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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



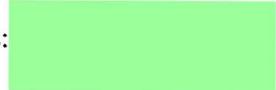
U.S. Citizenship
and Immigration
Services



DATE: **JUN 06 2014**

OFFICE: CALIFORNIA SERVICE CENTER

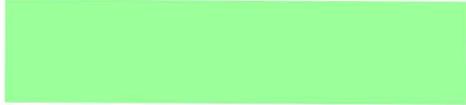
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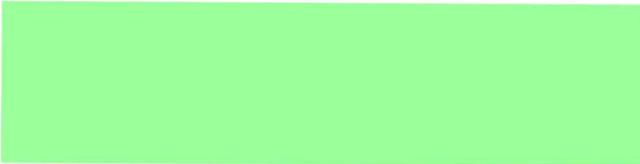
Petitioner:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with the word "for" written below it.

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.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Software & hardware solutions" firm with 41 employees in the United States. In order to employ the beneficiary in what it designates as a "S/W [software] Developer, Applications" 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position, failed to demonstrate that it had standing to file the visa petition as the beneficiary's prospective employer, and failed to establish that it has sufficient work for the requested validity period. On appeal, the petitioner 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 each of the bases specified in her decision. 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 the submissions on appeal.

II. THE LAW

The AAO will first address the specialty occupation basis of denial. Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

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

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;* and
- (3) Has an Internal Revenue Service Tax identification number.

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

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, 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* 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.

III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Software Developer, Applications position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1132. Software Developers, Applications from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. It is certified for employment at (1) 10185 McKellar Court, San Diego, California, (2) 10145 Pacific Heights Boulevard, San Diego, California, and (3) 5745 Pacific Center Boulevard, also in San Diego.

With the visa petition, filed April 1, 2013, counsel submitted evidence that the beneficiary received a "Bachelor of Engineering" degree in Information Science and Engineering from [REDACTED] Belgaum, Karnataka, India. An evaluation in the record states that the beneficiary's degree is equivalent to a bachelor of engineering degree in information science and engineering awarded in the United States.

Counsel also submitted, *inter alia*, (1) a Staffing Agreement dated June 23, 2011; (2) an employment offer, dated March 18, 2013; (3) a document headed, "Acknowledgement of Proprietary Information and Confidentiality Obligations; and (4) a letter, dated March 30, 2013, from the petitioner's manager;

The June 23, 2011 Staffing Agreement was executed by the petitioner's Vice President – Finance and the Senior Director – Legal Counsel of [REDACTED] Inc. [REDACTED] It states some terms pursuant to which the petitioner might provide workers to [REDACTED] That agreement does not state where the workers thus supplied would perform services, other than to state that they would be performed exclusively in the United States. It further states, "The Services may also be provided to any of [REDACTED]'s affiliated companies at their locations in the U.S." Thus, [REDACTED] appears to have the authority, pursuant to that contract, to reassign the workers the petitioner supplies to work for other employers. Further, that agreement states that [REDACTED] shall have the right to request the petitioner to replace any of its workers. An addendum to that agreement indicates that the beneficiary would work for [REDACTED] pursuant to that agreement, but does not indicate where

he would work, what services he would perform, or how long he would perform those services at that location.

The March 18, 2013 employment offer is addressed to the beneficiary and signed by [REDACTED] as the petitioner's President and CEO. Although it contains a signature line for the beneficiary, the beneficiary did not sign that agreement. That agreement does not indicate where the beneficiary would work.

The March 30, 2013 letter from the petitioner's manager contains the following duty description:

As a Software Developers, Applications, [THE BENEFICIARY] will be responsible for the following:

1. Write new program code using prescribed specifications.
2. Code, test and troubleshoot programs utilizing the appropriate hardware, and programming technology.
3. Evaluate simple interrelationships between programs such as whether a contemplated change in one part of a program would cause unwanted results in a related part.
4. Maintain and modify programs; make approved changes by amending flow charts, develop detailed programming logic, and coding changes.
5. Test and develop programming modifications.
6. Analyze performance of programs and take action to correct deficiencies based on consultation with users and approval of supervisor.
7. Certification testing and integration.

