U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 01 2011

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:

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 $630. 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,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition the petitioner stated that it is a software development and consulting services firm. To employ the beneficiary, from October 1, 2009 to September 30, 2012, in what it designates as a software engineer position, the petitioner endeavors 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, and (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed. The director also found (3) that the petitioner had failed to provide an itinerary of the beneficiary's prospective employment that satisfies the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of 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.

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

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely 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 U.S. 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 alien will likely perform for the entity or entities ultimately determining the work's content.

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

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

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

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

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

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

The regulation at 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

a particular position 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) (hereinafter referred to as *Defensor*). 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.

With the visa petition, counsel submitted a letter, dated April 11, 2009, from the petitioner's immigration specialist. In that letter, the petitioner's immigration specialist provided a description of the duties she attributed to the proffered position, without specifying her basis for asserting that the beneficiary would perform those duties. She also stated that the position requires a minimum of a bachelor's degree or the equivalent in computer science, engineering, computer information systems, mathematics, commerce, electronics, business administration, technology, or a related field.

As to the location where the beneficiary would work, the petitioner's immigration specialist noted that the approved LCA submitted to support the visa petition is approved for employment in King of Prussia, Pennsylvania and in Tampa, Florida. The immigration specialist asserted that the beneficiary would work in accordance with that LCA either at the petitioner's offices in King of Prussia, Pennsylvania or at a client location, but did not say who would assign the beneficiary's duties or supervise her employment when she was at client sites.

Counsel also submitted a copy of a letter, dated April 9, 2009, from the [redacted] a professional staffing firm. That letter states that the beneficiary was then working at the [redacted] as a software engineer/systems administrator and would continue to do so, but did not say for how long. That letter also stated that the position requires "at least a Bachelor Degree or equivalent in a relevant technology field," but provided no further indication of what fields would be considered relevant. That letter also provides a description of the duties of the proffered position. That description is considerably different from the description of the duties of the proffered position provided by the petitioner's immigration specialist. The letter does not say who would assign the beneficiary's duties or supervise her performance.

Because the evidence submitted was insufficient to show that the visa petition is approvable, the service center, on May 7, 2009, issued a RFE in this matter. The service center requested, *inter alia*, (1) an itinerary showing the locations of the beneficiary's work and the dates he would work there; (2) a letter from each end-user of the beneficiary's services identifying the vendor who provided the beneficiary to them, the title and duties of the beneficiary's prospective position, the end-user's minimum educational requirements for that position, the name and title of the person who would supervise the beneficiary's work, and whether the end-users identified have the ability to reassign

the beneficiary to another employer; and (3) contracts and work orders demonstrating the succession of contractors between the petitioner and the end-users of the beneficiary's services.

In response, counsel submitted (1) her own undated letter; (2) a contract between the petitioner and [redacted] Inc., an Iselin, New Jersey firm; (3) a Statement of Work (SOW) between the petitioner and [redacted] (4) a copy of a contract between [redacted] (5) a work order, dated February 11, 2008 and signed on May 15, 2008 by representatives of [redacted] (6) a copy of an identification card issued to the beneficiary by [redacted] showing that she is a contract worker of [redacted] (7) a letter, dated June 12, 2009, from a human resources coordinator at [redacted] and (8) a document labeled Employment Itinerary.

In her own letter, counsel stated that the petitioner is the beneficiary's actual employer. As to evidence that the proffered position qualifies as a specialty occupation position, counsel suggested that software engineer positions are categorically specialty occupation positions, and no additional evidence is required.

The contract between the petitioner and [redacted] is dated April 13, 2009 and delineates the terms pursuant to which the petitioner would provide personnel to [redacted] It does not state where those duties would be performed or what those duties would be. The associated SOW indicates that, also on April 13, 2009, the petitioner agreed to provide the beneficiary to [redacted] to work for Verizon in Temple Terrace, Florida beginning on April 14, 2009. The term of that SOW is stated as "one year + extendable." The AAO notes that the SOW, by its own terms, would expire on April 13, 2010 unless extended.

