

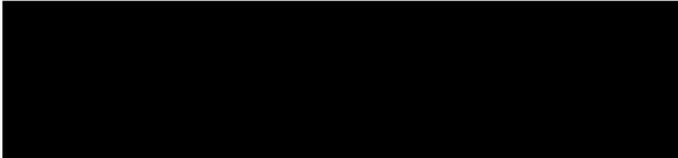
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



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

U.S. Citizenship
and Immigration
Services

PUBLIC COPY



DI

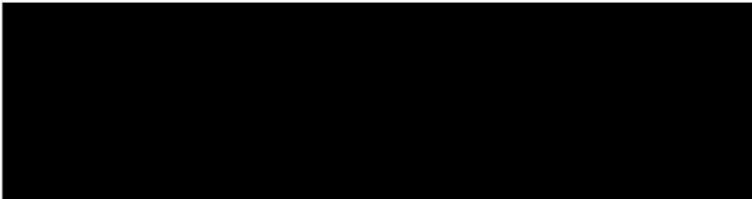
FILE: EAC 08 139 51602 OFFICE: VERMONT SERVICE CENTER DATE: NOV 03 2009

IN RE: Petitioner:
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:



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 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 a provider of IT solutions that was established in 2004 and currently has five employees. 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 did not submit a job description from the client for whom the beneficiary would perform his services and, therefore, there was insufficient evidence that the beneficiary would be working in a specialty occupation.

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.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it wished to employ the beneficiary as a programmer analyst. The petitioner submitted a generalized description of the duties that the beneficiary would perform, and the Labor Condition Application (LCA) that the petitioner had certified showed a work location of Plainsboro, New Jersey, which is where the petitioner is located. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2008. In the request, the director asked the petitioner to submit, among other items, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties, as well as evidence regarding its relationship with the beneficiary.

In its response, the petitioner submitted an Offer of Employment letter relating to the beneficiary, copies of its income tax returns, and several contracts it had entered into with various companies along with several work orders that were attached to certain contracts. One of the contracts related to a company named Vedicsoft Solutions Inc., NJ (Vedicsoft), and attached to it was a work order that listed the beneficiary by name. According to the work order, which was signed on April 28, 2008, the beneficiary would begin working on October 16, 2008 at Vedicsoft's office for a "24+" month period, performing the following duties:

- Research and test open source testing tools.
- To design and develop Load Test tool.
- Develop various Test Plans that mimic the most common user workflow.
- Perform Load Balancing of CRM applications on Apache Web Server.
- To deploy CRM application on Weblogic Application Server.
- To work on Oracle Schemas using Oracle Export/Import utilities.
- To document the configuration parameters of application servers and post it to Wiki.

On June 6, 2008 the director denied the petition. The director declined to find that the proffered position was a specialty occupation because, as an employment contractor, the petitioner was in the business of contracting

its employees to client sites. While acknowledging the contracts that the petitioner has submitted, the director found them insufficient in establishing that the ultimate user of the beneficiary's services would employ him in a *specialty occupation position*.

On appeal, both counsel and the petitioner disagree with the director's finding. The petitioner states in a letter that the beneficiary "will be mainly working for Vedicsoft's web application development" and reiterates the duties listed in the work order that was attached to its contract with Vedicsoft. The petitioner refers to the beneficiary's title as "web developer," not "programmer analyst," as it had previously called the proffered position.

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.

The work order that the petitioner submitted indicates that the beneficiary's work would be done at the offices of Vedicsoft. Therefore, the duties associated with that particular position must be assessed to determine whether they involve the theoretical and practical application of a body of highly specialized knowledge that are usually associated with a degree in a specific specialty. 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.*

The duties listed on the work order are quite generic and do not shed light on the skills that would be required to execute them. For example, one of the listed duties is "work on Oracle Schemas using Oracle Export/Import utilities." There is nothing about this task that necessarily involves the theoretical application of a body of highly specialized knowledge, as it could be performed by someone with a particular Oracle certification rather than a degree in a specific specialty. More importantly, the petitioner initially stated that the proffered position is one of a programmer analyst but now states on appeal that the position is one of a web developer. The evolving title of the proffered position is further evidence that the duties associated with the work that the beneficiary shall perform do not necessarily require a bachelor's degree in a specific discipline.

The AAO notes that even if the petitioner had not changed the title of the position to web developer, 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.

As evident above, 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; and, more importantly, the evidence of record regarding the particular position proffered here does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but that he would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. The petitioner has failed to make such a demonstration.

Not only does the *Handbook* not support the programmer-analyst occupation as one that normally requires at least a bachelor's degree in a specific specialty, but the evidence about the duties that the beneficiary would perform is insufficient to satisfy any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petitioner has not established 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 AAO also notes, beyond the director's decision, that the petitioner's evidence does not establish that, at the time of filing the petition, it had specialty occupation work to occupy the beneficiary for the dates of requested employment, from October 1, 2008 until September 3, 2011. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The work order from Vedicsoft for the beneficiary's specific services was signed on April 28, 2008, which was 27 days after the petition was filed on April 1, 2008. Thus, at the time of filing the Form I-

129, the petitioner did not have specific work to engage the beneficiary. Furthermore, the work order lists the duration of the beneficiary's services as "24+ months (Extendable)," which is a period of time that would not occupy the beneficiary for his entire three years in H-1B status. Although the work order does provide for an extension past the 24 months, the underlying contract between the petitioner and Vedicsoft on which the work order is based, was due to expire two years from the date on which it was signed (October 1, 2007), which would have been October 1, 2009. Considering that the petitioner is seeking the beneficiary's services until September 3, 2011, it has not shown that it has specialty occupation work to occupy the beneficiary after October 1, 2009. Although this issue was not raised by the director, it is an additional reason that the petition cannot be approved.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.