



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 20 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as software development and consulting company established in 2006. In order to employ the beneficiary in what it designates as a software design engineer position, the petitioner seeks 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 the basis of her determination that the petitioner had failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds three additional aspects which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely: (1) providing as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence, and occupational knowledge that the petitioner claimed for the proffered position through its descriptions of its constituent duties, (2) the petitioner's failure to demonstrate that, at the time the petition was filed, it had secured work for the beneficiary to perform throughout the entire period of requested employment; and (3) the petitioner's failure to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation.¹ For these additional three reasons, the petition must also be denied.

In its response to the director's RFE, the petitioner stated that the beneficiary would "be one of the primary developers to assist in the development and maintenance" of its new software product, [REDACTED]. The petitioner explained that the proffered position would entail debugging, troubleshooting, bug fixing, and working with the other developers to produce a "great product." Specifically, the petitioner stated that the beneficiary would perform the following tasks:

¹ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these additional three grounds for denial.

- Assisting in the wireframes and design of UI;²
- Developing and coding (primarily the middle tier);
- Troubleshooting and debugging;
- Working with other developers to ensure that all features work together; and
- Working with the alpha and beta test teams to fix UI/UX³ issues.

Although the AAO finds that the petitioner has failed to substantiate them, the petitioner asserted multiple claims regarding the purported complexity and specialization of the proffered position and its duties, and also regarding the level of independent judgment and occupational knowledge that the position would require. For example, in the undated letter it submitted in response to the director's RFE, the petitioner made the following claims:

To participate in developing a project from the ground up requires more than a junior level knowledge of programming. . . .

* * *

This is not a junior level position and [it] requires at [least] 2-5 years [of] experience plus a degree.

The AAO notes further that one element of the performance evaluation submitted by the petitioner was an evaluation of the beneficiary's ability to "self-manage and seek solutions."

The LCA that the petitioner submitted, however, was one that had been certified for a lower work level – and a lower required-pay level.

That LCA had been certified for a job prospect with only a Level I (entry level) wage level, within the "Computer Software Engineers, Applications," occupational classification (SOC (O*NET/OES) Code 15-1031.00) . The *Prevailing Wage Determination Policy Guidance*⁴ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These

² Although the petitioner did not define "UI," the AAO presumes it was referring to [REDACTED] "user interface."

³ Although the petitioner did not define "UX," the AAO presumes it was referring to [REDACTED] "user experience."

⁴ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed September 11, 2012).

employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

Aside from, and in addition to the petitioner's failure to establish their substantive nature, the petitioner's very statements relative to the purported duties' level of complexity and specialization, as well as to the relative level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage level is appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary would only be required to have a basic understanding of the occupation; that he would be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he would be closely supervised and his work closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proposed position's demands and level of responsibilities. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) makes clear that certification of an LCA does not constitute a determination that a positions qualifies for classification as a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 (emphasis added):

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.

The regulation at 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. Here, the petitioner has failed to submit an LCA that corresponds to the claimed duties of the proposed position. Specifically, it has failed to submit an LCA that had been certified for a position that corresponds to the level of work and responsibilities that the petitioner ascribes to the proposed position and to the wage-level corresponding to such a claimed level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

The statements of record regarding the claimed level of complexity, independent judgment and understanding required for the proposed position are materially inconsistent with the certification of the LCA for a Level I entry-level position, and this conflict undermines the overall credibility of the petition. The record contains no explanation for this inconsistency regarding the proposed position's wage level. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA certified for the proper wage classification.

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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), 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 proposed 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

As noted above, the petitioner claims that the beneficiary would work on a project entitled seeyourmoney.com. According to the petitioner, this project "is intended to be the first step in providing a one-stop solution for the small to medium businesses," and that it "is currently being developed and the website is not customer facing." A projected timeframe submitted by the petitioner indicates a release date of January 2013. The petitioner claimed that "[t]here is no end client or vendor," and that the beneficiary "would be working at one location," namely, the petitioner's business premises.

In her February 7, 2011 decision denying the petitioner the director stated that the very nature of the petitioner's consulting business indicated that the beneficiary would eventually be outsourced to client sites to implement specific projects and/or to assist clients with other technical issues. Having made that determination, the director found further that absent work orders or similar agreements from end-users of the beneficiary's services, the single in-house project identified by the petitioner could not be deemed representative of the beneficiary's entire schedule while in the United States, and at best could only serve as a representative sample of a single project upon which the beneficiary would work until clients demand additional consultancy services. Consequently, the director found that the petitioner had failed to demonstrate the existence of a specialty occupation and that the petitioner had sufficient work for the beneficiary to perform during the entire period of requested employment.

On appeal, the petitioner claims that the director reached her conclusion in error, and that although it will sell its web-based services directly to end users, the beneficiary would in fact be providing his services to the petitioner directly.⁵

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the record lacks documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment, and therefore whether the proposed duties actually constitute a specialty occupation.

⁵ The petitioner also identified three additional projects currently under development: (1) [REDACTED], (2) [REDACTED]; and (3) [REDACTED]. However, it did not indicate that the beneficiary would work on any of these projects.

The record lacks a detailed description of the specific duties to be performed by the beneficiary on the seeyourmoney.com project (or any other project) upon which he is to work. In this regard, the AAO finds that the list of duties provided by the petitioner are merely broad and generic descriptions of generalized functions. The AAO also finds that they lack sufficient specificity and detail to convey the substantive nature of the work that those functions' actual performance would entail; to convey, and explain the need for, whatever theoretical and practical applications of a body of highly specialized knowledge the work would require; and to show a necessary correlation between such applications and a need for at least a bachelor's degree level of knowledge in a specific specialty.

The AAO finds that this lack of substantial information about the substantive nature of the position and its performance requirements is compounded by the petitioner's failure to provide any meaningful information regarding the s [REDACTED] project itself.

The AAO concludes that the generalized and relatively abstract level of the information provided with regard to the proffered position and its actual performance requirements, combined with the petitioner's failure to provide any meaningful information regarding the project upon which it claims the beneficiary would work precludes a finding that the proffered position qualifies for classification as a specialty occupation or satisfies any of the criteria described above, 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

Furthermore, as already noted earlier in this petition, the AAO finds that the record lacks credible evidence that, at the time of the petition's filing, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). 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. 248 (Reg. Comm. 1978). As noted earlier, the petition must be denied for this reason also.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty

occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of his foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established. For this reason also, the appeal will be denied.

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 (9th 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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.