The contract between [redacted] and [redacted] is dated February 11, 2008 and includes various terms that would apply in the event that [redacted] provides workers to [redacted] to provide to its clients. The February 11/May 15, 2008 work order states that [redacted] agreed to provide the beneficiary to [redacted] who would, in turn, assign her to work for [redacted] That work was to begin on May 21, 2008 and continue through November 21, 2008, with month-to-month extensions possible thereafter. That agreement states, "[redacted] and [redacted] will discuss the hours and location where the work is to be performed, and [redacted] shall not be involved." That work order does not state the nature of the work the beneficiary would perform.

The June 12, 2009 letter from [redacted] human resources coordinator states,

>]The beneficiary] has been working for [redacted] .... with client [redacted] Temple Terrace FL, since 5/21/2008. Her current assignment is currently projected to last until December 27, 2009, with a very good possibility of extension.

[Errors in the original.]

The AAO notes that the assertion, in that June 12, 2009 letter, that the beneficiary's tenure in her work for [redacted] was projected to continue through December 27, 2009, with likely extensions,

appears to conflict with the previous agreement, made on April 13, 2009 between the petitioner and [redacted], that the beneficiary would work at [redacted] at least through April 13, 2010.

The document provided as an itinerary is signed by the petitioner's immigration specialist, and states:

> The beneficiary is assigned to various software development projects manifested by [the petitioner] and its clients in a wide array of industries including the Technology, Financial and Telecommunications industries. The end client is [redacted] in Tampa, Florida. As a Software Engineer, [the beneficiary] **may be responsible** for the following . . . .

[Emphasis supplied.]

The immigration specialist then stated some potential duties of a software engineer. That description of duties is the same as the immigration specialist provided in her letter of April 11, 2009, with two additional paragraphs of potential duties added. As to the location at which the beneficiary would work, the immigration specialist further stated, "Kindly note that . . . the beneficiary may be assigned to work at another location at any time . . . ."

The director denied the visa petition on June 30, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation and had not demonstrated that the LCA provided is valid for employment in all of the locations where the beneficiary would work, and because he found that the itinerary provided does not satisfy the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B).

On appeal, counsel cited non-precedent decisions of the AAO for various propositions.[1] While 8 C.F.R. 103.3(c) provides that Immigration and Naturalization Service precedent decisions are binding on all United States Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding and, in any event, counsel has not established that the facts of the cases cited are consistent with the facts of the instant case. Counsel's references to AAO non-precedent decisions have no persuasive impact.

Counsel reiterated the petitioner's position that it is the beneficiary's actual employer and not an agent. Counsel asserted that the evidence submitted is sufficient to demonstrate that the visa petition should be approved.

The petitioner has asserted that the proffered position is a position for a software engineer, and that software engineer positions are categorically specialty occupation positions. The AAO, however, will not base its analysis of whether a position qualifies as a position in a specialty occupation based

[1] Counsel characterized a submission on appeal as an addendum to the Form I-290B appeal, and stated that an appeal brief would follow within 30 days. However, no further submissions were received.

solely on the job description. 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 alien will likely perform for the entity or entities ultimately determining the work's content.[2]

Evidence in the instant case shows that an entity other than the petitioner would determine the substantive nature of the duties that the beneficiary would actually perform. The evidence indicates that, for some portion of the period of requested employment, the petitioner would assign the beneficiary to [redacted] which would assign him to work for [redacted] which would assign him to work for [redacted]

Because the petitioner will not, itself, be determining the beneficiary's specific duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that firm which will be the end user of the beneficiary's services. The record contains a copy of an identification card that indicates that the beneficiary has worked at some [redacted] location. The record does not, however, include any description provided by [redacted] of the work the beneficiary has performed or would perform at its location.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

Thus, without such comprehensive descriptions from the end-user entities of the specific duties that the beneficiary would perform for them in the context of their particular business operations, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation. Further, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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

[2] The AAO notes, however, that even if the petitioner had demonstrated that the proffered position is a position for a software engineer, the *Handbook* would not support counsel's assertion that the proffered position qualifies as a position in a specialty occupation. This is true because the *Handbook* states that, for such positions, "most employers prefer applicants who have at least a bachelor's degree" and "The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems." Thus, the *Handbook* does not support the assertion that a bachelor's degree in a specific specialty is a minimum requirement for a software engineer.

