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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[redacted]

FILE: WAC 06 225 52586 OFFICE: CALIFORNIA SERVICE CENTER DATE: AUG 21 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).

John F. Grissom
Acting 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 avers that it is engaged in "IT services and products." It seeks to employ the beneficiary as a programmer analyst 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).

On January 31, 2009, the director denied the petition because the petitioner failed to establish that the proffered position is a specialty occupation, it meets the definition of either a U.S. employer or agent, and the Labor Condition Application (LCA) is valid for all work locations. On appeal, the petitioner submits a letter.

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.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it would employ the beneficiary as a programmer analyst. The petitioner indicated on the LCA that the beneficiary would work in Omaha, Nebraska. The LCA was certified by the Department of Labor on July 12, 2006.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 11, 2008. In the RFE, the director noted that the petitioner was engaged in the business of software consultancy 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. Additionally, the director requested "clarification of the business address where the beneficiary will actually work."

In a response dated July 21, 2008, the petitioner submitted, among other items, a clarifying letter, an employment agreement between it and the beneficiary and several contracts that it had entered into with some of its clients. The petitioner stated in its letter that it will be the beneficiary's employer, that it requires a programmer analyst to have a bachelor's degree in a "quantitative discipline," and that the beneficiary would be working at its "development center" in Omaha, Nebraska.

On January 31, 2009, 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 and the record did not contain any evidence regarding the type of duties that the beneficiary would perform for these various clients. The director concluded that, without evidence regarding what duties the beneficiary would actually perform for the clients, the proffered position could not be classified as a specialty occupation. In addition, the director concluded that the petitioner could not be classified as a U.S. employer or agent because without the requested contracts, it was not possible to determine who would control the beneficiary's work or for whom the beneficiary would be performing

services. Similarly, the director declined to find that the LCA was valid for all work locations because the petitioner was in the business of outsourcing its employees to other companies.

On appeal, the petitioner submits a letter. The petitioner states that it will be the actual employer of the beneficiary because it will have the authority to hire, fire and control the beneficiary's work. In support of its claims, the petitioner submits a copy of its Employee Handbook as well as payroll information for its employees. In rebuttal to the director's conclusions regarding the LCA, the petitioner states that it filed an LCA for the beneficiary's work location, which is Denver, Colorado, and attaches a copy of this LCA. Regarding the specialty occupation determination of the director, the petitioner reiterates the position's responsibilities that it had previously submitted into the record and maintains that the beneficiary will be performing work of a specialty occupation as a programmer analyst.

Upon review of the record, the AAO agrees with the director's decision to deny the petition. Because the most important issue in 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, the AAO shall address this reason for denial first. 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.

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, 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.

Because the director wanted to know for whom the beneficiary would ultimately provide his services, she requested in her June 2008 RFE copies of contracts to show the project to which the petitioner intended to assign the beneficiary, as well as information about the beneficiary's specific work location. In response, the petitioner submitted several contracts. One of the contracts to which the petitioner referred was for Union Pacific, and the petitioner submitted a computer print-out of the service orders relating to this contract. On appeal, the petitioner states: "Please note that three of the [contracts] relate specifically to J2EE development services of the type performed by programmer analysts such as the Beneficiary. These services are performed at [the petitioner's] facility in Omaha, Nebraska."

The evidence in the record fails to establish that the proffered position is a specialty occupation. As stated previously, the duties that the beneficiary will perform for the petitioner's client control whether the job is a specialty occupation, not the petitioner's generalized description of a programmer analyst position with its firm. The petitioner stated in response to the director's RFE that the beneficiary would be working at one of its worksites in Omaha, Nebraska. The petitioner did not, however, specify for which client or contract the beneficiary would be working. Although the petitioner states on appeal that the Union Pacific and other contracts "relate . . . to . . . services of a type performed by programmer analysts such as the Beneficiary," the petitioner has never stated that the beneficiary would actually be assigned to work on such a project or any other specific contract. Therefore, the record does not contain any information about the requirements that one of the petitioner's clients would impose on the beneficiary or the responsibilities that he would have. 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)).

Additionally, the petitioner has introduced evidence into the record on appeal that further confuses the ultimate work location of the beneficiary. As stated previously, the petitioner has maintained that the beneficiary would be performing services at one of its worksites in Omaha, Nebraska, and it submitted an LCA that the Department of Labor certified for such a location. On appeal, the petitioner states in its letter: "[The petitioner's] records indicate that a LCA was submitted . . . specifying Denver, Colorado as the Beneficiary's work location." The petitioner also submits a copy of an LCA for the Denver, Colorado work location that was certified on November 1, 2006. The petitioner is obliged to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, there is no clarifying evidence to explain why the petitioner states on appeal that the beneficiary's work location will be Denver, Colorado, when it had previously stated on more than one occasion that he would be working in Omaha, Nebraska. Such a change in the evidence leads the AAO to conclude that the petitioner does not have a defined position for the beneficiary, since his work location is uncertain.[1]

Similarly, the employment contract between the petitioner and the beneficiary does not shed any light on the beneficiary's intended position with the petitioner or his ultimate duties; it also contains information that conflicts with other evidence. The employment contract lists the beneficiary's title as "software engineer," and provides his duties as:

- Provide consulting services on new and existing projects to [the petitioner's] Customers
- Provide technical expertise on [the petitioner's] internal projects and product development efforts
- Develop Architectural & Design Documents and White papers in [the petitioner's] core competency areas
- Provide technology assistance in the sales and marketing initiatives
- Other duties as defined by Company management

On the I-129H petition and in the supporting documentation, the petitioner lists the beneficiary's title as "programmer analyst," not "software engineer." The AAO does not concede that the job titles of software engineer and programmer analyst are interchangeable or that, based upon either job title alone, the position could be classified as a specialty occupation. Additionally, in none of its descriptions of the beneficiary's job as a programmer analyst did the petitioner state that the beneficiary would be responsible for providing, either in whole or in part, "assistance in the sales and marketing initiatives." The petitioner is obliged to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, *Id.* Here, there is no clarifying evidence regarding the beneficiary's job title and, therefore, the AAO questions whether the

[1] The AAO notes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Also, the LCA for the Denver, Colorado location is dated November 1, 2006, which is a date after the I-129 petition was filed. A petitioner must obtained a certified LCA that is valid for all work locations before filing a petition. 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

job duties that the petitioner has given the beneficiary accurately reflect the work he will be doing, particularly since the job duties listed in its employment contract with the beneficiary different from other job descriptions for the beneficiary in the record.

Because of the inconsistent evidence that the petitioner has introduced into the record and its inability to establish what the beneficiary will ultimately be working on while a contractor with one of its clients, the Service cannot find 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)*. For this reason alone, the petition may not be approved.

The director also denied the petition for two additional reasons that relate to the LCA and the petitioner's status as either a U.S. employer or an agent. The AAO affirms the director's reasoning on these two issues; however, we will not address them 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.

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.