identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

D1

[redacted]

FILE: EAC 07 142 50424 Office: VERMONT SERVICE CENTER Date: AUG 0 3 2009

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:

[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, as required by 8 C.F.R. 103.5(a)(1)(i).

for

John F. Grissom,
Acting 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.

The petitioner is a corporation doing business as a software development, consulting and training firm. To employ the beneficiary in a position designated as a programmer/analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that (1) the beneficiary was not qualified to perform the duties of a specialty occupation; (2) the petitioner had insufficient H-1B caliber work for the beneficiary; and (3) the proffered position was not a specialty occupation.

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 and attached exhibits in support of the appeal.

As a preliminary matter, the AAO withdraws the part of the director's decision denying the petition "in accordance with 8 C.F.R. [§] 214.2(h)(4)(D)(5) and 8 C.F.R. [§] 214.2(h)(11)(ii). The regulation at 8 C.F.R. § 214.2(h)(4)(D)(5), which deals with USCIS assessment of a beneficiary's qualifications to serve in a specialty occupation position, is not relevant, as the beneficiary's qualifications were not a subject of the director's decision. The regulation at 8 C.F.R. § 214.2(h)(11)(ii) is also not relevant, as it deals only with the grounds for automatic revocation of approval of a petition.

The first issue before the AAO is whether the petitioner has a bona fide offer of employment for the beneficiary and that it otherwise qualifies as a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner has a bona fide offer of employment for the beneficiary or that it will have an employer-employee relationship with the beneficiary.

On appeal, the petitioner claims that it "has entered into a contractual agreement with the beneficiary that gives rise to certain rights and responsibilities for both parties." The petitioner claims that it has the right to terminate the beneficiary's work but is also obligated to pay a salary and provide employee benefits. It further claims that it has substantial control over the beneficiary's work by deciding the specific tasks on which the beneficiary will work. In conclusion, the petitioner claims that it has provided ample evidence that a bona fide offer of employment exists and that the petitioner qualifies as an employer.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's federal tax returns and related documents contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's undated letter of support filed with the petition indicates its engagement of the beneficiary to work in the United States, this letter merely outlines the beneficiary's proposed salary and benefits but provides no details regarding the nature of the job offered or its location.

In the RFE dated August 28, 2007, the director requested various tax and financial documents from the petitioner in order to corroborate the petitioner's claim that a bona fide offer of employment existed for the beneficiary. In a response dated September 24, 2007, the petitioner submitted an employee list, copies of its Forms 941, U.S. Employer's Quarterly Tax Returns, for the first and second quarters of 2007, a copy of the petitioner's most recent Form W-3, Transmittal of Wage and Tax Statements, and other corporate documentation.

In the paragraph summarizing the bases of his decision to deny the petition, the director states, in part:

> USCIS . . . must conclude that the petitioner does not qualify as an H1B employer as they failed to provide evidence to establish that they have sufficient work and resources. The beneficiary is therefore not eligible for the requested H-1B visa because the petitioner is unable or unwilling to provide qualifying employment. . . .

On appeal, counsel argues that the H-1B regulations do not require that payroll documentation be provided or that a petitioner's ability to pay wages be established. While H-1B regulations do not specifically list this type of evidence as being required, 8 C.F.R. § 214.2(h)(9)(i) and 8 C.F.R. § 103.2(b)(8) both provide broad discretionary authority for USCIS to require the submission of evidence material to establishing eligibility for the benefit sought. Evidence of compliance with the H-1B program requirements with regard to other H-1B sponsored aliens is directly material to the director's determination of whether the job offered to the beneficiary is bona fide and whether the petitioner will adhere to and abide by the H-1B program requirements with regard to its proposed employment of this alien beneficiary.

As such, the request for payroll documentation was proper. Having said that, the petitioner on appeal has still failed to fully address the director's concerns regarding its compliance with the continuous employment of its

other H-1B employees *and, despite the additional documentary evidence submitted on appeal, nothing to overcome this issue was submitted.* While the director did not give examples, it appears based on the evidence provided that some H-1B employees, e.g., [redacted], and [redacted] were either (1) not paid the prevailing wage rate listed on their respective Labor Condition Applications (LCAs) or (2) benched during certain periods of time in 2006. More specifically, an examination of the wages paid to these sample employees as compared to the prevailing wage required to have been paid to them is deficient by approximately $25,133.72, $7,471.20, $395.44, and $9,633.15, respectively, for the part of the year the petitioner claimed to employ them. Moreover, the letters requesting leaves of absence do not include any requests from these employees that would explain this gap in pay. In any case, it does not appear that the petitioner fully complied with H-1B program requirements with regard to these and perhaps many of its other employees. As such, the director did not err in denying the petition on the ground that a bona fide offer of employment did not exist.

Without a bona fide offer of employment, the petitioner cannot be deemed 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). For the reasons set forth above, the petition must be denied.

Remaining are the issues of whether the director was correct in determining that the petitioner had provided insufficient evidence to establish that it would be employing the beneficiary in a specialty occupation position and whether the beneficiary was in fact qualified to perform the duties of a specialty occupation. The AAO will first address the question of whether the proffered position is that of a specialty occupation.

