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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 07 149 50426 Office: VERMONT SERVICE CENTER Date: FEB 16 2010

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).

for

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 matter will be remanded for further consideration and issuance of a new decision.

The petitioner is a software development and consulting firm that seeks to employ the beneficiary as a computer programmer. 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).

The director denied the petition based on the finding that the beneficiary is not qualified to perform the duties of a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. On appeal, counsel asserts that the beneficiary has the requisite education to make him eligible for U.S. employment in the proposed position with the U.S. entity. In reviewing the record in its entirety, the AAO finds that the director's conclusion was erroneous and must be withdrawn.

U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *See Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Here, the record shows that the director failed to first address the primary issue of whether the proffered position qualifies as a specialty occupation.[1] Absent a determination that the proffered position is in fact a specialty occupation, there is no basis on which the director could have determined whether the beneficiary is qualified or unqualified to perform the duties of the claimed specialty occupation.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *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.

[1] The AAO notes that the petitioner uses the terms "computer programmer" and "programmer analyst" interchangeably in its references to the proffered position.

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.

USCIS 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.[2]

As noted above, the issue that must first be addressed is whether the proffered position is a specialty occupation. The record as presently constituted does not establish that the proffered position is in a specialty occupation.

First, in reviewing the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2010-2011 edition, the AAO observes that a baccalaureate degree or its equivalent in a specific specialty is not the minimum requirement for entry into the position of computer programmer or programmer analyst. This observation indicates that the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*1*) and (*2*) have not been met.

Second, the AAO observes that while the petitioner indicates that the beneficiary would initially be employed in-house, the underlying implication is that the beneficiary would ultimately work off-site at the client's

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[2] The AAO notes 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). 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.

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).

specific location. In this respect, the AAO notes that the court in *Defensor v. Meissner*, 201 F. 3d 384, determined that 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 current record of proceedings 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.

Any time a petitioner fails to establish the substantive nature of the work to be performed by the beneficiary, USCIS is precluded from finding that the proffered position is 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.

In light of the above, the AAO finds that the director must also determine whether the petitioner submitted a valid LCA in support of its Form I-129 as of the date the petition was filed on April 2, 2007 and covering all intended work locations not within the same MSA or BLS area. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

> *(1)* A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
>
> *(2)* A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
>
> *(3)* Evidence that the alien qualifies to perform services in the specialty occupation. . . .

In the present matter, the LCA submitted at the time of filing lists the petitioner as the beneficiary's employer with the work location at the petitioner's main headquarters at [redacted]. The LCA indicates that the beneficiary will be employed at that address for three years. In its March 30, 2007 support letter, the petitioner stated that the beneficiary would only initially work in-house and further indicated that at some future date the beneficiary would be assigned to a project, which would require the beneficiary to work off-site for an unspecified time period. The petitioner has not provided specific dates and locations where the beneficiary would render services after he stops working in-house. Given this deficiency, the AAO finds that the petitioner failed to submit a valid LCA for the locations where the beneficiary will work.

Lastly, in light of the above, further clarification is required to determine whether the petitioner and the beneficiary would have the requisite employer-employee relationship with respect to the beneficiary as may

be indicated by the petitioner's ability to hire, pay, fire, supervise, or otherwise control the work of the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii)(*2*).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as an alien:

> (i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and
>
> (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added.)

In light of the beneficiary's intended offsite employment at client companies, the record is not clear in establishing that the petitioner has or will have the requisite common-law touchstone of control in that it has or will have ultimate say in paying, firing, supervising, or otherwise controlling the work of the beneficiary. Therefore, the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner or even an "employee" of another company which the petitioner may claim to represent as an agent.

Given the deficiencies discussed above, while the AAO will withdraw the director's decision, the record as presently constituted does not warrant an approval of the petition. Accordingly, the case will be remanded for a new decision, which shall take proper notice of the issues discussed above. The director is instructed to issue a request for additional evidence in order to allow the petitioner to address the relevant factors that pertain to its eligibility for the nonimmigrant benefit sought. The director may also request any additional evidence he deems necessary in order to determine the petitioner's eligibility.

ORDER: The decision of the director dated November 19, 2007 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.