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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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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SEP 2 3 2009

FILE: EAC 07 226 52341 Office: VERMONT SERVICE CENTER Date:

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:

SELF-REPRESENTED

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 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 engages in IT consulting and development, that it was established in 2004, employs 82 persons, and has an estimated gross annual income of $3,200,000 and an estimated net annual income of $177,376. It seeks to employ the beneficiary as a programmer analyst from June 1, 2007 to April 1, 2010. 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 May 23, 2008, the director denied the petition, determining that the petitioner failed to establish that the job offered qualified as a specialty occupation position pursuant to section 101(a)(15)(H)(i)(b) of the Act.

On appeal, the petitioner submits a statement and documentation in support of the Form-I-290B, and contends that the director's decision is erroneous.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on July 26, 2007; (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 the petitioner's brief and 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 its July 11, 2007 letter appended to the petition that it was founded "with the objective of providing top quality services in software engineering, systems design and development, system integration, web development, e-commerce, Internet solutions, and technical support." The petitioner listed a number of clients and noted that the proffered position of programmer analyst is highly complex and professional in nature. The petitioner listed the duties of the proffered position as:

> System Analysis and Design – 40% (16 hours a week)
> Write code and Develop programs – 40% (16 hours per week)
> Unit and System Testing and attending meetings – 20% (8 hours per week)

The petitioner also noted that the beneficiary would be working in PL/SQL, MySQL, MS Access, Oralcle 8.i dateabases, would use Cognos, Impromptu, Metris Manager data warehousing tools, would work in the Java, C#, COBOL, Prolog, LISP languages and in Visual C++, Visual Basic GUI and would use .Net, J2EE, J2ME, Adobe Photoshop, Apache, Tomcat, IIS 6 tools and packages.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 19, 2008. In the request, among other things, the director: noted that the petitioner had provided a broad description of the beneficiary's proposed duties and asked that the

petitioner clarify the beneficiary's duties and for whom the beneficiary would perform the proposed duties; requested that the petitioner provide a detailed itinerary with contracts to show for whom and where the beneficiary would work for the requested employment period; requested evidence establishing that the client for whom the beneficiary would work would include qualifying employment; and requested a detailed description of the duties the beneficiary would perform along with evidence to substantiate that the performance of the duties requires a bachelor's degree.

In a response dated March 10, 2008, the petitioner noted that it provided professionals and services to Fortune 500 companies and listed a number of its clients. The petitioner indicated that the beneficiary would work in Beaverton, Oregon for the Intel Corporation and would work at the petitioner's offices in Alpharetta, Georgia after finishing work with the client. The petitioner stated that the beneficiary would be "responsible for all QA activities from start to finish for various projects for the Web Marketing group." The petitioner also indicated that the beneficiary's daily responsibilities would include:

1. Review requirements[.]
2. Monitor and track team work status.
3. [C]reate test cases.
4. Test execution.
5. Track issues to resolution and attend meetings.

The petitioner also provided the beneficiary's skill set; however, as the beneficiary's education and skill set do not establish that a position is a specialty occupation, the AAO will not list the beneficiary's skill set here. The record also includes a July 23, 2007 contract between the petitioner and Mavensoft Technologies, LLC, (Mavensoft) located in Portland, Oregon with an appended Schedule "A." The Schedule "A" identifies the beneficiary as the individual to be assigned by the petitioner, indicates the performance schedule will be determined by the client, indicates that the beneficiary will perform SQA lead services for the end client's (Intel Corp) web applications, for the period beginning July 30, 2007 and ending on or about July 30, 2008. The Schedule "A" also listed the duties as: "to review requirements, create and execute test cases, track issues to resolution, attend meetings and co-ordinate with other team members as assigned by the client hiring manager/supervisor.

On May 23, 2008, the director denied the petition. The director observed that the petitioner failed to submit the requested evidence including an itinerary indicating where or for whom the beneficiary would perform the duties described. The director noted that the petitioner failed to submit statements from the client where the beneficiary would work showing the expectations and job requirements along with the degree necessary to perform the described duties. The director found that the petitioner had not established that it had a position available that requires a baccalaureate or higher degree or a position that requires a degree and that it had work at the H-1B level and the position is not speculative in nature. The director determined that the petitioner had not provided evidence establishing that the job offered qualified as a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

On appeal, the petitioner states: "[i]rrespective of client needs we keep the employees on our payroll and we keep them [in] reserve at our office and guest house [and] then send them to clients[']' places based the [sic] on the client's requirements." The petitioner also stated: "[w]e pay our employees all the time 365 days in [a] year whether they work at [the] client site or stay at home" and "[w]e have contracts in place with employees." The petitioner further stated: "CLIENT's MAY COME and Go But We are here to pay employees every two weeks irrespective of the client jobs." The petitioner also clarified that Intel Corporation is the end client where the beneficiary would work and that Mavensoft is the third party company placing the beneficiary. The petitioner referenced its contract with Mavensoft that had previously been provided and acknowledged that it did not have direct contact with Intel Corporation. The petitioner also repeated the previously provided description of the beneficiary's work listed in its response and on the Schedule "A" of the contract between the petitioner and Mavensoft.

The issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. 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 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 has submitted a broad statement of the beneficiary's proposed duties. The petitioner acknowledges that it does not have any contact with Intel Corporation, the ultimate end user of the beneficiary's services. The AAO notes that despite the director's specific request for evidence, in the form of contracts, statements from the ultimate end user of the beneficiary's services, or an itinerary, the petitioner failed to submit such evidence that relates specifically to the beneficiary and the beneficiary's proposed duties. 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).

The Schedule "A" to the contract between the petitioner and Mavensoft provides only a vague statement regarding the beneficiary's proposed work and does not provide the detail necessary to ascertain whether these duties, even if the duties were the duties required by Intel Corporation, comprise the duties of a specialty occupation. In addition, the AAO observes that the petitioner in this matter acknowledges that it does not have specific continuous work for the beneficiary to perform, but notes that it pays "our employees all the time 365 days in [a] year whether they work at [the] client site or stay at home." The AAO observes that it is not the ability to pay the beneficiary that is the issue in this matter, rather 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. Without a comprehensive description of the beneficiary's actual duties from the ultimate end user of the beneficiary's services and the evidence supporting that such a position exists for the entire requested employment period, the petitioner has not established that the proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter*

of Soffici, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the project(s) the beneficiary will work on for the duration of the requested employment period, 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 end user of the beneficiary's services, 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. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties 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. 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.*

In this matter, the record demonstrates that the petitioner acts as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients' worksites when contracts are executed. The petitioner has not

provided substantive evidence of in-house projects to which the beneficiary would be assigned or the work the beneficiary would perform in-house. The petitioner's failure to provide evidence of work orders or employment contracts between the petitioner and its clients and its client's clients throughout the requested employment period renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, is unable to analyze whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the 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 perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*.

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