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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: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 01 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 describes itself as a company that engages in software development and IT staffing that 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 on the grounds that the record failed to establish that the beneficiary will be employed in a specialty occupation.

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 with the petitioner's letter as well as a copy of the petitioner's client's letter and a copy of a credential evaluation for the beneficiary, both of which had been previously submitted. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition, the petitioner described itself as a company located in Jersey City, NJ with five employees and a gross annual income of $500,000. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from December 9, 2008 to December 8, 2011, at an annual salary of $60,000.

In the petition support letter, the petitioner generically described the job duties of a programmer analyst, but nowhere stated whether these duties would actually be performed by the beneficiary. The petitioner also alternated between the job titles of programmer analyst and engineer in its position description. It was not clear from the documentation submitted with the petition what the beneficiary would actually be doing.

The petitioner also stated that it requires a bachelor's degree in computer science or "[a] background in advanced computational fields of study such as engineering, mathematics or statistics which involves substantial college level education in computer sciences and usage of theory and practical skills in computer science to solve problems specific to such fields of study."

The Labor Condition Application (LCA) was filed for the beneficiary to work as a programmer analyst in Charlotte, NC or Jersey City, NJ and lists a prevailing wage of $56,181 for Charlotte, NC and $48,776 for Jersey City, NJ. The petitioner did not explain the reason for assigning the beneficiary to Charlotte, NC in the supporting documents submitted with the petition, even though its offices are in Jersey City, NJ. Additionally, in the Form I-129, the petitioner stated that the beneficiary would only work at its offices in Jersey City, NJ.

The petitioner also submitted a copy of a Secondary Supplier Service Agreement (SSSA) together with an Addendum to the Secondary Supplier Agreement. The SSSA is between the petitioner and a company called TEKSYSTEMS, INC., a Maryland corporation. The SSSA states that the petitioner agrees to assign its employee(s) listed in an attached Work Order to a customer of TEKSYSTEMS, INC., called Time Warner

Cable. The Work Order was not initially provided and no documentation submitted with the petition references the beneficiary or the duties he would allegedly perform. The SSSA states that its term corresponds to a term set forth in a Primary Agreement between TEKSYSTEMS, INC. and Time Warner Cable, a copy of which was not provided.

In his RFE, the director requested in pertinent part that the petitioner provide a list of all its employees, including the name and job title with degree and work status, a complete itinerary for the beneficiary's employment that covers the duration of the petition and provides the name and address of the client, copies of any end-user contracts, including the contract between TEKSYSTEMS, INC. and Time Warner Cable, and a letter from Time Warner Cable. The director also requested additional information regarding the petitioner's business and detailed description of any in-house projects on which the beneficiary may work.

In response to the RFE, the petitioner submitted a list of its employees, which indicates that there are only three workers, including one President and two Programmer Analysts, one of whom works in Jersey City, NJ and the other of whom works in Tampa, FL. It therefore appears that the petitioner no longer has five employees. The petitioner did not provide a job description for these individuals or their qualifications for the positions they hold. The petitioner also listed four other people who are not yet employed by the petitioner.

Additionally, the petitioner submitted a copy of a new SSSA between the petitioner and TEKSYSTEMS, Inc., which is dated January 16, 2009, after the petition was filed. The new SSSA states that the petitioner "[a]grees to assign its employee(s) listed in the attached Exhibit B Work Order ("Work Order") to [Time Warner Cable] in order to perform the Work described in Exhibit A for [Time Warner Cable]." The petitioner also attached a Work Order, also dated January 16, 2009, which lists the beneficiary by name, but leaves the worksite location blank. Additionally, the petitioner submitted a Statement of Work (SOW) that became effective on January 5, 2009, after the date the petition was filed. The SOW is between Time Warner Cable and TEKSYSTEMS, Inc. and states the following, in pertinent part:

> Time Warner Cable has engaged TEKsystems to provide Time Warner Cable with multiple Technical Resources with expertise in C#.net development, quality assurance testing and technical writing to participate in the Case Management and TWC360.com projects within the Enterprise Web Services Group. These efforts are to establish a central repository for customer interaction, establish an enterprise ticketing system and to help distribute corporate marketing materials to all divisions.

The SOW also states that TEKSYSTEMS, Inc. will provide up to six C#, Quality Assurance and Technical Writer resources. The SOW's validity period is from January 5, 2009 to April 5, 2009, or three months.

The petitioner also submitted an undated letter from TEKSYSTEMS, Inc., which states as follows:

> Please let this letter serve as notification that [the beneficiary] has been employed by TEKsystems at the client site of Time Warner Cable since February 25, 2008. This assignment is expected to run through April 5, 2009 with the possibility of being extended should Time Warner Cable's budget permit. . . . [The beneficiary's manager] is the Manager of Enterprise Web Services at Time Warner Cable. . . .