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).

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.

Further, the period of requested employment is from October 1, 2009 to September 30, 2012. Various documents indicate that the beneficiary's tenure at [redacted] location in Temple Terrace expired, unless extended, on either on November 11, 2008 or on December 27, 2009, or on April 13, 2010. Even if the work for [redacted] were shown to qualify as specialty occupation work, the record still would not suggest, let alone demonstrate, that the petitioner has arranged specialty occupation employment for the beneficiary, or any employment at all, throughout the period of requested employment.

Further still, the AAO notes that the petitioner's immigration specialist stated, in her April 11, 2009 letter, that the proffered position requires a minimum of a bachelor's degree or the equivalent in computer science, engineering, computer information systems, mathematics, commerce, electronics, business administration, technology, or a related field. Computer science, engineering, computer information systems, mathematics, commerce, electronics, business administration, technology, or a related field do not constitute a specific specialty. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. *Matter of Michael Hertz, Assoc.*,19 I&N Dec. 558, 560 (Comm. 1988).

Because the petitioner did not demonstrate, or even allege, that it would employ the beneficiary in a specialty occupation throughout the entire period of requested employment, nor even during any portion of it, the visa petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition . . . ." In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in [redacted] The petitioner's offices are, in fact, in [redacted] Other evidence submitted indicates that the beneficiary would work, for an unknown period of time, in [redacted] which is within the [redacted] The LCA provided to support the visa petition is valid for employment at those two locations. Additionally, however, the AAO finds that the immigration specialist's assertion has no weight, as it is not supported by the evidence in the record of proceeding. *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)).

As was noted above, the work order agreed to by [redacted] and [redacted] states, "[[redacted] and [redacted]] will discuss the hours and location where the work is to be performed and [redacted] shall not be involved." This indicates that, notwithstanding that the petitioner assigned the beneficiary to work at [redacted] behest, the location at which the beneficiary would work had not been agreed upon.

Further, as was noted above, the petitioner's immigration specialist has stated that the beneficiary may, at any time, be reassigned to another, unidentified, location. That location might or might not be within [redacted], or within their respective [redacted]. The LCA might, or might not, be valid for employment at that other undisclosed location. Therefore, the petitioner has not demonstrated that the LCA is valid for employment in all of the locations where the beneficiary might work, and has not, therefore, demonstrated that the LCA corresponds to the instant visa petition and may be used to support it. The visa petition was correctly denied on this basis, which has not been overcome on appeal. The appeal will be denied and the visa petition dismissed on this additional basis.

The final basis upon which the director relied in denying the instant visa petition is that the petitioner failed to provide an itinerary that satisfies the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part: "A petition which requires services to be performed . . . in more than one location must include an itinerary with the dates and locations of the services [to be provided] . . . ." The information provided as an itinerary provided in this case does not include the dates and locations where the beneficiary would work. Rather, it indicates that the beneficiary would work at multiple unidentified sites. That itinerary clearly does not satisfy the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B). The visa petition was correctly denied on that basis, which has not been overcome on appeal. The appeal will be dismissed and the petition will be denied on this additional basis.

The record suggests an additional issue that was not addressed in the decision of denial.

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

> (h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the

> United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. The regulation at 8 C.F.R. § 214.2(h)(4)(ii)(2) indicates that to qualify as a beneficiary's U.S. employer, a petitioner must have an employer/employee relationship with the beneficiary.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

In the instant case, counsel and the counsel and the petitioner's immigration specialist have asserted that the petitioner is not the beneficiary's agent, and the AAO concurs that the evidence does not demonstrate an agency relationship. The remaining consideration is whether the petitioner qualifies as the beneficiary's employer.

The petitioner would assign the beneficiary, through intermediaries, to work for [redacted] The record does not indicate that the petitioner would assign work to the beneficiary and supervise her performance of it and, pursuant to the scenario described, that seems unlikely. The AAO finds that the petitioner has not demonstrated that it would have an employer/employee relationship with the beneficiary and that, therefore, it has not demonstrated that it would be the beneficiary's employer. As such, the petitioner has not demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the petition denied on this additional basis.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.