Detailed Technical Activities:

1. Work on Testing, Validation and responsible for SQA of [REDACTED] PacketCable 2.0 and 1.5 solution, where in involved in -Testing of the Provisioning Flow for the compliance to PacketCable 2.0 Provisioning specifications and related RFCs. -Testing of the RST (Residential SIP Telephony) Application for the compliance to PacketCable RST Application.
3. Work on CSR- Cinderella A-10 Access Point, The work involves system testing includes validating the driver functionality in compliance to IEEE - 802.11a/b/g standards and some part of 802.11n features. CSR- Cinderella A-11 Access Point, the comprehensive testing involves Testing the following features and functionalities:Driver building and Configuration Testing, 802.11 b/g/n Functionality in Infrastructure Mode, AP functionality testing and system testing, IEEE-PS ,AMPDU, AMSDU, WMM, WPS, WMMPS, WEP, WPA, WPA2 Authentication functionality
4. Testing and SQA of Linux WLAN Driver Testing for [REDACTED] on Custom platform, focused mainly on WEB, WPA, WPA2 Authentication functionality and IOT Testing among others.

5. UNIX programming and Internals Multi threading Networking [TCP/IP protocol suite] Socket Programming. Work with debugging such as Valgrind, GDB Make tool such as GNU Make,CVS,SVN, PCSim2, Wireshark, PACT-2.x, GES-PySIP, Ominipeek, iperf, Wireshark, 3rd Party Wi-Fi Cards, UKBUGDB
6. . Design and development of GUI in GTK Library.

[Errors, including enumeration error, in the original]

The petitioner's manager stated that the duties would be performed at [REDACTED] Inc. [REDACTED] San Diego, CA." As to the educational requirement of the proffered position, the petitioner's manager stated, "The position of Software Developer, Applications requires a Bachelor's degree in Engineering, Mathematics, Mechanical or Computer Science, or related field, or the equivalent," and further, "The position of Software Developer, Applications requires a theoretical and practical application of acquired highly specialized knowledge." As to the petitioner's present employees, the petitioner's manager stated, "All our Computer Programmers have minimum Bachelor's degree in Engineering, or Computer Science, Mechanical or Mathematics, or equivalent degrees, or experience in the field."

As to the absence of a statement of work, the petitioner's manager stated:

Please note that we are unable to submit a Statement of Work (SOW) for this candidate since [REDACTED] Inc. does not issue SOWs in the candidate's name. ***Instead, they assign a Requisition Number to each Temporary Worker. In this case, the corresponding Requisition Number is [REDACTED]*** Once we submit a name of a Temporary Worker for a specific project, [REDACTED] Inc. approves it and issues a Temporary Employee Confirmation, containing the employee's name, job title, and proposed start date. **Exhibit A.**

The June 23, 2011 Staffing Agreement described above is marked Exhibit A.

On June 26, 2013, the service center issued an RFE in this matter. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation and the employer-employee requirements.

In response, counsel submitted, *inter alia*, (1) a different staffing agreement, dated October 1, 2012; and (2) a letter, dated July 28, 2013, from the petitioner's manager.

The staffing agreement provided is, again, between the petitioner and [REDACTED] and states the terms pursuant to which the petitioner may provide its workers to [REDACTED] It is substantially similar, in most respects, to the June 23, 2011 Staffing Agreement. However, as to the control of workers assigned pursuant to its terms, it states:

For purposes of applicable California and other state worker's compensation law, [REDACTED] shall be considered the "Special Employer" and have rights of control and supervision of the Temporary Employees and rights to determine the manner and means by which Temporary Employees perform their duties for [REDACTED]. Employer shall be the "General Employer" and hereby specifically reserves the right to reassign or terminate the employment of any Temporary Employee upon written notice to [REDACTED] in the event that such Temporary Employee fails to comply with any of his/her obligations to [the petitioner] or [REDACTED].

Neither that staffing agreement nor its addenda indicate that [REDACTED] will utilize the beneficiary's services or, if it does, what services the beneficiary will perform, where the beneficiary will perform those services, or how long the beneficiary will perform those services at that location.

