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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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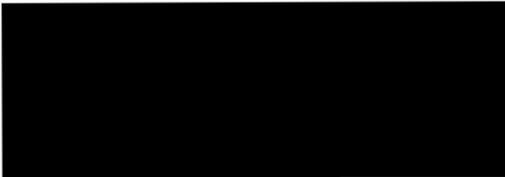
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FILE: WAC 08 146 51035 Office: CALIFORNIA SERVICE CENTER Date: NOV 09 2009

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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in “IT project and software development services,” that it was established in 2000, that it employs six persons, and that it has an estimated gross annual income of \$1,032,000 and a net annual income of \$300,000. It seeks to employ the beneficiary as a hardware engineer from October 1, 2008 to September 20, 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 August 16, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) the Labor Condition Application (LCA) is valid for all work locations; or (4) the proffered position is a specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on April 14, 2008; (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, counsel’s brief, and documentation 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 provides “project and software services for ASIC/FPGA design services.” The petitioner noted that its software developers and computer programmers are technically qualified from prestigious technical colleges and have development and implementation experience across a wide array of cutting edge technologies and solutions. The petitioner stated that the beneficiary, as a computer hardware engineer, would be responsible for system architectural development. The petitioner indicated that his responsibilities would include “analysis, design and evaluation of existing and proposed micro-architecture and system architecture of System On-Chip Applications.” The petitioner further indicated that the beneficiary would “design and develop communications processors,” would “work with a team dedicated to design, develop and formulate validation test plans customized Systems on Chip modules.” The petitioner noted that to perform these functions the candidate needs to be well versed and proficient in tools such as XScale assembly, C/C++, Java, PCI Architecture, JTAG/TAP protocols and RISC/CISC architectures, as well as debug tools such as Soft Ice, Linux Kernel debuggers and Modelism.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 14, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner’s employer-employee relationship with the beneficiary; asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit a complete itinerary of services or engagements that specifies the dates of

each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In a July 9, 2008 response to the director's RFE, the petitioner provided its March 13, 2008 employment offer signed by the beneficiary on March 15, 2008. The petitioner also stated that the beneficiary would work on a project called "Project Storage I/O Controller (Tahoe)" (Project Storage). The petitioner provided a project plan for Project Storage dated March 2008. The petitioner indicated in the plan that the project team consisted of the vice president of business development and marketing, a technical project manager, eight hardware and embedded engineers, and four software developers during the initial design phase and would grow to a team size of 25 personnel by year 2010. The petitioner noted that the core team members would be based in the United States with an application support and testing team located in an offshore development center in India. The petitioner also provided copies of its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the 2006 and 2007 years.

As noted above, the director denied the petition on August 16, 2008. The director observed that in response to her RFE, the petitioner had indicated that the beneficiary would work on projects at its office in Cupertino, California. The director noted, however, that public records showed that the petitioner's premises are residential and do not show that the place of intended employment is zoned for commercial use. The director found that the record suggested that the petitioner is not a firm completing its own projects but rather subcontracts workers with a variety of computer skills to other companies that need such computer services. The director concluded that without valid contracts between the petitioner and the end users of the beneficiary's services, the petitioner had not established that it qualified as an employer or agent. The director also concluded that as a subcontractor, without contracts from the ultimate end-client firm(s), USCIS could not determine that the LCA was valid for all work locations. The director further determined that without valid contracts between the petitioner and the actual end-client firm, the evidence does not establish that the duties to be performed are those of a hardware engineer position and thus a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner is currently embarking on an internal product development product and attaches a copy of the Project Storage plan dated August 2007. Counsel contends that the petitioner's premises have been leased to be used as office space for business only and includes a copy of the petitioner's lease and the petitioner's business license with the lease address. Counsel also claims that the petitioner has access to other office space from another company in Cupertino, California to accommodate the product development stage of its new project, an address specifically referenced in the business plan of the project to which the beneficiary

would be assigned. Counsel asserts that USCIS committed reversible error when failing to consider that the petitioner provided evidence of resources and plans for a specific in-house project to which the beneficiary would be assigned. Counsel avers that the petitioner is a United States employer, has submitted a valid LCA, and has provided evidence that it is offering a specialty occupation position to the beneficiary. Counsel references the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on hardware engineers, as well as the Department of Labor's *Dictionary of Occupational Titles* on the position of hardware/software engineer. