



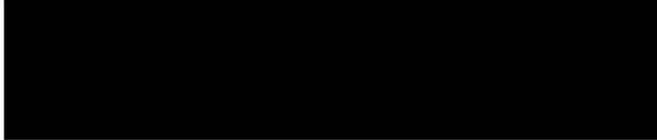
U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 130 52316 Office: CALIFORNIA SERVICE CENTER Date: **DEC 03 2009**

IN RE: Petitioner:
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:

SELF-REPRESENTED

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, California Service Center, denied the nonimmigrant visa petition. 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 software consulting, training and development company. The petitioner seeks to employ the beneficiary as a programmer analyst. Accordingly, the petitioner 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).

On October 2, 2007, the director denied the petition, determining that the proffered position was not a specialty occupation. Specifically, the director found that the petitioner would not be the beneficiary's ultimate employer and, as a result, the description of duties provided by the petitioner was not sufficient to establish that the proffered position was a specialty occupation.

On appeal, the petitioner submits Form I-290B accompanied by a three page letter.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), 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 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.

The record includes: (1) the Form I-129 and supporting documents; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

United States Citizenship and Immigration Services (USCIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In a March 28, 2007 letter appended to the petition, the petitioner claimed that it was in the business of "designing and developing software solutions for a wide range of commercial and scientific applications." It further stated that its mission was "to help our clients succeed in the global market place by exceeding their expectations and delivering value in everything we do." Regarding the beneficiary, the petitioner stated that his duties would include the following:

- (1) Developing customer software for enterprise resource planning needs;
- (2) Customizing functional modules on GUI mode like financial accountancy, material management, Human Resources management, sales & distribution and production planning[;]
- (3) Coding in programming languages that suit the particular front end package;
- (4) Writing algorithms required to develop programs using system analysis and design;
- (5) Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;
- (6) Using graphic files and text data from a database and presenting it on web;
- (7) Collecting user requirements and analyzing coding to be done;
- (8) Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding the client's requests for enhancements and new business functions;
- (9) Interface programming, debugging and executing of programs;
- (10) Monitoring the database using backup, archive and restoring procedures.

Daily Task Activity will be approximately as follows:

System Analysis	25%
System Design	20%
Writing the source code and Develop programs	30%
Unit and System Testing	15%
Implementation and Documentation	10%

The petitioner concluded by stating that "the position requires a professional with a minimum of Bachelor's degree or equivalent in relevant field."

On June 11, 2007, the director requested, among other items: clarification of the petitioner's employer/employee relationship with the beneficiary; an itinerary of services or engagements that specifies the date of each service or engagement and the names and addresses of each of the employers; and copies of signed contracts, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate end-user of the beneficiary's

services that list the beneficiary's name and a detailed description of the duties the beneficiary will perform.

In its August 17, 2007 response, the petitioner explained that it was the beneficiary's actual employer based on the fact that it will hire, pay, fire, supervise and control the work of the beneficiary. It claimed that "although some assignments to clients' sites would be required," the beneficiary would be working at the petitioner's office during the entire course of his employment. It submitted copies of its quarterly tax returns, consulting services agreements evidencing contracts for computer programmer services to outside clients, and copies of prior job postings for the proffered position.

As observed above, the director denied the petition, determining that the petitioner had not established that the proffered position is a specialty occupation. Specifically, the director concluded that while the petitioner would actually pay the beneficiary's wages, the duties to be performed would be outlined by outside clients. The director noted that absent additional evidence pertaining to the projects on which the beneficiary would work, the record did not contain a comprehensive description of the beneficiary's proposed duties. The director found that the petitioner's failure to submit evidence of an employment itinerary and contractual agreements and work orders specific to the beneficiary, as requested in his RFE, precluded a finding in favor of the petitioner.

On appeal, the petitioner focuses on the issue of whether it would be the beneficiary's employer, noting that it would pay the beneficiary's wages, provide medical insurance, and otherwise comply with all aspects of the regulatory definition of employer. The petitioner contends that the beneficiary's role is to write source code, design and analyze systems, and test systems on site at the petitioner, and claims that in the event that the beneficiary is required to be at a client site, it would not know the specifics of the client requirements until such need arises.

Upon review, the AAO concurs with the director's findings. The record prior to adjudication was vague with regard to the exact nature and scope of the beneficiary's employment. Specifically, the petitioner provided a brief list of duties followed by an overview of the percentage of time that the beneficiary would devote to such duties. For example, one of the stated duties included "collecting user requirements and analyzing coding to be done." Presumably, "user requirements" would be unique to each client and vary accordingly, thereby rendering it impossible to ascertain the exact nature of the beneficiary's duties. Moreover, "coding in programming languages that suit the particular front end package" further indicates that most, if not all, of the beneficiary's proffered duties will be client-specific. Without more details with regard to the ultimate client needs and requirements, it is impossible to determine the exact nature of the beneficiary's duties, and therefore impossible to find that the proffered position is a specialty occupation.