The July 28, 2013 letter from the petitioner's manager asserts that the petitioner is the beneficiary's employer, stating:

[T]he Master Services Agreement states in part, "*Except as provided in this agreement and/or required by law, all Temporary Employees shall remain subject to the supervision and control of [the petitioner], notwithstanding the fact that they may be performing services on the premises of [REDACTED]. To the extent that the applicable laws allow, [the petitioner] shall be the employer of all Temporary Employees.*"

Exhibit A, Master Services Agreement, page 2, item 4(b)).

The AAO observes that the last sentence that counsel attributes to the master services agreement, beginning, "To the extent" does not occur in that agreement.

The director denied the petition on October 21, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation, had not demonstrated that it would have an employer-employee relationship with the beneficiary, and had not demonstrated that it has work for the beneficiary to perform through the end of the requested validity period.

On appeal, counsel submitted (1) four vacancy announcements; (2) another LCA, certified March 26, 2013; (3) a document entitled, "Amendment No. 3 to the Statement of Work Dated January 12, 2011 Between [REDACTED] Ltd., and [the Petitioner]"; (4) a purchase order, dated October 16, 2013; and (5) an appeal brief dated December 27, 2013, and signed only by the petitioner's manager.

The additional LCA is certified for the petitioner's employment of an applications software developer at [REDACTED] Redmond, Washington from April 1, 2013 to March 31, 2016.

The document entitled "Amendment No. 3" was signed by the general manager of [REDACTED] Ltd. on September 24, 2013 and by the petitioner's vice president on September 30, 2013. It recites that the petitioner and [REDACTED] entered into a Consulting Agreement on November 23, 2005, and a Statement of Work (SOW) with an effective date of January 12, 2011. It further states that the petitioner and [REDACTED] wish to extend the term of the SOW until August 31, 2014. Those AAO observes that the instant visa petition was filed on April 27, 2013, prior to the ratification of that SOW extension. That extension does not indicate where the work would be performed or whether the beneficiary would work pursuant to that extension.

As to the work to be performed, that extension states:

[The petitioner] will perform develop [sic] software for [REDACTED] in the specified Windows operating system and perform software quality assurance testing and verification on such software in accordance with this Statement or Work [sic] and any extended terms under the [SOW].

The extension further states:

. . . [the petitioner] shall provide a (7) member team of an Authorized Employee [sic] for design, development, and engineering testing of WiFi software on [REDACTED]. The following tasks shall be performed by the [petitioner's] team:

- [REDACTED] iwconfig tool functionality from Linux to Windows mota application
- Port Linux MLAN changes to WCA branch
- Continue and maintain bug fixes for [REDACTED] for Windows 8

The extension lists the following deliverables to be provided by the petitioner to [REDACTED] by August 31, 2014: (1) P2P & Miracast for Windows 8, (2) [REDACTED] Driver sustaining activities, and (3) [REDACTED] Win8 drivers & bug fix work for passing MSFT WHCK.

The purchase order provided is between the petitioner as vendor and [REDACTED] as purchaser. It is dated October 16, 2013, which indicates that it was issued after the instant visa petition was filed. Further, it contains no indication of any work to which the beneficiary would be assigned. The purchase order contains a "Ship To" address of [REDACTED] in Santa Clara, California and a "Bill To" address of [REDACTED] Bermuda, but does not explicitly state the location of the "windows support" work performed pursuant to it. The purchase order also fails to mention who would perform the work.

In his appeal brief, the petitioner's manager stated the following:

C. Proposed Position is a specialty occupation:

1. Please note that we have a need for a Software Developer to work at our client, [REDACTED] site. Note that the LCA that is now being attached was in existence at the time this case was filed. We are changing [the beneficiary's] work location because a need has arisen with this client. See attached SOW and PO. Project details are given in the SOW, Exhibit A.

Also attached please find several copies of job postings for similar positions by companies in similar industry as our company- where they are requiring at least a Bachelor's Degree / Masters as a required qualification. Exhibit B.

The petitioner's manager further stated:

2. EMPLOYER EMPLOYEE RELATIONSHIP:

A. Beneficiary will work under the contract we have with [REDACTED]

1. To show that we will be the ultimate employer, we are attaching a copy of our offer letter as, which outlines the employee benefits that [the beneficiary] will be entitled to. Exhibit C.

Copy of our company's Performance Review Process can also be found in Exhibit C.

