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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 08 081 51248 Office: VERMONT SERVICE CENTER Date: JAN 13 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 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).

Michael T. Kelley

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a data warehouse design development and deployment company. It seeks to employ the beneficiary as a data warehouse consultant and to classify him 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 on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner has failed to establish that it has "sufficient work for the beneficiary to be employed in a specialty occupation as claimed."

The record of proceeding before the AAO contains: (1) Form 1-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on January 25, 2008, the petitioner described itself as being engaged in the business of data warehouse design development and deployment. The petitioner listed three employees in the Form I-129 with a gross annual income of $200,000. The petitioner indicated that it wished to continue to employ the beneficiary as a data warehouse consultant from July 6, 2008 through July 5, 2009 at an annual salary of $70,000.

In its January 17, 2008 letter of support submitted with the Form I-129, the petitioner states that the beneficiary "will perform technical services which may include, contract programming, software analysis, project analysis, project management, facilities management, documentation and/or any other services." The petitioner also states that the beneficiary will be responsible for:

- Front end deployment for the Global Datawarehouse on the WEB using Upfront;
- Creation of Reports and Cubes;
- Administration of Reports and Cubes;
- Design and implementation of Datawarehouse and Datamarts;
- Error Report Creation and Distribution;
- Analysis of User Requirements;
- Macros for Automation;

- Version Upgrades.

In the support letter, the petitioner goes on to state:

> The position requires specialized knowledge of computer science principles. Knowledge and immediate application of computer science principles demands formal coursework taught in bachelor degree programs in Computer Science or related fields such as Engineering. . . .

The submitted Labor Condition Application (LCA) was filed for a data warehouse consultant to work in Piscataway, NJ for a salary of $70,000 per year and covers the period requested by the petitioner. The LCA lists a prevailing wage of $53,539 obtained from an OES survey. The LCA submitted by the petitioner covers the validity dates requested by the petitioner in the Form I-129 request for H-1B extension on behalf of the beneficiary.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter does not provide this information. However, the Form I-129 indicates that the beneficiary will work at the petitioner's offices at [redacted]

On February 6, 2008, the director issued an RFE advising the petitioner to submit documentation regarding the petitioner's business to establish that the petitioner has sufficient work and resources to employ the beneficiary in a specialty occupation for the requested period of employment, including a detailed description of the position with percentages of time spent in each duty, copies of business contracts listing the name of the employee(s) who will service the contract, documentation regarding the petitioner's business and offices, and copies of the beneficiary's most recent federal income tax returns.

Counsel for the petitioner responded to the RFE on March 21, 2008 and stated as follows with respect to the description of the project on which the beneficiary will be working:

> The project is for Prudential Insurance. This project caters to the Managers and Sales force. The project aims at creating "Dashboards" that the user will see the first thing they log in. The "Dashboard" will consist of a set of Graphs, Charts like Pie-charts, cross-tabs, list reports. The user will be presented with high level summarized information and will be able to get all necessary and critical information at a glance. The user can click on any of the charts and graphs and other reports and it will take him to detailed reports that provide a breakdown of the values displayed in the "Dashboard". The job involves Analysis, Meta Data Design using Cognos Framework Manager, Report Development using Cognos Report studio, Cube Design using Cognos Transformer, Dashboard design using a combination of Cognos tools and Cognos Connection.

Counsel also provides a copy of a Consulting Agreement effective as of February 4, 2008, between the petitioner and a company called Combined Computer Resources, which is located in Iselin, New Jersey. No work orders listing the beneficiary by name are included. 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)).

Counsel also provides a copy of an e-mail dated January 11, 2008, from Combined Computer Resources to the beneficiary that describes a position for which the beneficiary is being considered. The position is for six months at Prudential in Roseland and states, "My technical director and I will speak with you briefly and assuming that goes well, we can get your resume over to Prudential." In other words, the e-mail to the beneficiary discusses a speculative assignment, not a confirmed one.

The copy of the 2007 Form W-2 provided by Counsel for the beneficiary indicates that the petitioner paid the beneficiary a salary of $37,906.94 for that year.

