) counsel's own letter, dated September 24, 2012.

One July 12, 2012 work order was executed, on that date, by the petitioner's "Director Operations" and an official of [REDACTED] and indicates that the beneficiary would work for [REDACTED] in [REDACTED] Minnesota beginning on July 23, 2012 for a duration of "Six (6) months, extendable." It further identifies [REDACTED]

The second July 12, 2012 work order was also executed, on that same date, by the petitioner's "Director Operations" and by the same official of [REDACTED] who signed the first July 12, 2012 work order. It indicates that the beneficiary would work for [REDACTED] Minnesota beginning on July 18, 2012 for a duration of "Eighteen (18) months, with possible extensions." The significance of the petitioner submitting two work orders, both purporting to have been ratified by the same people on the same date, but with conflicting terms, is unclear.

The September 6, 2012 letter from the Manager – HR & Contracts of [REDACTED] states that the beneficiary has been providing services through [REDACTED] partner, [REDACTED] on a project for Allianz and provides what purports to be a description of the duties the beneficiary provides to that project. It further states, "[The petitioner] retains the sole control over [the beneficiary's] services, assignments, reporting, monitoring, performance review, salary, benefits, etc." The AAO observes that [REDACTED] does not claim to be the end user of the beneficiary's services.

The petitioner's HR administrator's September 21, 2012 letter is an offer to extend the beneficiary's employment subject to approval of the instant H-1B visa petition. The beneficiary signed that letter on September 22, 2012, accepting that offer. That offer contains a description of the duties the beneficiary would perform. That description of duties is identical to the duty description in the September 6, 2012 letter from the Manager – HR & Contracts of [REDACTED]

In his September 24, 2012 letter, the petitioner's vice president did not mention [REDACTED] or [REDACTED]. Although he stated that the petitioner is based in [REDACTED] and has offices in [REDACTED] he did not state where the beneficiary would work or otherwise mention [REDACTED]. He provided what purports to be an extensive description of the duties the beneficiary would perform, however, the AAO observes that the petitioner did not then claim to be the end-user of the beneficiary's services.

In his September 24, 2012 letter, counsel stated that the beneficiary would continue to work on an Allianz project.

On February 6, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted, including evidence that the petitioner actually has an employer-employee relationship with the beneficiary.

In response, counsel submitted, *inter alia*, (1) a letter, dated April 26, 2013, from the petitioner's vice president of human resources to [REDACTED] (2) a letter, dated September 10, 2012, from the petitioner's Director of Data Warehousing to [REDACTED] and (3) counsel's own letter, dated April 30, 2013.

In his April 26, 2013 letter, the petitioner's vice president of human resources stated that the petitioner is developing an application to migrate its customers from [REDACTED] and other [REDACTED]. He further stated that the petitioner had terminated its agreement to provide the beneficiary to [REDACTED] and that, since November 10, 2012, the beneficiary had been working on this in-house project at the petitioner's location in [REDACTED] New Jersey "due to [an] urgent requirement to complete [its] in-house project." He provided a description of the beneficiary's duties on that project. He stated that the beneficiary would now work solely at the petitioner's location in [REDACTED] New Jersey.

The September 10, 2012 letter from the petitioner's Director of Data Warehousing is addressed to an officer of [REDACTED] and confirms that, as of November 10, 2012, the petitioner was withdrawing the beneficiary from the [REDACTED] project.

In his April 30, 2013 letter, counsel asserted that the evidence provided shows that the petitioner is neither a token employer nor an employment agency.

The director denied the petition on May 14, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

On appeal, counsel asserted that the petitioner had demonstrated that the beneficiary's work on the petitioner's in-house [REDACTED] migration application has been demonstrated to constitute specialty occupation employment.

In deciding this matter, the AAO notes that the petitioner initially asserted on the visa petition, and in documentary evidence provided, that the beneficiary would work in [REDACTED] Minnesota. Counsel provided duty descriptions for the work to be performed in [REDACTED]. However, the petitioner now states that, if the visa petition were approved, the beneficiary would not work there. Further, one duty description initially provided was signed by the [REDACTED] manager of HR & contracts, a matching duty description was provided by the petitioner's HR administrator, and another, somewhat different, duty description was provided by the petitioner's vice president.

Those descriptions, however, apparently pertain to work the beneficiary would allegedly have performed on a project at the location of [REDACTED] to which project the beneficiary would have been supplied by [REDACTED]. As was explained above, where the work is to be performed for an entity other than the petitioner, USCIS requires, consistent with *Defensor v. Meissner*, that the end-user of the beneficiary's services provide evidence of the nature of that work to be performed. In this case, if the beneficiary had worked on the Allianz project, that end-user might have been either [REDACTED] or [REDACTED] but would not have been the petitioner or [REDACTED]. As the duties described were not provided by [REDACTED] they are not the competent evidence contemplated by [REDACTED] of the duties the beneficiary would have performed.

Not only were the petitioner and [REDACTED] not initially intended to be the end-user of the beneficiary's services, but the petitioner now asserts that the beneficiary would not work on the [REDACTED] project and would not, therefore, perform the duties previously described by [REDACTED] the petitioner's vice president, and the petitioner's HR administrator. For both of those reasons, the description of the duties the beneficiary would have performed on the [REDACTED] project may not be considered in determining whether the duties to which the petitioner would assign the beneficiary would constitute specialty occupation duties.

Subsequently, however, the petitioner amended its claim, stating that the beneficiary would work on the petitioner's own project, i.e., migrate their [REDACTED]. The remaining duty description is the description of the duties the beneficiary would perform on that in-house project. The petitioner provided a description of the duties the beneficiary would perform on the petitioner's project, and stated that the beneficiary would perform those duties at the petitioner's own location in [REDACTED] New Jersey.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits approval of the visa petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather amended the job location, the project upon which the beneficiary would work, and the duties of the proffered position. Therefore, the description of the duties the beneficiary would perform on the petitioner's own project at the petitioner's own location cannot be considered.

In short, the petitioner has not provided any description of the duties that the beneficiary would perform that may be analyzed to determine whether the proffered position qualifies as a specialty

occupation position. 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.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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