B. [The petitioner] will remain the employer:

1. As stated in the USCIS Memorandum, dated January 8, 2010 (page 3), in determine [sic] whether a Petitioner has an employer-employee relationship, a number of factors are considered- with no one factor being decisive. Some factors mentioned are Petitioner's supervision of the employee, ability to hire, fire and pay the employee's salary, Petitioner's evaluation of employee's performance/reviews, whether Petitioner pays for the employee's employment tax, and whether the Petitioner provides employee with benefits. *USCIS Memorandum: January 8, 2010: Determining Employer-Employee Relationship for Adjudication of H1B Petitions,, including Third Party Site Placements.* Exhibit C.

Unlike in *Defensor v. Meissner*, where it was concluded that the hospital was the one that hired, fired, supervised, and controlled

the work of the nurses, in the case at hand, we are controlling these key aspects of employment- not our end client. The mere fact that our employee will be at our client's site, does not make it their employee. *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

Although the brief indicates that the SOW is included at Exhibit A, only the extension of the SOW, described above, was provided. The original Consulting Agreement dated November 23, 2005 and the original SOW of January 12, 2011, either of which might have revealed various terms, including who will supervise the petitioner's workers, where the work will be performed, and even whether the end client has agreed to utilize the beneficiary's services, were not provided.

IV. SPECIALTY OCCUPATION ANALYSIS

As a preliminary matter, the AAO observes that the petitioner has never alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. In his March 30, 2013 letter, the petitioner's manager stated that the proffered position requires a bachelor's degree in "Engineering, Mathematics, Mechanical or Computer Science, or related field, or the equivalent."¹ There are various reasons that this is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in either of two disparate fields, such as mathematics and computer science, would not meet the statutory requirement that the degree be "in *the* specific specialty." Section 214(i)(1)(B) (emphasis added).

Further, even if the petitioner had indicated that the proffered position requires a degree in engineering, with no acceptable alternatives, that would not be an assertion that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in

¹ The petitioner's manager appears to have stated that the educational requirement of the proffered position would be satisfied by a bachelor's degree in mechanical science. The AAO is not familiar with any such curriculum as mechanical science but, based on its name, it would be unlikely to be so closely related to computer science that the two would be considered to be within a single specific specialty. However, as other bases exist for dismissing the instant visa petition and denying the appeal, the AAO will not further analyze the matter of the degree in mechanical science.

question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The petitioner has not even alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent, and the director's decision must therefore be affirmed and the petition denied on this basis alone.

However, the AAO will perform additional analysis of the proffered position for the purpose of determining whether, if the petitioner had asserted it requires a minimum of a bachelor's degree in a specific specialty or its equivalent, that assertion would have been supported by the evidence.

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1132, Software Developer, Applications from O*NET. The AAO routinely relies on the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for the educational requirements of particular occupations.² The AAO reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Software Developers," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of software developers:

What Software Developers Do

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by asking how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it too difficult to use, software developers go back to the design process to fix the problems or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called information technology (IT) project managers. These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

The following are types of software developers:

Applications software developers design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

Systems software developers create the systems that keep computers functioning properly. These could be operating systems that are part of computers the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those in phones or cars.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Software Developers," <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2> (last visited May 21, 2014).

The duties described by the petitioner's manager in his March 30, 2013 letter are consistent with the duties of a software developer. However, as was noted above, where the work is to be performed for entities other than the petitioner, the requirements imposed by the end user on the performance of the duties of the position is the critical consideration. Before reaching the issue of whether the duties the beneficiary would perform require a minimum of a bachelor's degree in a specific specialty or its equivalent, the AAO must determine what those duties are, and, for the reasons explained in *Defensor, supra*, this requires, preliminarily, determining what entity would assign those duties.

The LCA submitted with the visa petition indicates that the beneficiary would work at one of three San Diego locations. The visa petition also indicated that the beneficiary would work in San Diego. The petitioner's manager then stated that the beneficiary would work at the location of [REDACTED]. The visa petition was denied because the director found that the work the beneficiary would perform at that location had not been shown to constitute specialty occupation employment.

On appeal, rather than providing evidence that the work to be performed for [REDACTED] is specialty occupation work, counsel provided an additional LCA, certified for employment in Redmond, Washington. The petitioner's manager, in the appeal brief, asserted that, rather than performing services for [REDACTED] in California, the beneficiary will perform services for [REDACTED] presumably at the Washington State location provided in the second LCA.

