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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

[redacted]

FILE: WAC 08 144 52152 Office: CALIFORNIA SERVICE CENTER Date: JAN 0 8 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and affirmed her decision in a subsequent motion to reopen or reconsider. 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 consulting, development, and support services, that it was established in 1999, that it employs 3 persons, and that it has a projected gross annual income of $500,000 and a projected net annual income of $100,000. It seeks to employ the beneficiary as a computer programmer from October 1, 2008 to September 15, 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 August 18, 2008, the director denied the petition. The director observed that she had requested that the petitioner submit evidence of signed contracts between the petitioner and the beneficiary, signed contractual agreements, statements of work, work orders, and a complete itinerary but that the petitioner had not fully complied with the request. The director, citing 8 C.F.R. § 103.2(b), found that a failure to offer a complete response to the request for evidence (RFE), is a ground for denying the petition. The director determined that the record as constituted precluded an affirmative determination as to the nature, complexity, and viability of the petitioner's business. On October 6, 2008, the director dismissed the petitioner's motion to reopen finding that the petitioner had not submitted "new" evidence and had not presented evidence or argument sufficient to grant a motion to reopen or to reconsider.

On appeal, counsel asserts that the director did not address any of the argument or evidence presented in support of the petitioner's motion to reopen. Counsel contends, as set out in the motion, that the beneficiary will develop petitioner's own products in-house and references previously submitted documentation.

Preliminarily, the AAO finds that the petitioner on motion did not submit "new" evidence or any other evidence or argument sufficient to grant a motion to reopen or reconsider, thus the director's dismissal of the motion is affirmed. However, the AAO recognizes that the director could have better articulated the reasons for denying the petition in her August 18, 2008 denial decision. The AAO affirms the director's decision in that the petitioner failed to provide sufficient information in response to the director's RFE to establish the beneficiary's eligibility for this benefit. 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. The AAO will discuss the deficiencies in the record that result in the failure to establish that the proffered position is a specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's response to the director's RFE; (4) the director's denial decision; (5) counsel's brief in support of the motion to reopen; (6) the director's dismissal of the motion; and (7)

the Form I-290B and counsel's brief in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in an undated letter appended to the petition that it "provides software consulting and applications development services" and that it is "also actively pursuing business opportunities to produce new software systems/applications and/or modify existing applications for client needs."

The petitioner indicated that the beneficiary is being offered employment as a "Computer Programmer in SAP ABAP development and support." The petitioner listed the job duties as:

- Prepare project requirements in programming sequence
- Prepare work flow charts and support to address workflow issues in various workflows in modules
- Administer and monitor error workflows
- Implement scope changes in workflows
- Write code to develop and test ABAP objects
- Conduct code review and testing
- Develop, modify and create custom ABAP reports

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 27, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested copies of signed contracts between the petitioner and the beneficiary; requested an itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested copies of contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate client companies where the work will actually be performed that list the beneficiary on the contract and provide a detailed description of the duties the beneficiary will perform; and, the petitioner's Internal Revenue Service (IRS) federal income tax returns for 2006 and 2007, payroll summaries and W-2 and W-3 forms, business licenses, and lease agreement.

In an undated response to the director's RFE, the petitioner stated that it would be the beneficiary's employer and that "there is no agent, OR no representative OR no end-client in the business relation involving the petitioner and the beneficiary." The petitioner noted that the "beneficiary will develop and support SAP/ABAP applications and systems" and that a bachelor's degree in computer information systems or information technology or engineering/science related areas and two years of experience in SAP/ABAP were the requirements of the position. The petitioner also listed the skills any computer programmer should have and particular skills a SAP ERP applications development team would need. The petitioner referenced a report issued November 2006 by USCIS outlining the characteristics of specialty occupation workers that included the phrase: "[s]pecialty occupations may include, but are not limited to, computer systems analysts and programmers, physicians,

professors, engineers, and accountants." The petitioner also referenced the Department of Labor's *Online O*NET (O*NET)* that classifies a computer programmer as a JobZone 4 and the required education and training code as 5 – bachelor's degree. The petitioner also submitted its lease, its payroll summary for the current year, its 2006 IRS federal tax return and the request for an extension for the 2007 year, its business license, and floor plan.

