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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

D2

[redacted]

FILE: EAC 08 139 51521 Office: VERMONT SERVICE CENTER Date: NOV 02 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, Vermont 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 provides software design and development services, that it was established in 1999, employs 400+ persons, and has an estimated gross annual income of $37,000,000. It seeks to employ the beneficiary as a software engineer from October 1, 2008 to September 19, 2011. 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 July 9, 2008, the director denied the petition. The director determined that the petitioner had made material corrections to the petition in response to the RFE to make a deficient petition conform to United States Citizenship and Immigration Services' (USCIS) requirements. The director also determined that the petitioner had provided abstract information about a proposed project and had not established that it was engaged in designing systems rather than providing design and consulting services to clients. The director concluded that the record was insufficient to establish eligibility for the benefit sought.

The record includes: (1) the Form I-129 and supporting documentation filed with USCIS on April 1, 2008; (2) the director's request for evidence (RFE); (3) former counsel for the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and former counsel's statement on the Form I-290B in support of the appeal. Former counsel indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Former counsel's statement provides a sufficient basis for adjudicating the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.[1]

When filing the Form I-129 petition, the petitioner averred in its March 20, 2008 letter appended to the petition that it was established to "provide software services, products, and business solutions to clients in the United States." The petitioner noted that it had offices in Newark, Delaware, Woonsocket, Rhode Island, Edison, New Jersey, and Wheeling, West Virginia and that it provided professionals and services to a range of industries. The petitioner noted: "[w]hile an individual may be temporarily located at a project site, no contractual or employment relationship exists between the client and the consultant." The petitioner noted its desire to hire the beneficiary as a software engineer and listed his responsibilities in the proffered position as:

> Analyze, Design, Develop, Implement, Integrate and maintain client server and web related eCommerce applications including Internet, Intranet, extranet and internal business applications including automation of back end systems using knowledge of

[1] The petitioner's current counsel submitted a Form G-28 approximately one month after the Form I-290B was filed. When submitting the Form G-28, current counsel did not attach a brief or additional evidence and, as noted above, former counsel also did not supplement the record.

eCommerce principles involving business models, Internet marketing, online transactions, ethics and security Entity-Relationship Model and Business Rules; Object-Oriented Modeling; Logical and Physical Database Design & Relational Model; Multiple-Table Queries; Functional Dependencies and Normalization, client/Server and Middleware Architecture, Transaction Processing: Concurrency Control and Recovery Database Security and Authorization, Data Warehousing and Data Mining; etc.

Create programming to monitor and report statistics utilizing automatic data capture technologies and control structures; Sequence, Repetition, and Selection, algorithms, Program Components, Variables, Constants, assignment statements, and arithmetic operators, Built-In functions and random number generation, Value-Returning functions and program-defined functions, Void functions and passing variables, pseudo code and flowcharts, Character and string manipulation, Object-oriented programming and the class definition, Sequential access files: writing and reading, Arrays: one and two dimensional;

Research web technologies and analyze business requirements and ensure that underlying application technology meets both short-term and long-term business needs and that system designs can adapt to emerging business and technology demands;

Manage the development infrastructure, change control and application security utilizing knowledge of Information Resource management;

Test and document code changes. This includes unit testing, system testing, performance testing and capacity testing;

Communicate with project managers as to the progress of open items and work with other developers, suppliers, contractors or other infrastructure resources as needed using knowledge of information systems infrastructure, systems development stages, systems development life cycle, rapid application development, systems analysis, systems design, steps in preliminary construction, steps in final construction, data modeling, process modeling, object modeling, project planning and control, economic system and project justification, evaluation of systems alternatives, web and GUI design, systems view, environmental constraints, methodology selection, preliminary investigation, project analysis, design tips, etc.

Work with the assigned development team to write and maintain software life-cycle documentation such as user guides, systems administration manuals, maintenance manuals, and other related materials

Perform and provide end-user support, systems and business analysis, documenting business processes and systems requirements, systems configuration and systems

testing. All of the above job duties will be performed under supervision from the Team Leader.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 28, 2008. In the request, among other things, the director: noted that the petitioner had provided a vague and generalized description of the beneficiary's proposed duties and asked that the petitioner clarify the beneficiary's duties; requested that the petitioner provide copies of contracts for computer consulting work that identify the company, the nature of the work to be performed, the number of consultants being supplied by the petitioner and a detailed description of the duties the petitioner's employees have performed for the clients; asked that the petitioner provide a copy of the contract for which the beneficiary will render services that identifies the nature and location of the work the beneficiary will be providing and a detailed description of the duties the beneficiary will perform; the entire chain of contracts that leads from the petitioner's business to the company where the beneficiary will provide services or to whom the beneficiary would provide services if located at the petitioner's office; and requested that the petitioner provide documentary evidence of the nature and type of in-house projects the beneficiary would be working on, when the project started, the programs and costs to date, the names of the workers engaged in the project and where the workers are located.

