



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 30 2014** OFFICE: CALIFORNIA SERVICE CENTER

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 (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") initially approved the nonimmigrant visa petition. In response to new evidence and upon review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

The petition was filed at the California Service Center on May 10, 2011, seeking to classify the beneficiary as an H-1B temporary 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) in order to employ him in what the petitioner designates as an application developer position.

The director approved the visa petition on May 27, 2011. However, on March 5, 2013, the director issued a notice of intent to revoke (NOIR) in this matter. The petitioner's response was received on March 25, 2013. Subsequently, on July 2, 2013, the director revoked approval of the visa petition. The petitioner filed a timely appeal on July 31, 2013.

The director's revocation of approval of the petition was based on her finding that a letter submitted by the petitioner is fraudulent; therefore, the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation and that the petitioner has sufficient work for the beneficiary during the requested period of intended employment. The AAO has determined that the director did not err in her decision to revoke approval of the petition on those bases. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will remain revoked.

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 evidence (RFE); (3) the response to the RFE; (4) the service center's notice of intent to revoke (NOIR); (5) the response to the NOIR; (6) the director's revocation letter; and (7) the Form I-290B and counsel's submissions on appeal.

As noted by the director in the NOIR, USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

- (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

An analysis of the specialty occupation basis for the revocation follows.

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 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 v. Meissner*, 201 F.3d 384 (5th Cir. 2000), 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* at 387-388. The court held that the former 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 an Application Developer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1021.00, Computer Programmers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. The LCA and the visa petition state that the beneficiary would work at [REDACTED]. The AAO notes that is not the petitioner's address, but the address of [REDACTED], a biopharmaceutical firm.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor of engineering degree in computer science and engineering from [REDACTED]. The record contains no evaluation of the beneficiary's degree in terms of an equivalent U.S. degree.

Counsel also submitted (1) a document headed, "Re: Job Itinerary"; (2) a letter, dated April 25, 2011, from [REDACTED]; and (3) a work order, dated April 28, 2011.

The document headed "Re: Job Itinerary" states, "[The beneficiary] will . . . provide his consulting responsibilities for [REDACTED]." It does not identify any other location where the beneficiary would work.

The April 25, 2011 letter from [REDACTED] states:

This is to confirm that [the beneficiary], an employee of [the petitioner] working for [REDACTED] Starting June 7th, 2011 in the position of Senior Consultant.

His duties and job responsibilities at this project are as under:

- Perform the role of [REDACTED]
- Provide estimates, project plan, execution with specific focus on requirement analysis and design.
- Create, modify, test and debug custom application systems to meet client requirements.
- Build, configure and deploy the customized software to calculate variable compensation for the enterprise sales force.
- Design, develop and test the data integration and reporting requirements of the client.
- Liaise with other team members to identify issues and provide defect fixes.
- Schedule and monitor the daily business operations process to generate timely and accurate payments for the sales team.
- Work with the client team to identify new enhancements and implementations.
- Other duties include installing systems and training end-users, status reporting as requested by the client.

[The beneficiary] is working as a consultant representing our firm. This position is a professional one and would require the service of an individual with the minimum of a Bachelor's degree in a related field and relevant experience. This project is on going [sic] with multiple phases planned over the next three plus years. Please do not hesitate to contact us directly at [REDACTED] should there be any need to verify this information or the details of [the beneficiary's] current project with [REDACTED] [The petitioner] as an employer will have all the liability related to [the beneficiary's] employment.

The April 28, 2011 work order is executed by the petitioner and [REDACTED] and indicates that the petitioner will provide the beneficiary to [REDACTED] from June 7, 2011 to May 23, 2014.

On May 18, 2011, the service center issued an RFE in this matter requesting additional documentation to establish that an employer-employee relationship will exist between the petitioner

and the beneficiary. Counsel responded by submitting (1) a letter, dated May 18, 2011, ostensibly from [REDACTED] (2) a copy of the petitioner's organizational chart, and (3) counsel's own letter dated May 23, 2011. The letter from [REDACTED] has a small "hp" seal placed immediately above the date. The body of that letter reads, in its entirety:

This is to reconfirm that [the beneficiary], an employee of [the petitioner] working through [REDACTED]

[REDACTED] starting June 6th, 2011 in the position of Senior Consultant. His duties and job responsibilities at this project are as under:

- Perform the role of [REDACTED]
- Provide estimates, project plan, execution with specific focus on requirement analysis and design.
- Create, modify, test and debug custom application systems to meet client requirements.
- Build, configure and deploy the customized software to calculate variable compensation for the enterprise sales force.
- Design, develop and test the data integration and reporting requirements of the client.
- Liaise with other team members to identify issues and provide defect fixes.
- Schedule and monitor the daily business operations process to generate timely and accurate payments for the sales team.
- Work with the client team to identify new enhancements and implementations.
- Other duties include installing systems and training end-users, status reporting as requested by the client.