As observed above, the director denied the petition on August 18, 2008, determining that the petitioner had not fully complied with the RFE and thus, had not established the beneficiary's eligibility for H-1B classification.

On motion, counsel for the petitioner asserted that "[t]he Petitioner intends for the Beneficiary to work on developing its own in-house products at its own location, which is authorized on the LCA." Counsel also submitted a "Technical Development Plan: Virtual Community for Churches" and "Business Plan for Portal of Virtual Community for Churches," both dated August 25, 2008, as an example of the petitioner's in-house product.

The director dismissed the motion without reopening the matter as the director did not find the petitioner had submitted any new evidence in support of the petition filed April 14, 2008.

On appeal, counsel for the petitioner reiterates that the beneficiary will work on the petitioner's own products in-house and that the petitioner made a *bona fide* effort to comply with the RFE. Counsel contends that contracts and work orders are not necessary as the beneficiary will work in-house on the petitioner's own products.

Upon review of the totality of the record, the AAO finds that the petitioner has not provided evidence of in-house projects that were in existence when the petition was filed. The AAO acknowledges the technical development plan and the business plan offered on motion and again on appeal; however, these plans are dated August 25, 2008, several months subsequent to the filing of the petition on April 14, 2008. The record before the director did not include any evidence of in-house products/projects or provide any information regarding to which projects the beneficiary would be assigned or for what client the beneficiary would work. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). The petitioner noted that it provided consulting and applications development services, as well as indicating that it was pursuing business opportunities to produce new software systems/applications and/or modify existing applications for client needs. The initial record did not specify that the beneficiary would be assigned to work on an in-house project and did not provide evidence that the petitioner had ongoing projects to which the beneficiary could be assigned upon entry into the United States in H-1B classification.

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. Thus, the AAO will review the petitioner's description of the beneficiary's duties in an effort to ascertain whether the record otherwise includes evidence that the proffered

position is 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 in this matter provided a general overview of the beneficiary's proposed duties and listed skills that an individual performing SAP/ABAP development and support should possess. The petitioner did not provide the actual duties the beneficiary would be expected to perform in conjunction with a specific project(s). Thus, USCIS had no specific information related to the beneficiary's actual duties so that it could ascertain whether those duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as 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)). To allow 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 disguises the nature of the actual position.

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 user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

A comprehensive description of the duties as those duties relate to specific project(s) is of particular importance when petitioning for an individual as a generic computer programmer. The AAO observes that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), a source

routinely used by USCIS when reviewing specialty occupation position, reports that a bachelor's degree commonly is required for computer programming jobs, but also recognizes that a two-year degree or certificate may be adequate for some positions. The *Handbook* also notes that "[e]mployers favor applicants who already have relevant programming skills and experience" and that "[s]killed workers who keep up to date with the latest technology usually have good opportunities for advancement." The petitioner in this matter has provided a general outline of duties and skills but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language/tool like SAP is necessary. The description shows, at most, that the beneficiary should have a basic understanding of particular computer programs, an understanding that could be attained with a lower-level degree or certifications in the programs.

The AAO acknowledges counsel's reference to the *O*NET* and the JobZone rating for a computer programmer. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of a computer programmer would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The AAO has also reviewed counsel's submission of the November 2006 report on specialty occupations issued by USCIS and observes that the report uses a phrase which states: "Specialty occupations may include . . . computer systems analysts and programmers . . . ." The use of this phrase does not mean that all computer programmer positions are unequivocally specialty occupations, only that some positions within that broad job classification may be classified as such if they meet the regulatory criteria. The record in this matter does not include a comprehensive description of the beneficiary's actual duties in relation to specific projects sufficient to identify the proffered position as a specialty occupation.

As noted above, the description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. Without evidence of statements of work or evidence of projects that include comprehensive descriptions of the specific duties the petitioner and/or 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. The AAO observes that without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously

employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. 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).

Without a comprehensive description of the beneficiary's actual duties from the user of the beneficiary's services and the evidence supporting that 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 AAO is also precluded from determining 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. 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 as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petition will be denied and the appeal dismissed for the above stated reason. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed.

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