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

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U.S. Citizenship and Immigration Services

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FILE: WAC 08 221 50499 OFFICE: CALIFORNIA SERVICE CENTER DATE: OCT 0 8 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 Director, California Service Center, 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 avers that it is a software development and computer programming company that was established in 1998 with 135 current employees. It seeks permission to continue to employ the beneficiary as a software engineer and, 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 because: (1) the petitioner failed to establish that the proffered position is a specialty occupation; (2) the petitioner does not meet either the definition of U.S. employer or agent; and (3) the petitioner has not established that the LCA it submitted is valid. On appeal, counsel submits a brief and additional evidence.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary issue, the AAO affirms the director's decision on the above issues regarding the failure to establish an employer-employee or agent relationship and to provide a valid LCA for the requested period of employment. The AAO will not, however, further address these issues because the petitioner has failed to establish that the proffered position is a specialty occupation. Since the classification of the position as a specialty occupation is the most crucial issue in the adjudication of an H-1B petition, this decision will focus solely on the petitioner's failure to establish that the proffered position requires the attainment of a bachelor's degree, or the equivalent, in a specific discipline.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it wished to continue employing the beneficiary as a software engineer. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 26, 2008. In the request, the director noted the petitioner's business industry and requested, in part, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties, as well as evidence regarding its relationship with the beneficiary.

In its response, the petitioner submitted, in part, a letter from Judge Technical Services (Judge), which stated that the beneficiary has been providing "systems administration and support" to a company called T-Systems North America (T-Systems) since January 2006. The letter writer provided the beneficiary's title as "System Administrator" and briefly outlined his job responsibilities as well as the skills that he has been applying to the project. The petitioner also submitted a "Work Order" between it and T-Systems for the beneficiary's services.

On December 16, 2008, the director denied the petition. The director declined to find that the proffered position was a specialty occupation because, as an employment contractor, the petitioner was in the business of contracting its employees to client sites. While acknowledging the letter from Judge, the director found it

insufficient because there was no information from Judge's client, T-Systems, regarding the beneficiary's specific duties. The director concluded that, without evidence regarding what duties the beneficiary was actually performing for T-Systems, the proffered position could not be classified as a specialty occupation.

On appeal, counsel states that the petitioner has submitted sufficient evidence to establish that the proffered position is bona fide. The petitioner submits a copy of a Work Order between Judge and T-Systems, a new letter from Judge confirming the beneficiary's placement at T-Systems, another copy of the Work Order between the petitioner and T-Systems, and copies of the beneficiary's Forms W-2. Counsel also submits a copy of the computer software engineer description from the Department of Labor's *Occupational Outlook Handbook* (OOH).[1]

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

It should be noted that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, of great importance to this proceeding is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

> An occupation which 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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,

[1] There is no evidence regarding the date of this publication.

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, the position must also meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 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), 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. 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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 proffered 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.*

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 AAO will first address a critical inconsistency in the record that precludes the petitioner from being able to establish that the position is a specialty occupation. On the Form I-129 and in its letter of support, the petitioner clearly stated that the beneficiary would be employed as a software engineer, and the petitioner described the generic job duties of such a position with its company. In contrast, however, the letter writer from Judge stated in its undated letter in response to the RFE that the beneficiary has been and would continue to be working for T-Systems as a systems administrator, not a software engineer. The Work Order between the petitioner and T-Systems also lists the beneficiary's project as "Unix Admin," which also points to the proffered position being a systems administrator position, not a software engineer position.

It is clear that the petitioner was not offering a software engineer position to the beneficiary when it filed the position; the beneficiary had not been and was not intending to continue working as a software engineer. The AAO does not concede that the positions of software engineer and systems administrator are interchangeable. According to the 2008-2009 edition of the OOH, systems administrators are responsible, in part, for maintaining network efficiency, while software engineers are typically involved in the design and development of many types of software. The petitioner has not explained why it maintained to USCIS that it was offering the beneficiary a software engineering position when the actual position involved systems administrator responsibilities. Further confusing the record is Judge's January 15, 2009 letter, in which the letter writer refers to the beneficiary as a software engineer, which contradicts its undated letter in which it called the beneficiary a systems administrator who had been "providing Systems Administration & Support"

to T-Systems since January 2006. 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). Here, the petitioner has not explained the discrepancy concerning the nature of the proffered position. As stated earlier, it appears from the evidence that the beneficiary would be working as a systems administrator, not as a software engineer as claimed on the I-129 petition.

Even if the AAO accepted that the beneficiary would be working as a systems administrator, the evidence would not be sufficient to find eligibility for this classification. Since the beneficiary has been performing services for T-Systems since January 2006, it is the duties associated with those services that are the most important; it is not the generic job description from the petitioner or Judge that will suffice. As stated earlier in this decision, the *Defensor* court held that the 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 entity using the beneficiary's services.

As the petitioner has not submitted evidence from T-Systems that describes the beneficiary's job duties and the knowledge and skills required to complete those tasks, it has not met its burden in establishing that the proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The OOH reports that: "Due to the wide range of skills required, there are many paths of entry to a job as a . . . systems administrator. . . . For systems administrator jobs, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field." Judge's letter, which the petitioner submits as the only evidence of the beneficiary's system administrator duties, does not establish that any of the duties described would require a degree in a specific discipline.

The petitioner's failure to provide evidence of the tasks and assignments that the beneficiary would perform for the actual client renders USCIS unable to assess whether the beneficiary's duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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