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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D1

FILE: WAC 08 153 50588 Office: CALIFORNIA SERVICE CENTER Date: OCT 0 8 2009

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is a systems and software design, development, and implementation business, that it was established in 2002, that it employs 60 persons, and that it has an estimated gross annual income of $7,000,000 and an estimated net annual income of $500,000. It seeks to extend the employment of the beneficiary as a programmer analyst from April 30, 2008 to April 29, 2009. Accordingly, the petitioner 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).

On June 25, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); or (3) the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits a brief and additional documentation.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on May 2, 2008; (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 and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its April 30, 2008 letter appended to the petition that it is in the business "of computer[-]based information technology, imaging document management, simulation, propriety databases, programming and business consultation services" and that it "designs, develops, markets and provides technical support for computer software and products." The petitioner indicated that in the position of "programmer analyst," the beneficiary "will continue to be responsible for custom program development and implementation, and system analysis and design" and additionally "will provide software support to our clients which will include testing, debugging, and modifying software to meet customer specifications." The petitioner indicated that the position required an individual with a degree in electronics and communication, physics, engineering, mathematics or a related field. The record also includes a Form ETA 9035E, Labor Condition Application (LCA) certified by the Department of Labor on April 30, 2008 for a programmer analyst in the Fremont, California area.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 7, 2008. In the request, among other things,[1] the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested

[1] The director also requested evidence that the beneficiary was eligible to extend his H-1B classification beyond the six-year limit set out in section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4).

evidence that a specialty occupation position exists at the petitioner's business location and evidence of the conditions of employment if the beneficiary works offsite; indicated that copies of signed contracts between the petitioner and the beneficiary and an itinerary of definite employment were necessary if the petitioner is an agent acting as an employer; asked that the petitioner provide copies of signed contractual agreements, statements of work, work orders, service agreements, and letters from authorized officials of the ultimate end-client companies where the work will actually be performed that provide a comprehensive description of the beneficiary's proposed duties; requested an itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested documentary examples of the petitioner's products or services; and asked for any other evidence that would substantiate the qualifying employment.

The petitioner provided information in response that related to the beneficiary's eligibility for an exemption to the six-year maximum limit in H-1B classification.

On June 25, 2008, the director denied the petition. The director observed that the petitioner had failed to submit: a valid contract between the petitioner and the beneficiary confirming the beneficiary's employment; an itinerary of services specifying the dates of services for services that will be performed for the period of time that the temporary employment is requested; and copies of contractual agreements, statements of work, work orders, service agreements, and letters from authorized officials of the ultimate end-client companies where the work will actually be performed that provide a comprehensive description of the beneficiary's proposed duties. The director determined that the record did not provide evidence to establish that the petitioner's offer of employment was authentic and that without contracts or an itinerary of definite employment, the petitioner had not established that it qualified as a United States employer or agent. The director also determined that without a contract between the petitioner and the beneficiary and without a contract between the petitioner and other software consulting firms and the actual end client firm, the evidence did not establish that a specialty occupation programmer analyst position would be available for the beneficiary; thus the petitioner had not established that the duties of the proffered position are a specialty occupation.

The AAO finds that the principle issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. In that regard, counsel for the petitioner submits on appeal an August 22, 2008 letter on Citi Residential Lending (CRL)[2] letterhead signed by a senior HR generalist. The letter-writer confirmed that the beneficiary is a contingent employee with the petitioner and that the beneficiary had been assigned to work as a consultant/programmer analyst for CRL on September 1, 2007. The letter-writer noted that the beneficiary had been "tasked with several key and critical projects like REO, OMS, SAE, and mycitirl within CRL's Corporate Headquarters" and that his responsibilities include "a variety of java-oriented integration projects" and that currently he had "focused on technical support of the Loan Servicing REO application integration and migration." The letter-writer added that the

[2] Citi Residential Lending appears to be part of Citi Group.

beneficiary "provides critical knowledge and unique technical expertise and guidance on a daily basis to internally developed and highly customized software that required intimate hands-on knowledge of the Reactor workflow engine which vitally supports processing of the REO (Real Estate Owned) properties vital to the continuance and revenue of the business." The petitioner also provided invoices between it and "Citi Group"[3] regarding the beneficiary's work from August 2007.

On appeal, counsel for the petitioner states that the contract between the petitioner and Citi Group cannot be released and should not be needed. Counsel references legacy Immigration and Naturalization Services (INS) memoranda for the proposition that the submission of contracts should not be the normal requirement for the approval of an H-1B petition filed by an employment contractor. Counsel also notes that the LCA filed with the petition on behalf of the beneficiary incorrectly listed the beneficiary's work location as Fremont, California when the beneficiary will actually be working in Orange, California. Counsel submits a second LCA certified by the Department of Labor on August 21, 2008 for the Orange County, California location.

The AAO observes 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, the AAO will specifically review 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

[3] The invoices are from Ameriquest Mortgage (Citi) and Citi Residential Lending, Inc.

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, 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), 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.

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 initially provided a brief and broad statement of the beneficiary's proposed duties as a programmer analyst. The general statement of the duties of the position is insufficient to establish that the beneficiary in this matter would be performing duties that comprise the duties of a specialty occupation. As the record did not include the underlying evidence of the actual work to be performed, a comprehensive description of the beneficiary's actual duties and the project(s) the beneficiary would work on for the duration of the requested employment period, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the director requested further evidence in the form of contracts, letters, statements of work, or other evidence that would assist in establishing that the proffered position is a specialty occupation.

The petitioner, in this matter however, failed to provide a further description of the beneficiary's duties in response to the director's RFE. The regulations state 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). 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 is reluctant to 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). The AAO finds, that even if the evidence offered on appeal is considered, the record still does not include sufficient evidence establishing that the proffered position is a specialty occupation.

To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties on the specific project(s) and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. Conclusory statements indicating that the position requires an individual with a certain background is insufficient when the actual position is not detailed. Although the AAO acknowledges counsel's reference to a legacy INS 1995 memorandum, regarding the submission of contracts, the AAO finds that without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the petitioner or the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. The petitioner's overview of the duties of a generic occupation will not suffice. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.*

In this matter, the record demonstrates that the petitioner acts as an employment contractor. The general and conclusory statements of the petitioner and of the end user client fail to provide the detailed specifics of the beneficiary's work. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A)(iii) or 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)*.

The director also denied the petition for reasons that relate to the petitioner's status as either a U.S. employer or an agent. The AAO affirms, but will not address these issues, because the petitioner has

failed to establish that the job is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition.

The AAO also notes that the petitioner acknowledged it had not filed the proper certified LCA when submitting the petition. The AAO finds that the LCA submitted on appeal was not certified until August 21, 2008, three months after the petition was filed. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B) requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor in the occupational specialty in which the H-1B worker will be employed. The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Thus when the petition was filed the petitioner had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). As the petition will be denied because the petitioner failed to establish the proffered position is a specialty occupation, this issue will not be discussed further.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.