The director articulated his determination with regard to the question of whether a specialty occupation position was offered to the beneficiary most clearly in the following paragraphs discussing the lack of documentary evidence of H-1B caliber work for the beneficiary:

> The evidence of [the] petitioner's offer of employment contained in the record does not satisfy 8 C.F.R. § 214.2(h)(1)(B) as the agreement does not cover the entire period of requested employment except indirectly by implication. There are no additional contracts, work orders, master service agreements or statements of work establishing the specific dates and locations of the beneficiary's proposed employment. The record also contains no evidence to demonstrate that a work itinerary existed for the position at the time the petition was filed. The submitted Labor Condition Application specifies only Chantilly, VA as the work location for the beneficiary.
>
> As the record does not contain documentation that establishes the specific duties the beneficiary would perform, USCIS cannot properly analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty or field of endeavor, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

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.

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 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 this matter, the record of proceedings fails to include documentary evidence corroborating the H-1B petition's claim that for the period requested the beneficiary would be employed on matters requiring him to apply the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The petitioner's Form I-129 identifies the Job Title as "Programmer/Analyst." The petitioner's letter of support, filed with the Form I-129 and dated April 10, 2007, describes the proffered position as follows:

> a. Analyze the communications, informational and programming requirements of clients; planning, developing and designing business programs and computer systems;
> b. Designing, programming and implementing software applications & packages customized to meet specific client needs;
> c. Reviewing, repairing and modifying software programs to ensure technical accuracy & reliability of programs;
> d. Training of clients on the use of software applications and providing trouble shooting and debugging support.
>
> Also, [as] part [of] his responsibilities, [the beneficiary] will be involved in analyzing user requirements, procedure and problems to automate processing and improve existing computer systems.

> The beneficiary will formulate/define system scope and objective and write a detailed description of user needs, program functions and steps required to develop or tailor computer programs.
>
> [The beneficiary] will be involved in systems integration, systems configuration, program specification, coding, testing and unit integration.

The petitioner's letter does not identify any project upon which the beneficiary would be employed. In addition, the petitioner further claimed that the industry standard and the petitioner's standard regarding education for a programmer/analyst is at least a bachelor's degree in science/commerce.

In response to the RFE, the petitioner submitted a more detailed description of the proposed duties of the beneficiary in a letter dated September 4, 2007. Specifically, the petitioner indicated that the job functions and approximate amount of time devoted to these functions were as follows:

- Convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language (25%)
- Develop and write computer programs to store, locate, and retrieve specific documents, data, and information (15%)
- Program web sites (10%)
- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced (10%)
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program (10%)
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes (10%)
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements (10%)
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct (10%)

On appeal, counsel contends that the beneficiary will be working in a specialty occupation and submits additional evidence in support of this claim. Counsel submits copies of two contracts for information technology services with Chemonics International, Inc. (Chemonics) and Ian, Evan & Alexander Corporation (IEA). The evidence includes (1) an eight-page Master Service Agreement with Chemonics, as well as a Statement of Work, attached as Exhibit A, which identifies a subcontractor who is not the beneficiary; (2) pages 1 to 5 of a signed and notarized contract document with IEA whose last page bears the statement "Strategic Alliance Agree004" and signatures of IEA and the petitioner; and (3) an eight-page document entitled "Strategic Relationship between USM Business Systems, Inc and IEA Corp." The AAO finds that these documents have no probative value. Neither the contracts nor the "Strategic Relationship" document provides substantive details of any work to be

performed in accordance with those documents. Moreover, the Master Service Agreement's Statement of Work identifies a specific subcontractor who is to perform the duties outlined in the agreement, not the beneficiary.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The AAO notes that the position described by the petitioner is akin to that of a programmer-analyst as described in the chapter "Computer Systems Analysts" at the 2008-2009 edition of the *Handbook*. The *Handbook's* "Computer Systems Analysts" chapter, however, indicates that while a bachelor's degree in a specific specialty may be necessary for the performance of some programmer analyst jobs, it does not indicate that programmer analysts constitute an occupational class normally requiring such a degree. Specifically, the *Handbook* states:

> For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Therefore, based on the *Handbook's* overview of educational requirements for programmer analysts, it is apparent that a bachelor's degree in a specific specialty is not required.

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 *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. On appeal, counsel claims that in addition to the petitioner's own in-house projects, the beneficiary will also be working on "in-house projects" under the umbrella of the IEA contract document. Counsel, however, provides no documentary evidence of the existence of these projects or the nature and educational level of specialized knowledge required for such work. Moreover, the IEA contract as well as the Chemonics agreement make no specific reference to the beneficiary, nor do they contain substantive evidence about any particular projects that the petitioner's agreements with these entities have generated for the period requested for the beneficiary's employment. 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).

In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, 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 and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, as noted by the director, 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.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, 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)(12). 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). For this reason also, the appeal will be denied.

The director also determined that the beneficiary would not be qualified to work in the proffered position even if it had been found to be a specialty occupation. However, a 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, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO will not address the beneficiary's qualifications further.

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.