In a June 3, 2008 response to the director's RFE, former counsel for the petitioner provided uncertified copies of the petitioner's federal income tax returns for 2003, 2004, 2005, and 2006 to establish the scope, size and nature of the petitioner. Former counsel also provided a January 9, 2008 business plan for the petitioner's software development initiative in the area of customer centered value management application and noted that the petitioner would "devote a substantial amount of focus for 2008 and beyond on the development of software that integrates with Customer Relationship Management tools." Former counsel claimed that the beneficiary would be working on such developments in-house with the petitioner at the petitioner's offices in Delaware. The record also contains a description of daily job duties for the beneficiary and an indication that the beneficiary would: assist in "requirements definition" as a junior team member; independently create flow charts and entity relationship diagrams as part of a team or individually; participate in software testing either individually or as a team member; and, assist in software technical documentation either individually or as a team member. The description of daily duties does not reference a particular project to which the beneficiary will be assigned.

As noted above, the director denied the petition on July 9, 2008. The director noted that in response to his RFE, the petitioner had provided the business plan for the ASI VM Software application as evidence of an in-house project, but had not presented this information initially. The director, citing *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), noted that a petitioner may not make material corrections to a petition in order to make a deficient petition conform to USCIS requirements. The director found the business plan the petitioner had submitted was abstract and did not provide practical information about the system. The director found that the petitioner had not documented its experience designing systems but showed only that it provided design and consulting services to clients. The director concluded that the petition must be denied. The director also noted

that the submitted Form ETA 9035E for a work location in Newark, Delaware might not be valid if the beneficiary would be placed in one of the petitioner's other offices.

On appeal, former counsel for the petitioner asserts that the business plan the petitioner submitted was submitted to clarify that the beneficiary would be working in-house and was submitted at the request of the director in his RFE. Former counsel contends that *Matter of Izummi* is not applicable, as the petition was not deficient and the documentation submitted was provided for clarification purposes. Former counsel avers that while the petitioner does provide design and consulting services to its clients, the petitioner also seeks to offer mid-end value-added bundled services including the ASI VM Software application. Former counsel asserts that the petitioner's growth as documented in the record[2] and the scope of its business development supports the petitioner's need for a software engineer in the ASI VM Software application project. Former counsel does not offer an explanation as to why no evidence of the ASI VM Software application and no reference to the ASI VM Software application project was made in the initial documentation submitted in support of the petition.

The AAO finds that the submission of the information regarding the ASI VM Software application project only in response to the director's RFE raises questions regarding the legitimacy of the petitioner's initial intent to assign the beneficiary to this purported project. However, upon review of the LCA showing that the beneficiary would work in Newark, Delaware where the petitioner has offices and the director's request for documentary evidence of in-house work, the AAO does not conclude that the petitioner's submission of the January 9, 2008 ASI VM Software business plan is a material change to the petition.

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Although the director could have better articulated the reasons for denying the petition, the AAO affirms the director's ultimate conclusion that the record is insufficient to substantiate the beneficiary's eligibility for this benefit. The AAO also observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties for the actual user of the beneficiary's services and whether those duties comprise the duties of a specialty occupation.

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[2] The petitioner has provided copies of uncertified federal tax returns to demonstrate that it is a viable company whose scope of business could include the design and development of computer-related software products. The AAO observes that although the director did not request certified copies of tax returns, uncertified tax returns do not carry substantial probative weight. Moreover, a review of the uncertified tax returns appears to limit the petitioner's business to providing consulting services. Thus, the record is of little assistance in documenting the petitioner's ability or lack thereof, to engage in endeavors beyond that of providing consulting services.

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. The AAO observes that the issue is whether the petitioner has established that the beneficiary's actual duties for the ultimate user of the beneficiary's services comprise the duties 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, 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, contrary to former counsel's assertion, 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 in this matter has provided a lengthy, yet general overview of the beneficiary's proposed duties. As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise would result in generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the petitioner's business plan for ostensibly a specific in-house project. Upon review of the business plan, the AAO does not find that the petitioner has allocated a specific number of resources to the project or described the number of software engineers or other computer-related positions that will assist in working on the project. The petitioner does not identify the beneficiary within the business plan or identify a team to which the beneficiary will be assigned. In addition, the description of the beneficiary's daily duties is not connected to any specific elements, applications, or endeavors related to the petitioner's business plan for its software development initiative in the area of customer centered value management application. The record does not include any work product or other documentary evidence substantiating that the petitioner's ASI VM Software application is ongoing and valid. 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)).

As the petitioner has not established the existence of an in-house project, it would be required to submit evidence that the beneficiary's work at a client site is of a specialty occupation caliber. Such evidence would included, but would not be limited to, statements of work or other evidence that describes the specific duties the end- use company requires the beneficiary to perform and the specific projects to which the beneficiary would be assigned. Without such evidence, 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. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165. 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.*

Although the *Defensor* court noted that evidence of the client companies' job requirements is critical, where the work is performed for entities other than the petitioner, the AAO finds that as in this matter, when the record does not include a comprehensive description of the beneficiary's actual duties as they relate to specific project(s) for the duration of the requested employment period, even if for the petitioner, the petition must be denied. 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 from the ultimate user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

The petitioner has not provided the underlying documentation necessary to substantiate that the beneficiary would perform the claimed daily duties set out in response to the director's RFE. The petitioner does not provide the underlying statements of work that describe the projects the beneficiary will work on and the beneficiary's actual duties as those duties relate to the specific projects. The AAO, therefore, is unable to analyze whether the beneficiary's duties 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 position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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)*.

Without a comprehensive description of the beneficiary's actual duties from the user of the beneficiary's services and the evidence supporting such a position exists for the entire requested employment period, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the petitioner has not established that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Without a meaningful job description, the petitioner has not established any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, that burden has not been met.

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