On appeal, 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 the 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). 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 amendment of the location where the beneficiary would work and the entity for which the beneficiary would work, and, thus, the work he would perform, is such a substantive change. The AAO will not consider the amended claim of employment for [REDACTED] presumably at the Washington State location shown on the amended LCA.

The evidence from [REDACTED] is in conflict. With the visa petition, counsel provided a Staffing Agreement dated June 23, 2011. An addendum submitted with that agreement suggests that the beneficiary would work pursuant to it. However, neither the agreement nor any other materials then provided from [REDACTED] indicate the type of work the beneficiary would perform.

Counsel subsequently submitted a revised Staffing Agreement, dated October 1, 2012. It also does not specify the duties that the beneficiary would perform. Further, however, this version of the staffing agreement is dated October 1, 2012 and purports to have been executed by a representative

of the petitioner on October 1, 2012 and by a representative of [REDACTED] on October 23, 2012. As such, it was ostensibly in effect when the visa petition was filed, on April 1, 2013, when counsel provided the June 23, 2011 version of the Staffing Agreement, implying that it was in some way relevant to the instant visa petition.

Why counsel provided, on April 1, 2013, the June 23, 2011 Staffing Agreement, if it had been superseded by the October 1, 2012 Staffing Agreement, is unclear. Counsel appears to have provided, with the visa petition, a staffing agreement that was no longer in effect. The only other apparent possibility is that the second Staffing Agreement is not what it purports to be, that is, an agreement executed in October of 2012.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592.

Absent such independent objective evidence demonstrating which of the Staffing Agreements from [REDACTED] if either, was in effect when the visa petition was submitted, the AAO cannot accord either any evidentiary weight. Even if either or both of those documents stipulated to the work that the beneficiary would perform if the visa petition were approved, given the doubt pertinent to whether those documents were actually in effect when submitted, they would not constitute evidence sufficient to corroborate the beneficiary's alleged duties.

Further still, the petitioner is now asserting that the beneficiary would not, in fact, work for [REDACTED]. As such, even if the record contained evidence sufficient to demonstrate the nature of the work available to the beneficiary at [REDACTED]'s location, no reason exists to believe that the petitioner would actually assign the beneficiary to that work if the visa petition were approved, given that the petitioner now asserts that it would not.

For all of the above reasons, the petitioner has failed to establish the nature of the work the beneficiary would perform if the visa petition were approved. 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. Because the petitioner has failed to demonstrate that the proffered

position qualifies as a specialty occupation position, the appeal will be dismissed and the visa petition will be denied.

Further, the new LCA provided is certified for employment from April 1, 2013 to March 31, 2016. Even if the petitioner's new claim on appeal were permissible, and the visa petition were approvable pursuant to that new claim, the visa petition could not be approved for any period after March 31, 2016.

An additional limitation exists pertinent to the new claim of employment for [REDACTED] in Washington State. The document entitled "Amendment No. 3 . . ." states that the petitioner and [REDACTED] wish to extend the term of an SOW until August 31, 2014. There is insufficient evidence that the project at [REDACTED] would continue beyond that date. Even if the new claim on appeal were permissible, and the visa petition were otherwise approvable pursuant to that new claim, the visa petition could not be approved for any period after August 31, 2014, the last date that any work for [REDACTED] has been shown to be available.

Yet further, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. That is, the petitioner now asserts that the beneficiary will not work for [REDACTED] but no evidence in the record indicates that [REDACTED] the only other prospective end-user mentioned in the record, has agreed to utilize the beneficiary's services. The petitioner has failed, therefore, that it has any work for the beneficiary to perform if the visa petition were approved. USCIS regulations 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)(1). 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'r 1978).

The petitioner has not demonstrated that it has any work at all to which it could assign the beneficiary. For this additional reason, the appeal will be dismissed and the petition denied.

V. EMPLOYER-EMPLOYEE ANALYSIS

The remaining basis for the decision of denial was the finding that the petitioner has not demonstrated that it has standing to file the visa petition as the petitioner's prospective employer, that is, the petitioner has not demonstrated that, if the visa petition were approved, it would have an employer-employee relationship with the beneficiary.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a

labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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:

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. . . .

