



U.S. Citizenship
and Immigration
Services

D1



FILE: EAC 08 140 50692 Office: VERMONT SERVICE CENTER Date: DEC 07 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)

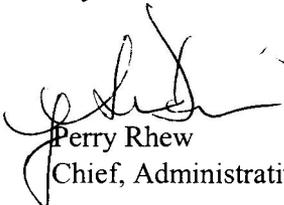
ON BEHALF OF PETITIONER:



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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides software development and consulting services, that it was established in 2002, that it employs 90+ persons, and that it has an estimated gross annual income of \$9,000,000 and an estimated net annual income of \$900,000. It seeks to employ the beneficiary as a computer programmer from October 1, 2008 to September 24, 2011. 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 July 2, 2008, the director denied the petition. The director observed that the petitioner was in the business of locating persons with computer backgrounds for placement with third party organizations to complete their projects. The director noted that the petitioner indicated in response to the request for evidence (RFE) that the beneficiary would be working on in-house projects. The director found that the information provided in connection with the petitioner's in-house projects did not include sufficient information to establish the validity of the projects and was a material change to the initial petition. The director concluded that as the record did not include documentation establishing the specific duties of the beneficiary under contract for a third party or for in-house projects, United States Citizenship and Immigration Services (USCIS) could not determine whether the duties comprised the duties of a specialty occupation. The director further determined that as the record did not include contracts, work orders or statements of work with the end client for the entire period of proposed employment, the petitioner had also failed to satisfy 8 C.F.R. § 214.2(h)(2)(i)(B).

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 1, 2008; (2) the director's RFE; (3) prior counsel for the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and counsel's brief in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its April 1, 2008 letter appended to the petition that it "is a computer consulting company that provides computer consulting and software development services" and that it "needs to hire professional staff, to satisfy the needs of our clients." The petitioner indicated further that it provides "services to clients in various industries, that its "contracts may not necessarily be for the services of a particular, designated consultant," and that the "staffing of these projects is generally within the discretion of the company." The petitioner noted that computer professionals are assigned to a specific project upon employment and remain there unless the individual's expertise is needed in another client's project. The petitioner noted further that it delivers solutions and services in custom software development, project consulting, and software product development. The petitioner also provided an overview of the duties of a computer programming position and listed the percentage of time the beneficiary would perform the

duties outlined.¹ The petitioner acknowledged that a “computer programmer” is a broad classification and “only outlines the nature of duties performed by professionals in the field and do[es] not reveal the diversity of specific tasks performed by professionals in the field.” The petitioner concluded that because computers encompass a variety of human endeavors, “the individual attempting to accomplish customized application of computer based solutions to ‘problems’ it is imperative that the individual possess a thorough understanding of the theoretical knowledge underlying such endeavors, in addition to substantial theoretical and practical knowledge of computer sciences.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 24, 2008. In the request, among other things, the director requested copies of user client contracts which clearly detail the specifics of the contract to include the project name, location, supervisor, and the beneficiary’s proposed duties and responsibilities using specifics, not generalities.

In a June 4, 2008 response to the director’s RFE, prior counsel for the petitioner provided the petitioner’s June 2, 2008 letter. The petitioner stated:

We want to emphasize that we seek to employ the beneficiary as a Computer Programmer for a period of three years. [The petitioner] is the only actual employer and we retain complete control over all employees. We control all day-to-day activities and discretionary decisions [sic] making, such as hiring and firing and performance. We retain managerial authority over our employees. Our employees always remain on our payroll and are paid by us whether [we] are engaged in productive projects or otherwise. They are computer experts with specialized knowledge and skills, and they design, develop and implement customized computer software. In sum, at all times, the beneficiary will be a direct employee of [the petitioner]. If there is a material change in the conditions of the beneficiary’s employment, an amended petition will be filed on her [sic] behalf.

The petitioner attached a number of consulting agreements and work orders and statements of work. None of the consulting agreements, the work orders, or statements of work identifies the beneficiary as the consultant. The documentation also fails to provide a description of the beneficiary’s duties. The record also included the petitioner’s 2007 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to its employees in a number of states. The petitioner also indicated: “in-house projects are vital to the company’s success” and “[a]t any given time, we always have some consultants working on in-house projects.” The petitioner acknowledged that “there is generally no agreement to supply a particular individual for a particular job” and that the client does not know which professional will be assigned to a particular job site. The petitioner further acknowledged that it gave priority to clients’ projects over in-house projects and that individuals generally begin work on in-house projects when first employed and as needed are scheduled to work

¹ As the petitioner’s description of duties is not particular to any position, the AAO will not list the duties here.

on client projects. The petitioner provided marketing and project plans for two in-house projects. The project plans do not identify the number or type of human resources that are needed for the projects.

As observed above, the director denied the petition on July 2, 2008.

