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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 146 52855 Office: CALIFORNIA SERVICE CENTER Date: OCT 28 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 IT resource and technology support services company that seeks to employ the beneficiary as a programmer-analyst. 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 two grounds: (1) the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) that the petitioner had failed to establish that the evidence it had submitted is credible and sufficient to explain that it would comply with the terms and conditions of employment.

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.

Upon review of the entire record of proceeding, the AAO finds that the director was correct in her determination that the record before her failed to establish the existence of a specialty occupation position, and finds that the documents submitted on appeal have not remedied that failure.

The petitioner filed the petition on April 14, 2008. On its tax return, the petitioner described its "principal business activity" as software consulting. In its March 19, 2008 letter of support, the petitioner described itself as "an IT services company that delivers system and the Application Integration-Business, e-commerce, database technologies, and also web services specialized technology staffing and a spectrum of other IT services." The petitioner outlined the duties proposed for the beneficiary in its March 19, 2008 letter, and discussed her qualifications to perform the proposed duties. The petitioner did not identify a particular project upon which the beneficiary would work but stated that the beneficiary would perform the following tasks:

- Analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize the petitioner's ability to deliver more efficient and effective technological and computer related solutions to its business clients;
- Gather information from users to define the exact nature of system problems, and then design a system of computer programs and procedures to resolve these problems;
- Plan and develop new computer systems, and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline the business processes of the petitioner's clients;
- Design or add hardware or software applications to the computer systems of the petitioner's clients, which will better harness the power and usefulness of their computer systems;
  Analyze subject-matter operations to be automated, specifying the number and type of records, files, and documents to be used, and format the output to meet the users' needs;
- Develop complete specifications and structure charts that will enable computer users to prepare required programs; and
  Once systems have been instituted, coordinate tests of such systems, participate in trial runs of new and revised systems, and recommend computer equipment changes in order to obtain more effective operations.

The director issued a request for additional evidence on June 9, 2008 and requested, among other items, further information regarding the duties proposed for the beneficiary. The director stated that if the petitioner was engaged in the businesses of consulting, employment staffing, or job placement that contracts short-term employment, in any way, it must submit evidence to establish that a specialty occupation exists for the beneficiary. The director requested that the petitioner clarify its employer-employee relationship with the beneficiary and submit: (1) copies of signed contracts between the petitioner and the beneficiary; (2) a complete itinerary of services or engagements listing the dates of each service or engagement, names and addresses of the actual employers, and names and addresses of the establishment, venues, or locations where services would be performed for the period of time requested; and (3) copies of signed contractual agreements, statements of work, work orders, etc., specifically naming the beneficiary and describing her proposed duties.

The petitioner responded to the director's request on August 28, 2008. The petitioner stated that it would be the actual employer of the beneficiary for the entire period of requested employment.

Although the petitioner had stated in its March 19, 2008 letter that the beneficiary would perform such tasks as designing or adding hardware or software applications to the computer systems of the petitioner's clients, so as to better harness the power and usefulness of their computer systems; and analyzing computer and business problems of existing and proposed systems, and initiating and enabling specific technologies to maximize the petitioner's ability to deliver more efficient and effective technological and computer related solutions to its business clients, the petitioner stated in its August 27, 2008 letter that the beneficiary would work on an internal development project at the petitioner's worksite, rather than providing services to client companies. The petitioner stated that the beneficiary would work as a programmer-analyst, and work on the development of a program called "NAT," which it was creating for Doli Systems Inc. (Doli), one of its clients. The petitioner submitted a copy of a proposal describing the NAT project, which states on the cover sheet that it was prepared for Doli's C.E.O. on July 31, 2008. The proposal was signed by the petitioner on August 5, 2008, and by Doli's C.E.O. on August 6, 2008.

The director denied the petition on September 9, 2008. The director found the proposal regarding the NAT project insufficient to demonstrate the existence of a specialty occupation at the time the petition was filed, as it was dated July 31, 2008, and signed by the parties in August 2008. As noted by the director, by the time the proposal was signed by both parties, 114 days had passed since the filing of the petition. As such, the record did not indicate that this project existed at the time the petitioner had filed the petition. The director also noted that although the petitioner is engaged in an industry that typically outsources its personnel to client sites to work on particular projects, the petitioner had not submitted documentation regarding any projects upon which the beneficiary would work for the petitioner's clients. Accordingly, the petitioner had failed to establish that it had a specialty occupation position for the beneficiary at the time it filed the petition.

On appeal, counsel contends that the director erred in denying the petition. Counsel submits a March 3, 2008 document entitled "Project Confirmation," as well as March 10, 2008 document entitled "Statement of Work." According to counsel, the March 3, 2008 "Project Confirmation" verifies "preliminary negotiations between the petitioner and Doli, and the March 10, 2008 document is the "final contract" between the two. Counsel contends that the July 31, 2008 proposal the petitioner submitted in response to the director's request for additional evidence "was the detailed project description outlining the parameters of the 'specialty occupation' and not the agreement between the two parties."

Upon review of the entire record of proceeding, 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 her services for the entire period of requested employment, and therefore whether her services would actually be those of a programmer-analyst for that entire period of time.

The AAO is not persuaded by the assertions of counsel on appeal. As a preliminary matter, the AAO notes the evolution in the nature of the duties proposed for the beneficiary between the time the petition was filed and the petitioner's response to the director's request for additional

evidence. The duties as described by the petitioner at the time the petition was filed were set forth previously, and the AAO notes again that no mention was made of the NAT project. However, by the time the petitioner responded to the director's request for additional evidence, the beneficiary was to spend all of her time working on that project. The AAO finds this change in the nature of the beneficiary's duties by the petitioner to be a material alteration to, rather than a mere clarification or further description of, the beneficiary's proposed duties. 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. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. For this reason alone, the AAO's analysis will be based upon on the job description contained in the petitioner's March 19, 2008 letter, which was the first time the petitioner described the job duties proposed for the beneficiary.

Even if such were not the case, the petition could still not be approved, as the record does not support counsel's assertions regarding the existence of the NAT project at the time the petition was filed. Counsel's assertion that the July 31, 2008 proposal submitted in response to the director's request for additional evidence was merely "the detailed project description outlining the parameters of the 'specialty occupation' and not the agreement between the two parties" is not supported by the record. First, the AAO notes that the signature page of the July 31, 2008 proposal, which both parties signed, states specifically that "[b]y their signatures to this document, the parties indicate their agreement to the terms and conditions and responsibilities set forth herein." Nor does counsel explain why the March 3 and March 10, 2008 documents were not submitted at the time the petition was filed, or in response to the director's request for additional evidence. If the petitioner had wanted the March 3 and March 10, 2008 documents to be considered, it should have submitted the documents in response to the director's request for additional evidence. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO will not consider the March 3 and March 10, 2008 documents. The AAO agrees with the director's determination that the petitioner has failed to establish that the NAT project existed at the time the petition was filed. For this additional reason, the AAO's analysis will be based upon on the job description contained in the petitioner's March 19, 2008 letter.

The specific duties proposed for the beneficiary in the petitioner's March 19, 2008 letter (i.e., designing or adding hardware or software applications to the computer systems of the petitioner's clients, et al) indicated that she would be performing such duties for the petitioner's clients. However, no substantive evidence was submitted regarding any particular substantive work that she would perform while pursuing such duties. 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). In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, as noted by director, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

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.

Also, at a more basic level, 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. USCIS regulations affirmatively 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)(12). 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 will 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 grounds of the director's denial of the petition.

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 appeal will be dismissed and the petition denied 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.