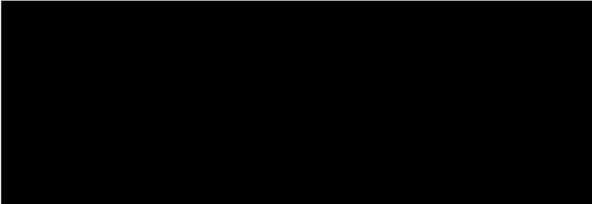




U.S. Citizenship
and Immigration
Services



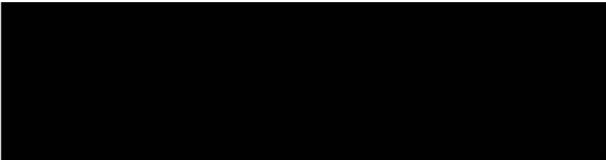
D1

FILE: WAC 07 145 50094 Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2009

IN RE: Petitioner: [Redacted]
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:



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).

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 and information technology consulting 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 September 18, 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. The director also found that the petitioner had failed to establish that it would comply with the terms and conditions of employment.

On appeal, counsel for the petitioner submits Form I-290B accompanied by a brief and additional evidence.

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 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, brief and accompanying evidence in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

In a March 22, 2007 letter appended to the petition, the petitioner claimed that it is a full service software development and consulting firm, whose software solutions range from outsourcing complete projects to testing and maintaining existing software. Regarding the beneficiary, the petitioner stated that it would employ him as a programmer analyst, and described his proposed duties as follows:

As a Programmer Analyst, the beneficiary will plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers. The beneficiary may also write manuals and document operating procedures and assist users to solve problems. The beneficiary will also replace, delete and modify codes to correct errors, analyze, review and oversee the installation of software and provide technical assistance to clients. Furthermore, the beneficiary will be assigned to various projects, which will require the maintenance of client's networks and software builds. The individual will also coordinate with various locations during transitioning, oversee, network administration and create test scripts and applications to manage and test the various functionality of builds and network administration.

On May 10, 2007, the director issued a request for additional evidence. The director requested, among other items: clarification of the petitioner's claimed 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 July 28, 2007 response, counsel for the petitioner explained that the petitioner typically was engaged by U.S. businesses to provide software consulting services, noting that in many cases, it is not cost effective for businesses to keep full-time software consultants on staff. Counsel further claimed that the petitioner hires employees and then assigns them to in-house projects, and essentially claims that it employs consultants to fulfill product and service contracts with other companies. Further, counsel claimed that consultants may work on more than one project at a time.

It is noted that on page three of counsel's July 28, 2007 letter, he claims that the most recent contracts between the petitioner and various clients are included in the response. Upon review, however, no contractual agreements were submitted into the record.

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 it appeared that 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 further found that the petitioner's failure to submit evidence of an employment itinerary specific to the beneficiary, as requested in the RFE, precluded a finding in favor of the petitioner.

On appeal, counsel for the petitioner contends that the petitioner is the beneficiary's employer, noting that it would pay the beneficiary's wages as evidenced by its most recent quarterly tax return. Counsel further submits that a sufficient description of the beneficiary's job duties for the petitioner's clients was provided, but provides an additional overview of the beneficiary's duties with a breakdown of the percentage of time the beneficiary would devote to each stated task.

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 overview of generic duties which the beneficiary would allegedly perform as a programmer analyst. For example, one of the stated duties includes planning and developing computer programs to user specifications. Presumably, the term "user" refers to clients, and therefore such plans would be unique to each client and vary accordingly, thereby rendering it impossible to ascertain the exact nature of the beneficiary's duties. Moreover, the statement on appeal which claims that the beneficiary will design, construct and test systems for end users 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 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 resolve this outstanding issue.

Moreover, despite counsel's claim that contracts between the petitioner and end clients were submitted in response to the request for evidence, no such documents were submitted. It is noted that, on appeal, a consultant service agreement identifying the beneficiary as the consultant assigned to the project is submitted. However, this evidence will not be considered. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

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.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the 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 the beneficiary 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 the true employer of the beneficiary would be the petitioner’s clients.

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 will be 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. It is noted that counsel submits a contracts and work order on appeal in an attempt to demonstrate the core requirements for the position of a programmer analyst and in an attempt to demonstrate that the proposed duties of the beneficiary are complex in nature and are similar among various clients. Once again, however, these documents will not be considered for the reasons discussed, *supra*.

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)(1).

The second issue in this matter is whether the petitioner has complied with the terms and conditions of employment. Specifically, the director found that the petitioner filed an extraordinarily high number of H-1B petitions in relation to the number of employees it claimed to have on staff. Specifically, the director noted that while the petitioner claimed to employ fifteen persons, it had filed thirty-seven H-1B petitions for 2007 alone. The director noted this discrepancy in the RFE, and requested evidence to clarify why the petitioner did not maintain a larger staff based on the number of H-1B petitions filed on its behalf.

In a letter submitted by the petitioner dated July 25, 2007, the petitioner provided an explanation regarding this issue. The petitioner stated that one-tenth of the petitions filed were extension requests for current employees, and one-tenth were petitions where the beneficiary elected to work for a different company after approval was issued. Another one-tenth of these petitions, it claimed, had expired, and an additional one-tenth represented employees who worked for the petitioner for a brief period then moved on to other ventures. In support of these contentions, the petitioner submitted a list of its current employees along with withdrawal letters for other beneficiaries.

The director denied the petition, noting that the petitioner had failed to comply with the requests outlined in the RFE. On appeal, counsel restates the explanation provided in the petitioner's July 25, 2007 response to the RFE, and submits wage and payroll records for 2005 and 2006. However, the petitioner still fails to submit documentary evidence of wages paid in the first quarter of 2007, as requested by the director.

As stated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In this case, the director focused on the discrepancy between the number of petitions approved and the number of employees at the

time the petition was filed in April 2007. Specifically, the payroll records from the first quarter of 2007 are relevant to this issue, yet the petitioner failed and/or refused to submit them. As a result, the AAO cannot determine how many of the 37 H-1B beneficiaries were on staff at the time of filing.

The restatement of the petitioner's July 25, 2007 explanation is insufficient. 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). Absent a more in-depth explanation and corroborating evidence to support the petitioner's claim, the AAO is left to conclude that numerous employees of the petitioner either violated their status of their own volition or were forced to violate their status by being benched by the petitioner. Either way, the director's concerns regarding the petitioner's compliance with the terms and conditions of its alien workforce are justified and, as such, shall not be disturbed.

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, as the petitioner has failed 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 at 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 22, 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. 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) or 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 at 1043.

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.