On appeal, counsel for the petitioner asserts that the petitioner established that the company is a valid H-1B employer with internal software development projects that require employees to perform the duties incumbent of a specialty occupation. Counsel contends that USCIS disregarded in part and misinterpreted the presented evidence when determining the proffered position is not a specialty occupation. Counsel claims that the evidence submitted demonstrates that the petitioner is offering the beneficiary a specialty occupation position because it will employ the beneficiary at the petitioner's offices to work on proprietary software development. Counsel also asserts that the petitioner is "shifting its focus to include providing leading-edge services in software engineering and custom application development." Counsel attaches a business diversification study and proposal presented to "EZ Minds" on May 19, 2006 in support of his assertion. Counsel does not substantiate or otherwise explain the relationship of "EZ Minds" to the petitioner. Counsel resubmits the project plans for the petitioner's proprietary software and avers that the beneficiary would be employed by the petitioner to provide product development for a particular client per its specification but would not be programming for an end-client. Counsel contends that the documentary evidence submitted supports the petitioner's claim of product development for which the petitioner requires the beneficiary to apply specialized knowledge of a theoretical and practical body of study.

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. While the AAO acknowledges the director's discussion of sufficient office space and counsel's explanations on appeal, the principle issue in this matter is whether the petitioner has provided sufficient evidence that the proffered position is a specialty occupation. Thus, the AAO will not address counsel's explanations regarding the sufficiency of the petitioner's office space and will not address other extraneous issues set forth by counsel on appeal. The AAO also finds that the petitioner has provided evidence of in-house projects, but that evidence of an in-house project(s) without an allocation of resources and the specific duties of each resource on the project, is insufficient to establish that the specific position offered to the beneficiary qualifies as a specialty occupation. The AAO determines that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the description of the proffered employment in an effort to ascertain the beneficiary's actual duties for the actual user of the beneficiary's services and whether those duties comprise the duties of a specialty occupation.

For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a

specialty occupation.

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), 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)(1) 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.

The petitioner in this matter provided a general overview of the beneficiary's proposed duties. Providing a generic statement of the duties of a computer programmer and then allocating a certain amount of time to each duty does not provide the information necessary to ascertain the beneficiary's actual duties. As the director observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the nature of the petitioner's business and observes that the petitioner indicated that it provides computer consulting and software development services and that it needed "to hire professional staff, to satisfy the needs of our clients." Moreover, the petitioner acknowledged that its "contracts may not necessarily be for the services of a particular, designated consultant," and that its employees always remain on its payroll and are paid whether it is engaged in productive projects or otherwise. Thus, the petitioner's initial information did not provide information or evidence of the beneficiary's actual duties and for whom the beneficiary would perform services.

In response to the director's RFE, the petitioner provided copies of contracts and work orders that did not identify the beneficiary as well as evidence of in-house projects. The petitioner acknowledged that it gave priority to client's projects over in-house projects while indicating that individuals generally begin work on in-house projects when first employed and as needed are scheduled to work on client projects. Thus, the petitioner's response to the director's RFE does not clearly evidence where the beneficiary will be working as an H-1B nonimmigrant for the period of intended employment. The AAO observes that the IRS Forms W-2 submitted demonstrate that the petitioner in practice places personnel in several different states. Further, upon review of the in-house project plans, the AAO does not find that the petitioner has allocated a specific number of resources to the project or described the number of programmer analysts or other computer-related positions that will assist in working on the project. The petitioner does not indicate the specific duties the beneficiary will perform on the project or identify a team to which the beneficiary will be assigned. This is of particular importance when petitioning for an individual as a generic programmer analyst.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that a bachelor's degree commonly is required for computer programming jobs, but also recognizes that a two-year degree or certificate may be adequate for some positions. The *Handbook* also notes that "[e]mployers favor applicants who already have relevant programming skills and experience" and that "[s]killed workers who keep up to date with the latest technology usually have good opportunities for advancement." The petitioner in this matter has provided a general outline of programming duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language is necessary for the specific position to which the beneficiary will be assigned. The description is broadly stated and vague

regarding details of the level of support and actual actions that the beneficiary will be expected to perform. The petitioner acknowledges that a “computer programmer” is a broad classification. The AAO finds that such an overview or outline of the duties of a broadly described occupation insufficient without the specific detail provided to individualize the particular beneficiary’s duties as they relate to specific projects or work orders.

As observed above, the petitioner has not provided a description of the beneficiary’s daily duties that is specifically connected to identified elements, applications, or endeavors related to the petitioner’s development of its proprietary software or to specific and particular contracts, work orders, or statements of work. 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)). The AAO acknowledges counsel’s assertion on appeal that the general outline of the duties of the proffered position provided by the petitioner will be accomplished by the beneficiary in setting up the specialized framework of the proprietary software; however, again the AAO does not find an allocation of resources or other information that establishes the specifics of the beneficiary’s duties. 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).

Without evidence of the particular duties of the beneficiary or statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, as those duties relate to specific projects, the petitioner has not established whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, 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. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.*

Although the *Defensor* court noted that evidence of the client companies' job requirements is critical, where the work is performed for entities other than the petitioner, the AAO finds that as in this matter, when the record does not include a comprehensive description of the beneficiary's actual duties as they relate to specific project(s) for the duration of the requested employment period, even if for the petitioner, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties from the ultimate user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

The AAO, therefore, is unable to analyze whether the beneficiary's duties 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 position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Without a comprehensive description of the beneficiary's actual duties from the user of the beneficiary's services and the evidence supporting such a position exists for the entire requested employment period, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the petitioner has not established that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Again, without a meaningful job description, the petitioner has not established any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed for the above stated reason. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed.

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