The documentation provided in response to the RFE, including the e-mail from Combined Computer Resources, which demonstrates that the work to be performed by the beneficiary was speculative at the time the petition was filed and was going to take place at a third-party client site, conflicts with the information that the petitioner indicated in the Form I-129 and LCA, namely, that the petitioner would employ the beneficiary at its offices in Piscataway, NJ. This indicates that it is unlikely that the petitioner has sufficient work for the beneficiary covering the requested period in the petition or that the petitioner will assign the beneficiary to work at the location listed in the Form I-129 and LCA. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel's brief, dated May 2, 2008, states that the beneficiary is currently working for Prudential, NJ. Counsel does not provide a copy of the contract with Prudential, stating that "Due to Policy restrictions, Prudential does not give letters for Consultants." Instead, counsel provides a letter from Combined Computer Resources, Inc. and timesheets for the beneficiary from Prudential for February, March, and April 2008. However, the Combined Computer Resources letter does not remedy the absence of documentation from Prudential establishing the substantive nature of the duties performed by the beneficiary for it. The letter from Combined Computer Resources, Inc. confirms that it contracted with the petitioner for the beneficiary's services to work at Prudential Financial for six months starting February 4, 2008. Counsel also includes copies of sample e-mails from vendors in various locations that have shown interest in the beneficiary, but since these e-mails do not constitute confirmed assignments, they are not probative, except to indicate that it is the petitioner's intention to assign the beneficiary to different third-party client sites at different locations on an as-needed basis.

Counsel's brief also states that the reason the beneficiary did not earn the proffered wage in 2007 is because he only worked for seven months that year due to being outside the United States for the rest of the time. To support this assertion, counsel provides copies of stamps in the beneficiary's passports indicating that he did not arrive in the United States until the end of March 2007, and then did not start work until May 1, 2007 due to allergies, later leaving for India on December 15, 2007. Not all of the passport pages are provided, although the ones that are indicate the travel dates mentioned by counsel in the appeal. However, counsel did

not provide any documentation to substantiate the beneficiary's illness, nor did counsel provide any statement or documentation from the petitioner with respect to the beneficiary's employment start date in 2007. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO will first consider whether the proffered position is a 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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), U.S. Citizenship and Immigration Services (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.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director's determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a Data Warehouse Consultant.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

The AAO notes that the record lacks documentary evidence that, at the time of the petition's filing, any specific project was definite and non-speculative for the beneficiary for the employment period specified in the petition. This is a critical deficiency which, by itself, defeats, this petition. As the record lacks documentary evidence of such projects, the petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or associated with the proffered position or that the petitioner had any specific employment designated for the beneficiary at the time the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

At the time the petition was filed, the petitioner had not yet signed the Consulting Agreement with Combined Computer Resources, Inc. Moreover, the beneficiary had not yet been selected to work with Combined

Computer Resources, Inc. for its client, Prudential Financial. Therefore, at the time the petition was filed, the petitioner did not yet know to which third-party client location the beneficiary would be assigned or what work the beneficiary would perform. Moreover, the petitioner did not submit any copies of contracts with Prudential Financial describing the project on which the beneficiary would work or work orders with Prudential Financial listing the beneficiary by name.

Further, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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 to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The 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. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a 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.

Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation with respect to confirmed assignments from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO will address the issue of whether or not the petitioner has established sufficient work for the beneficiary to be employed in a specialty occupation. As mentioned above, on appeal, counsel for the petitioner states, without supporting documentation from Prudential, that Prudential does not give letters for consultants. However, if the petitioner only intends to employ the beneficiary on short-term work orders at different third-party sites throughout the U.S. on an as needed basis, which is what the supporting evidence

that the petitioner submitted indicates it intends to do, then there is no guarantee of work for the beneficiary for the requested period in the petition and any offer of employment made to the beneficiary would be purely speculative.

By not submitting any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and location requested in the petition and the substantive nature of the work, the petitioner precluded the director from determining the beneficiary's proposed work schedule, dates of service, pay schedule, and work location. In other words, the director could not establish whether the petitioner has made a bona fide offer of H-1B specialty occupation employment to the beneficiary.

In the denial, the director stated that the beneficiary's tax return in 2007 indicated that he was not paid the proffered wage. As discussed earlier, the petitioner and counsel did not provide sufficient evidence to overcome this determination, such as documentation to support counsel's assertion that the beneficiary missed over one month of employment due to illness. Moreover, even if the petitioner could provide sufficient evidence to demonstrate that the beneficiary was paid the proffered wage, without copies of contracts from third-party clients or other supporting documentation regarding confirmed assignments for the beneficiary that cover the period requested in the petition, the AAO cannot determine whether there is sufficient work for the beneficiary to perform in a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner has not established that the petitioner has sufficient H-1B work for the beneficiary.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.