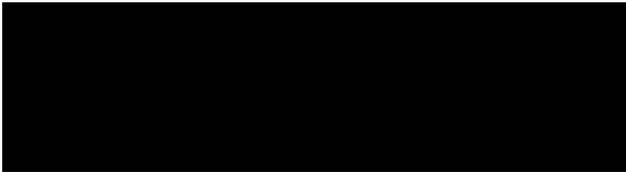




U.S. Citizenship
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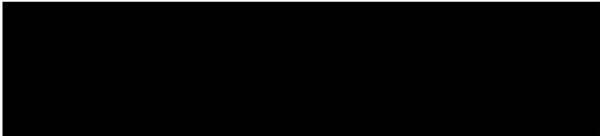


FILE: WAC 08 150 53250 OFFICE: CALIFORNIA SERVICE CENTER DATE: **DEC 03 2009**

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

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.

The petitioner avers that it is an information technology consulting company that was established in 2008 and currently has one employee. It seeks permission to employ the beneficiary as a programmer analyst and, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to establish that: (1) it would act either as an employer or agent; (2) the labor condition application (LCA) was valid for all work locations; or (3) that the proffered position was a specialty occupation. On appeal, counsel submits a brief.

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

As a preliminary matter, the AAO affirms, but shall not discuss, the director's decision to deny the petition for reasons other than the petitioner's failure to establish the job as a specialty occupation. Because the foundation of the H-1B nonimmigrant visa category is whether a job qualifies as a specialty occupation, this decision shall focus solely on the evidence in the record that the petitioner has provided to support its assertions that it is offering a specialty occupation to the beneficiary.

When filing the H-1B petition, the petitioner stated that it was seeking to employ the beneficiary as a programmer analyst to execute the following broad responsibilities, each of which would take approximately 20 percent of the beneficiary's time: systems analysis; design/development; development of system models; testing/debugging; and testing/implementation. For each job responsibility, the petitioner provided some details regarding the duties that the beneficiary would perform. Otherwise, no other information about the beneficiary's proposed position was provided.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 22, 2008. In the request, the director asked the petitioner to submit, among other items: copies of signed contracts between it and the beneficiary; a complete itinerary of the beneficiary's services; and copies of signed contracts between the petitioner and its clients that list the duties that the beneficiary will perform and that list the beneficiary by name in the contracts.

In its response, the petitioner stated that the beneficiary would be working at the petitioner's office in Santa Clara, California. The petitioner's former counsel claimed that the beneficiary would be working on an in-house project for one of the petitioner's clients, [REDACTED]. The petitioner submitted a "Project Proposal Plan" and a letter from the president of [REDACTED] who stated that the company had an agreement with the petitioner "to develop and deploy our website so that we are better able to manage our real estate activities." The president stated that the project would last approximately 42 months and that the work for the project would be performed at the petitioner's

offices. Former counsel maintained that "irrespective of the work location," the beneficiary will perform job duties that require the specialized knowledge that only a person with a baccalaureate degree or its equivalent could have.

On September 4, 2008, the director denied the petition. The director declined to find that the proffered position was a specialty occupation. The director noted that the petitioner's business is the provision of information technology consulting services and, therefore, the duties that the petitioner's client would require the beneficiary to perform, not the petitioner's own summation of the duties, controlled as to whether the job could be considered a specialty occupation. The director also noted that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not establish that all programmer positions required the incumbent to possess a bachelor's degree.

On appeal, current counsel states that the requirement for agreements between the client and the beneficiary is without merit. Counsel states that the petitioner has provided a list of the beneficiary's job duties, a letter from [REDACTED] and the [REDACTED] which should be sufficient. According to counsel, the beneficiary's proposed duties are included in the Business Plan, and state:

The Programmer Analyst will be responsible for designing the architecture required for [REDACTED] website and maintaining the same. They will be installing the required operating systems on Server and clients and setup the client Server architecture. They will also be installing Application servers, deploying website and their Add-on/servers.

Section 214(i)(1) of 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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 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. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

In this matter, the petitioner has not submitted any contract between it and [REDACTED]. The record contains only a Project Proposal Plan, which is undated and unsigned, as well as an August 18, 2008 letter from the president of [REDACTED] who "confirms" that the petitioner will develop and deploy its website. As the record presently stands, there is no evidence that the petitioner had secured the [REDACTED] project when it filed the H-1B petition on April 14, 2008 when eligibility must be established. 8 C.F.R. § 103.2(b)(1) and *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Without evidence of the contractual agreement between the petitioner and [REDACTED] that could establish, among other items, the date into which the contract was entered, and the terms of the contract, the petition may not be approved. As the record presently stands, the record lacks evidence establishing the existence of a specialty occupation for the beneficiary when the petition was filed.

Furthermore, the AAO notes an inconsistency between the Project Plan Proposal and the petitioner's organizational structure. The petitioner stated on the H-1B petition that it had only one employee. In contrast, language at page eight of the Project Plan Proposal provides that the petitioner will have three of its personnel "involved in overseeing this project." Additionally, page five of the Plan lists the "on site team" as being comprised of six members. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has not explained how it would be able to supply the necessary personnel to this project in light of its current organizational structure.

Even if the AAO were to accept the Project Proposal Plan and the August 18, 2008 letter as evidence of a "contract" between the petitioner and [REDACTED] the job proposed for the beneficiary would not qualify as a specialty occupation. On appeal, counsel states that the petitioner has provided a description of the beneficiary's proposed duties. A review of the record indicates that two types of job descriptions have been provided; one generic programmer analyst description from the petitioner, and the job description that is contained in the Project Proposal Plan. The AAO shall

assess the duties that are described in the Project Proposal Plan, not the generic programmer analyst description that the petitioner initially provided. In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was 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.* For this reason, the job duties listed in the Project Proposal Plan are critical, not the petitioner's own description of the beneficiary's job.

The AAO does not find that the duties listed in the Project Plan Proposal are entirely those of a programmer analyst. A duty such as "installing the required operating systems on Server" is not typically associated with a programmer analyst. The AAO notes that even if it agreed with the petitioner that the position could be classified as a pure programmer analyst job, the programmer analyst occupation is not one that categorically requires an incumbent to possess a bachelor's degree in a specific discipline. The Programmer Analyst occupational category is discussed in the *Handbook* chapters entitled "Computer Programmers" and "Computer Systems Analysts."

The *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, as indicated in the following excerpt from the "Educational and training" subsection of the *Handbook's* "Computer Systems Analysts" chapter:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

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.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

The *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree in a specific specialty. The *Handbook* only indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for this type of position. Thus, the AAO would not find the programmer analyst occupation to normally require the attainment of a baccalaureate degree, or its equivalent, in a specific specialty.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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