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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

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[redacted]

FILE: WAC 08 145 50788 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 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).

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 states that it is a software and IT services company. It seeks to employ the beneficiary as a programmer analyst and to classify her 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 grounds that the petitioner does not qualify as a United States employer or agent and that the petitioner did not submit an appropriate and valid U.S. Department of Labor, Form ETA-9035, Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-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 H-1B petition, which was submitted on April 24, 2008, the petitioner listed 40 employees in the Form I-129. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2008 through October 1, 2011 at an annual salary of $42,000.

The petitioner seeks to employ the beneficiary as a programmer analyst. The position description in the petitioner's support letter provides that the beneficiary would be responsible for designing, evaluating, programming, and implementing applications as well as maintaining computer systems, writing program specifications, identifying problems, and troubleshooting, among other functions. The generic and vague position description as written in the petitioner's support letter does not indicate how these duties would be incorporated into the scope of a specific project or how they require specialized knowledge in their performance.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Phoenix, AZ and covers the period requested by the petitioner. The LCA lists a prevailing wage of $37,461.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner provided an unsigned summary of an oral agreement between the petitioner and the beneficiary, which states that, "[t]he employee shall work out of Employer's office located in Phoenix, AZ. Employee recognizes and accepts that *she may be required to work anywhere in the United States for extended periods of time.*" (Emphasis added.)

The petitioner also provided an itinerary of service for the beneficiary, which states that the beneficiary will work at the petitioner's offices in Phoenix, AZ for the duration of the petition. Attached to the itinerary is a Schedule of Duties, which states as follows:

> **Note: This schedule includes duties to be performed by the Beneficiary in connection with a specific project that is currently scheduled at our Office location**

> **as detailed in Part 1 or in Part 2 of Form I-129, Petition for a nonimmigrant Worker. Be this as it may, *Beneficiary may be required to perform these duties at locations other than those currently specified on this petition* in compliance with a certified Labor Condition Application on Form ETA-9035.**

(Emphasis added.)

The Schedule of Duties also provides a list of programming skills that the beneficiary will utilize in performing the duties of the proffered position.

Copies of the beneficiary's foreign degree and transcripts were provided, but it is not clear whether the beneficiary obtained a three- or four-year degree. No credential evaluation was provided by the petitioner.

On May 1, 2008, the director issued an RFE stating that the evidence of record is not sufficient to demonstrate that the present petition meets the criteria for H-1B petitions involving a specialty occupation and requested evidence pertaining to the petitioner, including a clarification of the petitioner's employer-employee relationship with the beneficiary and a demonstration of specialty occupation work with the end-client company where the work will be performed. The director also requested documentation evidencing the petitioner's business.

Counsel for the petitioner responded to the RFE, stating, "As a preliminary matter, it is important to realize *that Petitioner is both a software developer* (employing entity) *and an employment contractor* (Petitioner acting as agent for multiple employers). . . ." (Emphasis added.)

With the RFE response, counsel included, in pertinent part, the following documents:

- A signed Memorandum of Understanding between the petitioner and DataFactz, a company located in Farmington Hills, MI, executed March 5, 2007, which states it will be in force for three years from the date of execution.
- A Consulting Agreement Individual Work Order between the petitioner and DataFactz, stating that the location of work will be at the petitioner's Development Center in Phoenix, AZ. The document lists four consultants by name, however, the beneficiary's name is not listed and the document is dated June 2, 2008, subsequent to the date the petition was filed for the beneficiary.
- Copies of the petitioner's Forms W-2 issued in 2007, which indicate the majority of its employees resided (and therefore presumably worked) outside the state of Arizona that year.
- A data warehousing project description.

No explanation was provided with respect to the beneficiary's specific role in the data warehousing project or how the proffered position's duties would be incorporated at a level requiring specialized knowledge.

On appeal, counsel specifically states:

> **Petitioner in this case does contract short-term employment, but their employees are NOT traditionally self-employed and are not placed in vacant job positions in other companies. In other words, Petitioner is not a Job Shop, or Staffing Agency. . . .**
>
> * * *
>
> [The petitioner] was scheduled to begin the Change Management project on August 8, 2008 and complete the project in April 2010. . . .

Counsel also provides a letter from DataFactz on appeal, which states that, "DataFactz is the end user for this product and we intend to use this product for our internal development to handle change management process for Microstrategy environment." DataFactz's letter, which is dated August 22, 2008, does not mention the beneficiary by name, nor does it provide any information about where the work on this project is or will be performed. 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 documentation provided by the petitioner provides conflicting information. On the one hand, counsel for the petitioner indicates that the beneficiary will be assigned to the petitioner's offices in Phoenix, AZ for the three-year duration of the petition to work on one project for the petitioner's client and will remain an employee of the petitioner. On the other hand, counsel acknowledges that the petitioner is a contractor and the petitioner states in its support letter, oral agreement, and Schedule of Duties that the beneficiary may be required to work outside of the petitioner's offices for extended periods of time. The supporting documentation indicates that the petitioner has a contract with the client that is valid only through April 2010 and a work order that is dated after the petition was submitted and that does not list the beneficiary by name. Additionally, the Forms W-2 indicate that the petitioner assigns the majority of its personnel to client sites outside of the Phoenix metropolitan area. 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).

