U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 08 146 50712 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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 an information technology consulting business and indicates that it currently employs 9 persons. It seeks to employ the beneficiary as a programmer analyst. 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 the petitioner qualifies as an agent and that it has already provided three contracts, one of which is between the petitioner's client [redacted] the end-client for whom the beneficiary will provide the duties described in the said contract. Counsel submits a new labor condition application, listing all the locations where the beneficiary will work, and requests an amendment to the instant petition, to reflect the beneficiary working on the [redacted] project in Redmond, Washington, rather than in-house at the petitioner's facilities in Columbus, Ohio. As supporting documentation, counsel submits: a "job order contract" with a start date of October 1, 2008, signed by the petitioner and a representative of [redacted] assigning the beneficiary to work at the Redmond, Washington location; a labor condition application certified by the Department of Labor on September 23, 2008, listing the beneficiary's work locations as Redmond, Washington and Columbus, Ohio; a letter dated September 21, 2008, addressed to the beneficiary from the petitioner, assigning the beneficiary "to the projects of our client Schakra, Inc. based in Redmond, WA."; and copies of previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its March 15, 2008 letter of support as a provider of "consulting, design, implementation, integration, and maintenance of [redacted], internet, intranet and legacy applications."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 17, 2008. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director requested documentation such as contractual agreements with the actual end-client firm where the beneficiary would work, and the petitioner's federal income tax returns for 2006 and 2007.

On July 30, 2008, the director received the following documentation from counsel, submitted in response to the RFE: an employment offer to the beneficiary from the petitioner, dated March 10, 2008; an itinerary for the beneficiary, dated July 17, 2008, assigning the beneficiary to work on a "Turn key project of Schakra for Microsoft," from October 2008 "[t]hrough end of year 2011"; two

letters from the president of [redacted] one undated and the other dated July 16, 2008, indicating that Schakra is currently executing various projects for Microsoft, and that the beneficiary will work as a software development engineer at [redacted] work site at [redacted] on the "Live Meeting Services (LM Services)" project for Microsoft; a "Schedule" for the [redacted] project (executed in accordance with the terms of the "Microsoft Master Services Agreement" dated May 15, 2005), effective as of June 16, 2008 and expiring on June 30, 2009, signed by representatives of [redacted] a "job order contract" signed by representatives of the petitioner and [redacted] assigning the beneficiary to work at the Redmond, Washington location from the start of the project on October 1, 2008 through the end of the project on September 30, 2011; and copies of the petitioner's income tax returns for 2006 and 2007.

On August 26, 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)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 a programmer analyst.

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 15, 2008 listing the beneficiary's proposed duties has been reviewed. The petitioner's president indicated that the beneficiary would perform the duties of a programmer analyst at the petitioner's office in Columbus, Ohio. Information on the petition and labor condition application also indicated that the beneficiary would work as a programmer analyst at the petitioner's work site in Columbus, Ohio.

On appeal, counsel states that at the time of filing, the petitioner intended for the beneficiary to work in-house at the petitioner's facilities in Columbus, Ohio, but due to "unexpected changes" after the filing of the petition, the petitioner determined that "[the beneficiary's] services would be better implemented on-site in Redmond, WA." The AAO acknowledges counsel's statements on appeal and in response to the RFE that the beneficiary will work on-site in Redmond, Washington. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by counsel and the petitioner in response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the beneficiary's duties and work location from the petitioner's office location in Columbus, Ohio to Schakra Inc.'s office location in Redmond, Washington.

The record contains insufficient information regarding the nature of the beneficiary's proposed position and accompanying duties. As mentioned above, the record is inconsistent regarding the work location and exact duties of the beneficiary. It is also noted that the record does not contain a comprehensive description of the specific LM Services project to which the beneficiary would be assigned. Without a comprehensive description of the specific project to which the beneficiary would be assigned and a detailed description of the beneficiary's proposed duties in relation to this project from the entity that requires the beneficiary's services, 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)).

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, information provided at the time of filing indicates that the beneficiary would be working on client projects at the petitioner's location in Columbus, Ohio. Despite the director's specific request for documentation to establish the actual job duties in relation to those 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 it 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.