[The beneficiary] has been employed as a C#.net developer and has been assisting with two primary initiatives: TWC360 (an enterprise wide marketing distribution portal) and IssueTrack (an enterprise wide ticket track system).

Please find the job requirements and the specific duties performed by [the beneficiary] for Time Warner Cable.

**Complete Description:**
The successful candidate must possess four to six years experience in full lifecycle development of web and database-centric applications. Two to three years experience with web portal product development, XML, ASP.NET, C#.NET, and web services. Experience working with high volume web sites, enterprise-level systems integration, reporting, e-commerce, content management, and billing system interfaces are a plus.

From this letter, the following information can be gleaned:

- The proposed project on which the beneficiary would allegedly work is only for three months duration and therefore does not cover the duration of the requested validity period in the petition.
- The beneficiary would not be working at the petitioner's offices, as was stated in the Form I-129.
- The beneficiary was not assigned to the project with Time Warner Cable until after the petition was filed.
- The beneficiary would work at a third-party client site. Although the third-party client has been identified by the petitioner, no address of the third-party client or confirmation from the third-party client has been provided.
- The beneficiary will not be employed as a programmer analyst, but as a C#.net developer, a position that does not appear to require at least a bachelor's degree or its equivalent in a specific specialty, but instead requires four to six years of experience.
- The beneficiary will report directly to someone employed by the third-party client rather than someone employed by the petitioner. The project, as well as the beneficiary's role in the project, is completely dependent on the third-party client and the petitioner appears to have little, if any, control over the beneficiary's work.

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 petitioner did not submit an itinerary nor attempt to explain what work the beneficiary would perform or where the beneficiary would work once the three-month project with Time Warner Cable was completed.

The director denied the petition on February 25, 2009.

The primary issue for consideration is 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 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.

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 programmer/analyst.

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.

Insufficient evidence was provided with respect to the third-party client, such as a letter from Time Warner Cable, that would have been probative in determining whether actual performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, in accordance with the statutory and regulatory requirements for an H-1B specialty occupation. In fact, as discussed previously, the evidence submitted, such as the letter from TEKSYSTEMS, Inc., indicates that the position is not that of a programmer analyst and, moreover, does not require at least a bachelor's degree or the equivalent in a specific specialty. 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 notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387-388, 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. *Id.* 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. *Id.* Here, as indicated above, the job requirements would appear to be those of Time Warner

Cable, the ultimate, third-party client, and do not require at least a bachelor's degree or the equivalent in a specific specialty. Moreover, the beneficiary's alleged role with Time Warner Cable was not established until after the petition was filed and was only expected to last three months, rather than for the duration of the petition. The petitioner did not indicate that any other assignments would be available to the beneficiary upon the project's completion. Regardless, the record of proceeding lacks such substantive evidence from any end-user entity 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.

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 his placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. In fact, the documentation submitted by the petitioner in response to the RFE indicates that the beneficiary would not work as a programmer analyst or any other job requiring at least a bachelor's degree or the equivalent in a specific specialty, despite the petitioner's statements to the contrary. 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 – the AAO finds that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform throughout the duration of the petition. 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.

Beyond the decision of the director, the AAO will examine whether the petition must be denied for the additional reason that it was filed without an itinerary of the dates and locations where the beneficiary would work. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The

> address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations.

As mentioned previously, the Work Order and SOW submitted by the petitioner in response to the RFE, which were dated after the petition was filed, only covered three months of work, which is far less than the petition's requested duration. Additionally, the petitioner indicated in the Form I-129 that the beneficiary would work at the petitioner's offices, but then also submitted evidence that the beneficiary would work at third-party client site(s). It is therefore clear that the petitioner intends to assign the beneficiary to more than one work location. The AAO therefore finds that the petitioner failed to submit an itinerary as required under 8 C.F.R. § 214.2(h)(2)(i)(B) and denies the petition on this additional ground.

Also beyond the decision of the director, the AAO also finds 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.

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

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 either Charlotte, NC or Jersey City, NJ, do not correspond with the evidence provided by the petitioner that the beneficiary would work at one or more third-party client worksites in unspecified locations. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations not identified in the Form I-129 and the LCA filed with it, 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. 8 C.F.R. § 103.2(b)(1). 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).

Also beyond the decision of the director, the AAO finds that the petitioner does not qualify as an H-1B employer or agent. As discussed previously, the letter from TEKSYSTEMS, Inc. states that the beneficiary will report directly to someone employed by the third-party client, rather than someone employed by the petitioner. Moreover, the validity period of the SOW between Time Warner Cable and TEKSYSTEMS, Inc. only covers three months. 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 at the location requested in the petition, the petitioner has not established who has actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 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).

The petition will be denied and the appeal dismissed 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.