[Italics added]

When the petitioner submitted the instant visa petition, the scenario proposed was that the beneficiary would perform services for [REDACTED], or for companies to whom [REDACTED] assigned the beneficiary. The June 23, 2011 Staffing Agreement does not make clear who, pursuant to that scenario, would assign duties to the beneficiary and supervise his performance of those duties. However, the record contains insufficient evidence that, if the beneficiary were to work pursuant to that Staffing Agreement, the petitioner would control whatever project the beneficiary would work on, especially if [REDACTED] chose to assign the beneficiary to work for some other company. The petitioner has not demonstrated who would assign the beneficiary's duties and supervise his performance if he were to work pursuant to the June 23, 2011 staffing agreement, which is a critical factor in determining whether the petitioner is the beneficiary's prospective employer. If the petitioner were seeking approval of the instant visa petition pursuant to the scenario of the beneficiary being employed pursuant to the June 23, 2011 Staffing Agreement, without evidence to demonstrate that the petitioner, rather than [REDACTED] or some other company, would parse out duties to the beneficiary and supervise his performance, the visa petition could not be approved.

The second Staffing Agreement, however, clarifies this matter. It makes explicit that, if the beneficiary were assigned to work for [REDACTED] pursuant to that agreement, [REDACTED] would, "have rights of control and supervision over the [beneficiary] and rights to determine the manner and means by which [the beneficiary] perform[s] [his] duties for [REDACTED]. If this Staffing Agreement was in effect when the instant visa petition was submitted, then [REDACTED] and the petitioner anticipated that [REDACTED] and not the petitioner, would assign duties to the beneficiary and supervise his performance. Under these circumstances, the AAO would not find that the petitioner is the beneficiary's prospective employer, with standing to file the instant visa petition.

In any event, the petitioner has now asserted that, if the visa petition were approved, the beneficiary would work, not for [REDACTED] or its assignee, but for [REDACTED]. As such, whether the petitioner would be the beneficiary's employer in the original scenario, in which the beneficiary would perform services for [REDACTED] need not be further addressed.

However, as was pointed out above, the 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 the 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.*, supra. 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 amendment of the location where the beneficiary would work and the entity for which the beneficiary would work is such a substantive change and, as was stated above, the AAO will not consider the amended claim of employment for [REDACTED].

The petitioner has made plain that it intends, if the visa petition is approved, to assign the beneficiary to perform work for another entity. Because the evidence conflicts as to the identify of that other entity, and who would assign the beneficiary's tasks and supervise his performance pursuant to that assignment, the AAO cannot find that, if the visa petition were approved, the petitioner would have an employer-employee relationship with the beneficiary. As such, the petitioner has not demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the visa petition denied for this additional reason.

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

Although the petitioner's manager stated, in his March 30, 2013 letter, that the beneficiary would work at [REDACTED]'s site in San Diego, neither of the agreements with [REDACTED] indicates where the beneficiary would work. The June 23, 2011 agreement, submitted with the visa petition, states that the work will be performed exclusively in the United States, but contains no other geographic limitation. It also indicates that [REDACTED] may provide the beneficiary to some other company to perform services for it.

The October 1, 2012 Staffing Agreement also does not state the location where the beneficiary would work. It does not even explicitly state that the work performed will be confined to the United States. Again, the record contains insufficient evidence to demonstrate where the beneficiary would work if the beneficiary were assigned to work for [REDACTED] pursuant to that agreement.

Further still, because, as was noted above, the petitioner has not provided independent objective evidence to satisfy the requirement of *Matter of Ho*, supra, neither of those two documents is accorded any evidentiary weight. Even if one, or the other, or both documents identified the location where the beneficiary would work if the visa petition were approved, the petitioner would not have satisfactorily demonstrated that it would employ the beneficiary in a location for which it has an

approved LCA.³ The LCA has not been shown to correspond to the instant visa petition. The visa petition will be dismissed for this additional reason.

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.

VI. CONCLUSION

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

³ As was stated above, the claim, first asserted on appeal, that the petitioner would assign the beneficiary to work for [REDACTED] will not be considered.