



U.S. Citizenship
and Immigration
Services

D1



FILE: WAC 08 145 52734 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 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)

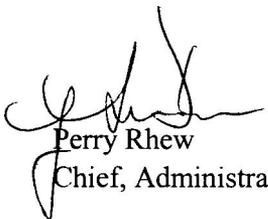
ON BEHALF OF PETITIONER:



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, California 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.

The petitioner describes itself as a subsidiary of its Korean parent company, [REDACTED], and indicates that the petitioner was founded in order to expand its parent company's markets of IT consulting business to an international level. Information on the petition reflects that the petitioner currently employs 12 persons. It seeks to employ the beneficiary as an SAP consultant. The petitioner, 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 it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

On appeal, counsel states, in part, that, as disclosed on the petition and the labor condition application, the beneficiary will perform SAP consulting/software engineering duties at the petitioner's business site and also at [REDACTED] which is located in Richardson, Texas. Counsel also states that, as indicated in the petitioner's July 29, 2008 letter, the beneficiary "may visit client's job sites 'to analyze, evaluate, test and train for a very short time. But any software programming will be done at the petitioner's own location.'"

When filing the I-129 petition, the petitioner describes itself in its March 28, 2007 letter of support as a subsidiary of its Korean parent company and indicated that it was founded in order to expand its parent company's markets of IT consulting business to an international level.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 4, 2008. In the request, the director asked the petitioner to submit additional evidence, including a detailed itinerary for the beneficiary. The director requested documentation such as: contractual agreements with the actual end-client firm where the beneficiary would work; copies of the petitioner's present and past vacancy announcements; documentary examples of the petitioner's products or services; documentation of the petitioner's past employment practices pertaining to H-1B employees; the petitioner's federal income tax returns for 2007; and the petitioner's quarterly wage reports for the last four quarters.

In a letter dated August 1, 2008 submitted in response to the director's RFE, counsel stated, in part, that the beneficiary would work at the petitioner's business offices, but might spend up to 25% of his time at clients' offices for analyzing, evaluating, testing, and training, but any software programming would be done at the petitioner's own location. As supporting documentation, counsel submitted: tax information related to the petitioner; the petitioner's job offer to the beneficiary; a letter dated July 29, 2008 from the petitioner's CEO/Managing Director; a letter dated June 11, 2008 from the consulting team director of Samsung, stating, in part, that he would like the petitioner's employee,

██████████ (not the beneficiary), to work on their new Partner Support System (PSS) project as a consultant; the petitioner's business plan and website information; various consulting services agreements, including one between Samsung and the petitioner, dated August 3, 2007, for the petitioner to provide qualified consultants to work on projects for Samsung or Samsung's clients; work orders related to the consulting services agreements; and the petitioner's job announcements, organization chart, and list of employees.

On August 21, 2008, the director denied the petition. The director found that the petitioner had failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

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 are 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.

In addressing whether the proffered position is a specialty occupation, the record is unclear as to whether the beneficiary’s services would be that of an SAP consultant.

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’s letter of support dated March 28, 2007 listing the beneficiary’s proposed duties has been reviewed. The petitioner’s CEO/Managing Director indicated that the beneficiary would perform the following duties of an SAP consultant/software engineer: technically guide and assist clients to provide technical support to clients; discover clients’ necessities and develop the business; and interconnect with the Korean parent company and recommend strategic decisions.

On appeal, counsel states, in part, that the beneficiary would work at the petitioner's business offices, but might spend up to 25% of his time at clients' offices for analyzing, evaluating, testing, and training, but any software programming would be done at the petitioner's own location. The AAO acknowledges the petitioner's statement on appeal that the beneficiary would perform all software programming duties on-site at the petitioner's office location in San Jose, California. The record, however, contains insufficient information regarding the nature of the beneficiary's proposed position and accompanying duties in the context of the petitioner's client projects. The AAO also acknowledges the various consulting services agreements, including one between Samsung and the petitioner, for the petitioner to provide qualified consultants to work on projects for Samsung or Samsung's clients. The record, however, does not contain a comprehensive description of the specific projects to which the beneficiary would be assigned. Nor does the record contain a detailed description of the beneficiary's proposed duties in relation to such projects. As such, the record contains insufficient evidence of the client projects to which the beneficiary would be assigned, and the petitioner fails to establish that the duties the beneficiary would perform in the context of such projects 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)).

In support of this analysis, USCIS cites to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) (hereinafter "*Defensor*"), 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.* In *Defensor*, the court found that 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, counsel states that the beneficiary would work at the petitioner's business offices, but might spend up to 25% of his time at clients' offices for analyzing, evaluating, testing, and training, but any software programming would be done at the petitioner's own location in San Jose, California. Despite the director's specific request for documentation to establish the actual job duties in relation to the beneficiary's assigned projects, however, the additional evidence submitted

by the petitioner was insufficient. The AAO, therefore, cannot analyze whether the beneficiary's 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)(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).

Although the director also denied the petition because the petitioner had not demonstrated that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, and that the petitioner has sufficient work for the requested period of intended employment, the AAO affirms, but shall not discuss, these additional issues because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

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 director's decision is affirmed. The petition is denied.