[The beneficiary] is working as a consultant to provide the services to [REDACTED] hours per week. This position is a professional one and would require the service of an individual with the minimum of a Bachelor's degree in a related field and relevant experience. This project is on going [sic] with multiple phases planned over the next three plus years. [The beneficiary] will be reporting to me during this project and my details are below.

[REDACTED]

As [the beneficiary] will be the employee of [the petitioner], [the petitioner] will have ultimate right over the control of [the beneficiary]. [The beneficiary's] end employer will be liable and responsible for all the benefits, salary and tax treatment.

The letter is largely a copy of the April 25, 2011 letter from [REDACTED] except that it purports to have been issued by [REDACTED]. Further, it purports to be a response to the RFE dated May 18, 2011; however, it was issued on the same day that the RFE was issued.

The visa petition was approved on May 27, 2011. On March 5, 2013, the service center issued an NOIR. In the NOIR, the director informed the petitioner that the Kentucky Consular Center had determined that the May 18, 2011 letter purportedly issued by [REDACTED] was not authentic. Specifically, the director stated the following:

In a memorandum dated, February 6, 2012, the United States Consulate General in [REDACTED] notified USCIS that it refused to issue a visa to the beneficiary and returned the petition for possible revocation because during the visa interview and/or subsequent investigation by the Department of State, information was revealed that was unknown to USCIS at the time the petition was approved. The information discovered by the Consulate includes the following:

* * *

The letter from [REDACTED] was sent to the Kentucky Consular Center (KCC) to confirm its validity. KCC contacted [REDACTED] and received confirmation that the document was not authentic.

The director provided the petitioner with thirty-three days to submit additional evidence or arguments for consideration in the proceedings.

In response to the NOIR, counsel submitted (1) copies of e-mail exchanges, (2) copies of time sheets showing hours the beneficiary had purportedly worked during the weeks ending July 23, 2011, July 30, 2011, August 13, 2011, and August 20, 2011, and (3) a letter from counsel dated March 25, 2013.

The e-mails provided were exchanged primarily between people working for the petitioner and people working for Staffing Technologies, which may be the "Strategic Staffing Solution" referred to in the letter ostensibly from [REDACTED]. One e-mail chain includes an e-mail from a person with a [REDACTED]. That e-mail, dated August 22, 2011, only indicates his approval of five weekly time sheets, four of which are the time sheets described above. The fifth time sheet described in the letter is for work performed during the week ending August 6, 2011. No other e-mails submitted by the petitioner appear to originate from an employee of [REDACTED].

An e-mail chain between [REDACTED] whose e-mail address is at the petitioner's domain, appears to address the May 18, 2011 letter purportedly written by [REDACTED]. [REDACTED] email dated March 19, 2013 states:

[REDACTED]

We need documentation/reconfirmation from staffing technologies that the project where [the beneficiary] was going to engage was a real project and the letter provided was a real letter from [REDACTED]; holds the contractual paperwork regarding this project.

Any reconfirmation would help. Thanks.

[REDACTED] replied with the following on the same day:

Hello,

Unfortunately we are unable to provide this documentation. The person that signed the original is no longer with [REDACTED]

[REDACTED] did not provide any additional documentation/reconfirmation, as requested, from [REDACTED] project is a real project, or that the May 18, 2011 letter is genuine. He did not confirm that [REDACTED] holds any contractual paperwork regarding that alleged project, as [REDACTED] requested. Further, he did not explain why no one else at [REDACTED], who ostensibly provided the May 18, 2011 letter, is able to confirm the existence of the project to which the beneficiary would allegedly be assigned.

In his March 25, 2013 letter, counsel asserted that the record contains sufficient information that USCIS can investigate and determine that the May 18, 2011 letter was actually issued by [REDACTED] and that the employment offered to the beneficiary on the project with [REDACTED] actually exists. The AAO observes that such an investigation was conducted and determined that the May 18, 2011 letter is inauthentic. The AAO also notes that the time sheets state that [REDACTED] was the customer to whom those time sheets pertain and that the project that the beneficiary worked on was "[REDACTED]"; however, they were not signed by anyone at [REDACTED]. Although the time sheets contain signature lines for the beneficiary and a supervisor, those time sheets are unsigned.

In the revocation notice, the director reiterated that the Kentucky Consular Center determined that the May 18, 2011 letter purportedly issued by [REDACTED] was not authentic. The director further stated that the confirmation was made by [REDACTED] Immigration Policy and Government Relations, [REDACTED] on August 18, 2011.

On appeal, counsel referred to the following paragraph in the revocation notice:¹

¹ It is noted that the director's statement in the revocation notice that the memorandum was dated "February 2, 2012," is a typo. The memorandum is dated February 6, 2012.