The AAO will first address the issue of whether or not the petitioner qualifies as a United States employer. In the RFE response letter and in the appeal brief, counsel for the petitioner argues that the petitioner is the actual employer.

On appeal, counsel for the petitioner argues that the beneficiary will work at the petitioner's offices in Phoenix, AZ for the duration of the petition. This argument is not persuasive given the evidence provided that directly contradicts this assertion. As mentioned above, the petitioner's support letter, Schedule of Duties, and Summary of Oral Agreement all specifically state that she may be assigned to work at other client sites, and no objective evidence was submitted to indicate that the beneficiary would work on the project for DataFactz at the petitioner's offices. None of the contractual documents with DataFactz or the letter from DataFactz list the beneficiary by name or state where the work will be performed. Moreover, the contract

with DataFactz does not extend through the duration of the petition and no information is provided about the beneficiary's claimed assignment once the contract with DataFactz has ended.

The Consulting Agreement Individual Work Order, which details who will be assigned to the project on which the beneficiary would allegedly work, lists four names, but does not include the beneficiary and, moreover, is dated after the petition was filed. The AAO notes that 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). The petitioner must establish eligibility at the time the petition was filed. 8 C.F.R. § 103.2(b)(1).

Given the lack of evidence that the beneficiary will work at the petitioner's offices for the duration of the petition in contrast to counsel's statement and supporting documentation evidencing that the petitioner is a contractor for short-term employment, the AAO concludes that the petitioner's client(s) are likely the actual end-user entity that would generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. Therefore, by not submitting any documentation justifying the assignment of the beneficiary to the projects for third party client(s) requiring the performance of duties in a specialty occupation, such as signed contracts and work orders listing the beneficiary by name, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary or that it or its client(s) will have sufficient control over the beneficiary to establish an employer-employee relationship based on the evidence of record.

The information provided by the petitioner is insufficient to determine whether the beneficiary will be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or its client(s) or that the termination of the beneficiary's employment is the ultimate decision of the petitioner or its client(s). Moreover, whether there is any work to be performed by the beneficiary as well as the nature of that work is unclear. Therefore, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii)(defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). 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 AAO therefore affirms the director's finding that the petitioner does not qualify as a United States H-1B employer or agent as it failed to establish that it has sufficient work and resources for the beneficiary.

The AAO also affirms the director's finding that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

> 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 . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

With regard to Labor Condition Applications, section 212(n)(1)(A), 8 U.S.C. § 1182(n)(1)(A), requires in pertinent part the following (with emphasis added):

> The employer–
>
> (i) is offering and will offer . . . nonimmigrant wages that are at least–
>
> * * *
>
> (II) the prevailing wage level for the occupational classification *in the area of employment* . . . .

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Based on a review of the statutory and regulatory provisions cited above, it is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the

petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being at the petitioner's offices in Phoenix, AZ, do not correspond with the statements made by the petitioner in the support letter, the oral agreement, or the Schedule of Duties attached to the itinerary that the beneficiary may be assigned anywhere in the United States for extended periods of time or counsel's statements that the petitioner is a contractor for short-term employment. Moreover, none of the documents from DataFactz list the beneficiary by name or indicate the project will last for the duration of the petition, and the petitioner's Forms W-2 indicate that the majority of its workforce is located outside the Phoenix, AZ metropolitan region. Therefore, insufficient evidence was provided by the petitioner to demonstrate that the beneficiary will work at the petitioner's offices in Phoenix, AZ for the duration of the petition. Consequently, USCIS cannot ascertain that this LCA actually supports the H-1B petition. A 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).

Beyond the decision of the director, the AAO will next 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 at 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, as discussed above, the AAO finds that the record is devoid of documentary evidence with respect to the end-client firm, and therefore whether the beneficiary's services would actually be those of a programmer analyst.

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.

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 (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.

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. As the petitioner failed to demonstrate that the beneficiary was assigned to the project for Datafactz at the petitioner's offices for the duration of the petition, in contrast to the petitioner's business model of short-term assignments at third-party client sites, the record of proceedings lacks such substantive evidence from any end-user entities that will 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.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third party client, the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis established by the Court in *Defensor*, USCIS has found that the record does not contain any relevant documentation 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 finds that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further except to note that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.