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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

PUBLIC COPY

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FILE: WAC 08 142 53568 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 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 information technology solutions, that it was established in 2004, that it employs 85 persons, and that it has a gross annual income of $13,100,000 and a net annual income of $247,000. It seeks to extend the employment of the beneficiary as a systems analyst from July 5, 2008 to July 4, 2011. Accordingly, the petitioner endeavors to extend the employment of 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 December 12, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it had submitted a valid Form ETA 9035E, Labor Condition Application (LCA) for all work locations; or (4) it had established 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 17, 2008; (2) the director's RFE; (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and counsel's brief and documentation 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 its April 16, 2008 letter appended to the petition that its "business focus is in two areas – product development and professional services." The petitioner indicated that it had "a need for a Systems Engineer to assist in the research, design, testing and development of systems level software applications." The petitioner stated further that the beneficiary will continue:

> [T]o analyze and solve conceptual and complex systems issues; identify systems level requirements and prepare system specifications; perform trade off and cost analysis of commercial products; work closely with client, vendors and other technical staff to identify and resolve complex issues that impact enterprise business systems; and provide documented procedures to common problems and train the business users.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 4, 2008. In the request, among other things, the director: requested evidence to establish that a specialty occupation exists for the beneficiary; asked that the petitioner clarify the employer-employee relationship between the petitioner and the beneficiary; asked that the petitioner submit copies of signed contracts between the petitioner and the [beneficiary]; requested that the petitioner submit a complete 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 that the petitioner submit copies of signed contractual

agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically list the beneficiary by name on the contracts and provide a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In a September 10, 2008 response to the director's RFE, the petitioner provided a September 2, 2008 letter extending the beneficiary's employment signed by the beneficiary on September 4, 2008. The petitioner indicated that it would be the beneficiary's employer and that the beneficiary would work at the end-client, Princess Cruises' office in Valencia, California. The petitioner noted that the beneficiary's assignment was pursuant to an agreement between the petitioner and US Technology Resources, (US Tech) a third party company that had an agreement with Princess Cruises. The petitioner provided a copy of its contracting agreement with US Tech dated April 3, 2006. The petitioner indicated that it had requested a copy of the agreement between US Tech and Princess Cruises but that it had not been provided due to confidentiality clauses between US Tech and its customers. The petitioner provided a letter from the Acting Manager/Project Lead dated September 3, 2008 confirming that a professional services agreement between Princess Cruises and US Tech existed. The letter was not on Princess Cruises' letterhead. The Acting Manager indicated in the letter that the assignment was for a programmer analyst/software engineer for a CRM Analytics project and that the job duties consisted of programming and maintenance of customer systems. The letter also identified the beneficiary as the professional on the project.

As observed above, the director denied the petition on December 12, 2008. The director noted that the petitioner had provided its contract with US Tech, a third party firm, which would further assign the beneficiary's services to its client, Princess Cruises. The director also noted the September 3, 2008 letter apparently written on behalf of Princess Cruises. The director determined, based on the record, that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services. The director found that, without the end contracts between US Tech and Princess Cruises that ultimately define the work order of the beneficiary, the petitioner had not established who had control of the beneficiary's actual work. The director determined that the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that without the end contracts from the ultimate end-client firms, USCIS was unable to determine whether the petitioner had submitted a valid LCA covering all the locations where the beneficiary would be employed. Finally, the director determined that without the end contract between US Tech and the ultimate user of the beneficiary's services, USCIS could not conclude that the actual duties of the proffered position encompassed the duties of a specialty occupation.

Upon review of this matter, the AAO affirms the director's decision on the issues of failing to establish an employer-employee relationship and the validity of the LCA. The AAO, however, will not further address these issues because the petitioner has failed to establish that the proffered position is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition. The AAO finds further 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, but 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 submitted by the user of the beneficiary's services to ascertain whether the description of the beneficiary's actual duties comprise the duties of a specialty occupation. For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

On appeal, the petitioner submits a letter on Princess Cruises' letterhead, dated January 6, 2009, which re-states the general information provided on the previous letter submitted on behalf of Princess Cruises. The petitioner also submits a January 9, 2009 letter prepared by US Tech that indicates the beneficiary "works as a Business Intelligence Architect and is responsible for the daily maintenance and feature enhancements for the CRM system, marketing system and the related analytical system OBIEE." US Tech also provides a list of the beneficiary's responsibilities as part of the CRM information technology team. The petitioner further provides change orders on US Tech letterhead noting that US Tech "will continue to provide application development, enhancements and support for Siebel applications as directed by Princess Cruises, at the rates shown in the Team Member List below." Two of the change orders submitted identify the beneficiary by name.

Preliminarily, the AAO finds that despite the director's RFE requesting the contract with the end user which specifically mentions the beneficiary and the duties he will perform for that end user and additional evidence demonstrating that the position qualifies as a "specialty occupation," the petitioner failed to fully comply with the request. Although the petitioner submitted a contract and a letter from the end client, the end client's letter did not provide a comprehensive description of the duties the beneficiary would be expected to perform. The AAO finds that the end client letter submitted on appeal likewise fails to provide a comprehensive description of the beneficiary's duties. The AAO has reviewed the January 9, 2009 letter prepared by US Tech that provides a general description of the beneficiary's duties for its client, but again, this description is not provided by the end client, Princess Cruises. Further, the change orders confirm that the work being done is at the direction of Princess Cruises, not US Tech or the petitioner. Thus, the record continues to lack the necessary detailed description of the beneficiary's actual duties on the assigned project.

Providing a generic statement of the duties of a programmer analyst that relates to software engineering does not provide the information necessary to ascertain the beneficiary's actual duties. USCIS 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 results 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. 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)).

Without evidence of the beneficiary's particular duties substantiated by statements of work or other information providing the detail the end use company requires the beneficiary to perform, as those duties relate to specific projects, the petitioner has not established 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.*

As the petitioner failed to comply with the director's specific requests in the RFE and the record includes limited information regarding the actual duties, the AAO affirms the director's decision in this matter. 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 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) and has not established 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 reasons. 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.