Although you claim the letter from [REDACTED] is authentic, your statement conflicts with the information provided to USCIS by the consular officer. The United States Embassy in [REDACTED] revealed, in a memorandum dated February 2, 2012, that Kentucky Consular Center (KCC) contacted [REDACTED] and received confirmation that [REDACTED] employee whose signature appears on the client letter, did not sign the letter. It was confirmed on August 18, 2011, by [REDACTED] Immigration Policy and Government Relations, [REDACTED] [REDACTED]

As to the content of that paragraph, counsel stated:

[Y]ou allege that on August 18, 2011, [REDACTED] Immigration Policy and Government Relations for [REDACTED] confirmed KCC's statement that that [sic] [REDACTED] did not sign the letter. However, KCC allegedly contacted HP on February 2, 2012 and that would be after [REDACTED] could have confirmed KCC's statement. The timeline is inaccurate and there is not a singl [sic] bit of evidence to support KCC's claim.

Counsel is incorrect that KCC allegedly contacted [REDACTED] during February of 2012. The NOIR makes no such statement. Rather, it indicates that the contact is referenced in a memorandum issued in February 2012. There is no indication in the NOIR that the contact was made during February of 2012, rather than earlier, in, for instance, August of 2011.

Counsel also claims that the revocation must be overturned because it contravenes controlling precedent. Counsel cited *Matter of Estime*, 19 I&N Dec. 452 (BIA 1987) for the proposition that:

Where [an NOIR] is based on an unsupported statement or unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained

Counsel further states:

Pursuant to the holding in *Estime*, the [NOIR] was improperly issued and the subsequent Notice of Revocation is unsustainable for the following reason: Notice of Intent to Revoke is based on unsupported statements and/or unstated presumptions used by USCIS in revoking the prior approval of the H-1B Visa.

Counsel provided no evidence that the letter ostensibly provided by [REDACTED] is authentic, provided no evidence that [REDACTED] actually intends to utilize the beneficiary's services, and made no other argument on appeal.

The AAO observes that the NOIR stated, *inter alia*, "The letter from [REDACTED] was sent to the Kentucky Consular Center (KCC) to confirm its validity. KCC contacted [REDACTED] and received

confirmation that the document was not authentic." That was sufficient to inform the petitioner of the basis for the anticipated revocation of the approval of the instant visa petition and to accord the petitioner an opportunity to respond to the derogatory evidence.

The only sense in which the petitioner addressed that information in its response to the NOIR was to provide a copy of an e-mail in which [REDACTED]. That assertion, whether true or not, bears no relevance to whether the letter ostensibly from [REDACTED] is authentic.

In the notice of revocation, the director stated, even more specifically:

Although you claim the letter from I [REDACTED] is authentic, your statement conflicts with the information provided to USCIS by the consular officer. The United States Embassy in [REDACTED] revealed, in a memorandum dated February 2, 2012, that Kentucky Consular Center (KCC) contacted [REDACTED] and received confirmation that [REDACTED] employee whose signature appears on the client letter, did not sign the letter. It was confirmed on August 18, 2011, by [REDACTED] Immigration Policy and Government Relations, [REDACTED]

Notwithstanding the typographical error discussed above, the petitioner was thus accorded another opportunity to address the derogatory evidence, that is, that the letter ostensibly provided by [REDACTED] was inauthentic. Counsel did not address that evidence, rather contending that the NOIR was insufficient.

Matter of Estime, 19 I&N Dec. 452 (BIA 1987), made explicit that the "notice of intention to revoke must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." In the instant case, the director provided a specific statement of the facts underlying the proposed action as well as a specific statement of the supporting evidence. Specifically, the petitioner was informed that the letter purportedly from [REDACTED] had been found to be inauthentic, and that this information was received by KCC from [REDACTED]. Thus, the petitioner was informed of the derogatory information, and not just of the conclusion drawn, but of the information on which it was based and the source of that information. The conclusion was that the letter purportedly from [REDACTED] appears to be inauthentic. That conclusion is based on an investigation by KCC. The source of that information is [REDACTED] pursuant to a contact initiated with them. The petitioner was accorded ample opportunity to respond to the derogatory evidence. The AAO rejects counsel's assertion that the notice to the petitioner was in some respect insufficient.

Upon review of the record, the AAO finds that the NOIR sufficiently placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions. The petitioner was provided an opportunity to verify the authenticity of the letter from [REDACTED]; however, it did not do so.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the approval of the petition. The AAO further finds that the petitioner's submissions on appeal failed to overcome the basis for revocation. Therefore, the appeal will be dismissed and approval of the visa petition will remain revoked.

As a final matter, it is noted that the record does not contain an evaluation of the beneficiary's foreign degree in terms of its equivalence to a U.S. degree. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) requires that, if a petitioner will rely on a beneficiary's foreign degree to show that the beneficiary has the equivalent of a U.S. bachelor's or higher degree, the petitioner must provide an evaluation of the beneficiary's education from a reliable credentials evaluation service that specializes in evaluating foreign educational credentials. As the record contains no such evidence, it contains no such evidence to show that the beneficiary's foreign education and degree qualify him to work in any specialty occupation position. For this additional reason, it appears that the approval of the instant visa petition involved gross error.

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 approval of the petition remains revoked.