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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 08 028 00583 Office: VERMONT SERVICE CENTER Date: MAR 04 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, Vermont 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.

The petitioner describes itself as a software consulting and development business and indicates that it currently employs more than 25 persons. It seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to establish that the proffered position qualifies as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, and that the petitioner has complied with the conditions of the labor condition application.

On appeal, counsel states, in part, that the petitioner has already submitted sufficient documentation, including a purchase and project description, to demonstrate that the proffered position is a specialty occupation. Counsel also states that "the petitioner is a full fledged IT services company" and thus the director erroneously relied on *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). Counsel cites to the guidance in a memorandum issued by Louis D. Crocetti, Associate Commissioner, to all the Service Center Directors, pertaining to the submission of end-client contracts (referring to the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995)).

When filing the I-129 petition on November 2, 2007, the petitioner described itself as a "software consulting and development" business. The petitioner submitted a labor condition application listing the beneficiary's work location as Cary, North Carolina.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on March 28, 2008. In the request, the director asked the petitioner to submit additional evidence, including a detailed itinerary for the beneficiary. The director requested documentation such as: contractual agreements with the actual end-client firm where the beneficiary would work; the petitioner's state and federal income tax returns; the petitioner's lease agreement and organizational chart; photographs of the petitioner's premises; and additional evidence that the proffered position qualifies as a specialty occupation.

In his May 7, 2008 letter submitted in response to the director's RFE, counsel stated, in part, that the petitioner "is working on a project to its client Tekway for the purposes of [its] client AT&T (end-client of [the petitioner]) named as SE IVR Dispatch Application Support." Counsel also stated that the beneficiary "will be providing his services in this project from Cary, NC virtually from the petitioner's office, and sometimes at the primary project location in Atlanta, GA." Counsel's supporting documentation included: an Independent Contractor Agreement dated October 27, 2007, between Tekway Inc. and the petitioner, for Tekway to retain the petitioner to provide services described in the Statement(s) of Work; a purchase order naming the beneficiary to perform services

as a "J2EE Consultant" for AT&T, starting on November 26, 2007, with an expected duration of the assignment to November 26, 2009; a project description; tax documentation; a lease agreement; and sample contracts.

On June 27, 2008, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, and that the petitioner has complied with the conditions of the labor condition application.

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

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 are 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 proffered position is a specialty occupation, the record is unclear as to whether the beneficiary's services would be that 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.

The petitioner's description of the proposed duties in its October 30, 2007 letter is paraphrased as follows:

> Plan, develop, test and document computer programs; evaluate requests for new or modified programs and determine compatibility with current systems; identify current operating procedures and clarify program objectives; design software solutions for specific business problems; write manuals, periodicals and technical reports; formulate plans outlining steps required to develop programs; prepare flow charts and diagrams to illustrate program steps;

and convert project specifications into a sequence of detailed instructions and logical steps for coding into language processable by computer.

On appeal, counsel does not specify the specific duties that the beneficiary would perform during the requested validity period. The AAO acknowledges counsel's statement in his May 7, 2008 letter that the beneficiary would be assigned to the "SE IVR Dispatch Application Support" project for the petitioner's end-client AT&T, located in Atlanta, Georgia. The record, however, contains insufficient details regarding the actual duties the beneficiary would perform in the context of this project. It is noted that the "SE IVR Dispatch Application Support" project is described only generically in the "GMail" document that was submitted in response to the RFE. For example, the project description in the "GMail" is listed as follows: "NETMAX, MGI, IVR Dispatch, SNAPI & Tech Talk Support." In addition, the record does not contain a detailed description from an actual end-client, in this case, AT&T, of the beneficiary's proposed duties. As such, the record contains insufficient evidence of the specific duties to which the beneficiary would be assigned.

The record contains insufficient information regarding the nature of the beneficiary's proposed position and accompanying duties. As mentioned above, the "SE IVR Dispatch Application Support" project is described only generically. Without a comprehensive description of the specific project to which the beneficiary would be assigned and a detailed description of the beneficiary's proposed duties in relation to this project from the entity that requires the beneficiary's services, in this case, AT&T, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In support of this analysis, USCIS cites to *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000) (hereinafter "*Defensor*"), 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.* In *Defensor,* the court found that that evidence of the client

companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the job description provided by the petitioner indicates that the beneficiary would be working on a project for the petitioner's end-client, AT&T. Despite the director's specific request for documentation to establish the actual job duties in relation to that project, however, the additional evidence submitted by the petitioner was insufficient. The AAO, therefore, cannot analyze whether the beneficiary's duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*.

Although the director also denied the petition because petitioner had not demonstrated that it is in compliance with the conditions of the labor condition application, the AAO shall not discuss this additional issue because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

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 director's decision is affirmed. The petition is denied.