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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: EAC 07 104 52246 Office: VERMONT SERVICE CENTER Date: NOV 30 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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.

The petitioner is an information technology company that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that the proposed position qualifies for classification as a specialty occupation; and (2) that it had submitted a valid labor condition application (LCA).

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; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 requires theoretical and practical application of a body of highly specialized knowledge in field 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 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 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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, 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 his services would actually be those of a software engineer for that entire period of time.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner filed the instant petition on March 5, 2007, and outlined the duties proposed for the beneficiary in its February 20, 2007 letter of support. In his April 8, 2008 request for additional evidence, the director requested, among other items, documentation from the end-user of the beneficiary's services. Specifically, the director instructed the petitioner to submit a copy of the contract with the end-user of the beneficiary's services referencing the beneficiary specifically, and describing the duties he would be performing.

The petitioner responded to the director's request for additional evidence on May 23, 2008. The petitioner submitted, among other items, an October 1, 2004 "Subcontractor Services Agreement" between the petitioner and Analysts International Corporation (AIC), which called for the petitioner to assist AIC in providing services to its clients, pursuant to statements of work to be executed by both parties. Although a December 31, 2007 statement of work was submitted, it did not pertain to the beneficiary; the statement of work referenced another employee. The petitioner also submitted a document entitled "Employment Itinerary."

In document, the petitioner asserted that the beneficiary "is assigned to a software development project manifested by [the petitioner] and its clients in the retail technology industry," and stated that the beneficiary was working in Oklahoma City, Oklahoma at the office of an unnamed end-client. The petitioner, however, submitted no information from the unnamed end-client directly, as the director requested. Nor did the petitioner make any reference to, or explanation for, this failure to comply with the director's specific request. Noting as such, the director denied the petition on July 16, 2008, finding the record to lack documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment.

On appeal, counsel contends that the director erred in denying the petition. In her September 11, 2008 submission, counsel states that the beneficiary requested that the end-client provide confirmation of work, but that such end-client "could not understand why they were required to provide a letter confirming employment." Counsel also stated that the beneficiary had been working in Nashua, New Hampshire for two and one-half years. Counsel cites to unpublished AAO decisions and proposed regulations that were never enacted. Counsel also submits a "Corporation to Corporation Contractor Agreement," between the petitioner and Cogent Systems, Inc. (Cogent), which is dated both January 2, 2006 and April 3, 2006, which calls for the petitioner to provide consulting services to Cogent's clients. Counsel also submits a work order issued pursuant to this agreement, which is dated both January 2, 2006 and April 3, 2006,

which calls for the petitioner to provide software consulting services to Cogent beginning on January 5, 2006.

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny this petition.

As a preliminary matter, the AAO accords no weight to the unpublished AAO decisions cited by counsel or the proposed regulations that were never enacted. With regard to the unpublished decisions she cites, the AAO notes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Given that the proposed regulations she cites were never enacted, the AAO will accord no weight them, either.

The AAO notes further that counsel's assertion on appeal that the beneficiary has been employed in Nashua, New Hampshire for two and one-half years conflicts directly with the petitioner's assertion made in response to the director's request for additional evidence that the beneficiary's "full-time work location shall remain in Oklahoma City." 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). 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. *Id.* at 591.

Nor does the AAO find the agreement and work order with Cogent persuasive. As was noted previously, the director specifically requested information from the end-user of the beneficiary's services in his April 8, 2008 request for additional evidence. The petitioner did not submit such evidence at that time, and made no attempt to explain its failure to do so. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted this agreement to be considered, it should have submitted the document in response to the director's request for

evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. For this reason alone, the petition must be dismissed.[1]

Even if the AAO were to consider the sufficiency of the agreement between the petitioner and Cogent, the AAO would still find such sufficiency lacking. First, it is unclear that the agreement was in existence at the time the petition was filed on February 2, 2006. Although the signatures on the document are ostensibly dated January 2, 2006, the date of April 3, 2006 appears in bold letterface on each page of the agreement. It is unclear that this agreement was in existence at the time the petition was filed.

Nor does the substance of the agreement and accompanying "work order" demonstrate the existence of a specialty occupation. Although the language of the agreement makes clear that it would be a client of Cogent, and not Cogent itself, that would be the end-user of the beneficiary's services, the work order does not name which of Cogent's clients would be the end-user of the beneficiary's services. Nor does the work order name the beneficiary, or does it provide any meaningful information regarding the actual duties he would perform, which would enable the AAO to make a determination as to whether such duties would constitute a specialty occupation. Nor is any information submitted directly from the end-user of the beneficiary's services.

Accordingly, the AAO agrees with the director's decision to deny this petition. The record lacks any meaningful information regarding the actual duties proposed for the beneficiary from the end-user of the beneficiary's services. The AAO, therefore, cannot make a determination as to whether the proposed position qualifies for classification as a specialty occupation.

For all of these reasons, the AAO finds that the record fails to contain substantive evidence about any particular project on which the beneficiary would work during the entire period of requested employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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[1] The AAO notes that, on appeal, the petitioner submits an affidavit from the beneficiary in which he states that he requested this document from the end-user of his services at the time the request for additional evidence was issued, but that the end-client did not understand why he needed such information. However, he was eventually able to obtain the document and submits it on appeal. The AAO finds this explanation deficient. Given that both Cogent and the petitioner signed this agreement, it is unclear to the AAO why the petitioner was unable to submit a copy of this agreement itself. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. *See also Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor,* the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes finding 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's 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.

In accordance with its previous discussion, the AAO agrees with the director's determination that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks evidence that when the petitioner filed the petition, the petitioner had secured work 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. 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. 1978). For this reason also, the appeal must be denied.

As the petitioner's petitioner to demonstrate the existence of H-1B caliber work for the beneficiary to perform precludes approval of this petition, the AAO need not address the

remaining ground of the director's denial of the petition. The AAO affirms, but will not discuss, that ground of the director's decision.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.