Although the petitioner did in fact submit copies of its Form 1120, U.S. Corporation Income Tax Return for 2004, 2005 and 2006, as well as copies of its Form 941, Employer's Quarterly Federal Tax Returns for previous quarters which demonstrated respectable gross revenues and salaries paid to employees, this evidence alone did nothing to clarify the exact nature of the beneficiary's

employment, and/or whether the petitioner or an outside client would control the beneficiary's work. Despite the director's request for clarification with regard to the exact nature and ultimate employer of the beneficiary, the petitioner failed to submit sufficient evidence to permit a full analysis of this issue.

Moreover, the record contains several contracts between the petitioner and end clients including Walgreens, MailCode, Atos Origin IT Services and SAP America. However, these documents shed little light on the beneficiary's proposed position, since they (1) refer specifically to other subcontractors, not the beneficiary; and (2) provide no information regarding the nature of the work to be performed. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, 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)).

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, for guidance, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), is 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."

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." 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. In *Defensor*, the court found that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner.

In this matter, the failure of the petitioner to specifically identify the nature and scope of the beneficiary's employment makes it impossible to positively identify the duties of the proffered position. It appears that while the petitioner contends the beneficiary will be employed on site in its Illinois office, the beneficiary will not provide services to the petitioner. Rather, he will provide services as mandated and requested by the clients, and ultimately be placed at client sites to perform services established by a contractual agreement between the petitioner and the client. Therefore, it appears that, regardless of who will actually be the beneficiary's employer under the common law touchstone of control analysis, the beneficiary's job duties will ultimately be determined by the petitioner's clients and the particular projects to which he will be assigned. As such, absent evidence

of these contracts and/or projects to which the beneficiary will be assigned, an analysis of the beneficiary's likely job duties cannot be performed such that it can be determined that the proffered position will be a specialty occupation.

As discussed above, the petitioner failed to submit evidence of the client companies' job requirements in response to the request for evidence. This omission is critical, since it appears that the work to be performed is for entities other than the petitioner. The petitioner failed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by the clients for whom the beneficiary will provide consulting services. While it provided a brief list of duties the beneficiary would be required to perform, the petitioner also indicated that the beneficiary would analyze specific client needs and requests and formulate applications to satisfy client requirements. As the record does not contain any documentation of the specific duties the beneficiary would perform for the petitioner's clients, the AAO cannot analyze whether his 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)(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)(I).

While not addressed by the director, the AAO also questions whether the petitioner submitted a valid Labor Condition Application (LCA) for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA submitted in support of the petition lists the beneficiary's work location as Arlington Heights, Illinois. In reviewing the petitioner's supporting documentation, however, the AAO finds that the actual work location(s) for the beneficiary cannot be determined. The petitioner has failed to provide a concise itinerary evidencing that the beneficiary will work only at the petitioner's site in Arlington Heights, Illinois and not in multiple locations.

The petitioner acknowledges that it will send the beneficiary to work on client sites as needed, but fails to provide any details regarding the needs and locations of these clients. Although it submits related contractor services agreements in response to the request for evidence, these documents are not specific to the beneficiary, and cannot suffice as evidence that the petitioner, and not a third party employer, will act as the beneficiary's employer during the entire three-year period. Moreover, the locations of the clients included in the contracts are not restricted solely to Arlington Heights, Illinois, where the petitioner is based and which is claimed to be the work location of the beneficiary on his LCA. Instead, they are located in Deerfield, Illinois, Lafayette, Indiana, Houston, Texas, and Newtown Square, Pennsylvania, thereby suggesting that the beneficiary may in fact be outsourced contrary to the petitioner's claims. Absent end-agreements with clients, the duration and location of worksites to which the beneficiary will be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that it is an employer or agent as required by the regulations. As briefly touched upon above, the failure of the petitioner to submit sufficient evidence regarding the nature of the beneficiary's proposed employment and the entity or entities who will ultimately exercise control over the beneficiary, the petitioner has failed to establish that it meets the regulatory definition of an intending United States employer 8 C.F.R. § 214.2(h)(4)(ii); or the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F). Merely claiming in its letter dated March 28, 2007 that the petitioner would exercise complete control over the beneficiary, without evidence to support the claim, is insufficient to establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, direct and oversee the beneficiary's work, provide the tools necessary to perform the work, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements, payroll records, or work orders to corroborate its claim, the petitioner failed to submit such evidence that relates specifically to the beneficiary. 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)).

In view of this lack of evidence, the AAO finds that the petitioner failed to establish that the petitioner would act as the beneficiary's employer or agent pursuant to 8 C.F.R. §§ 214.2(h)(4)(ii) and 214.2(h)(2)(i)(F).

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

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.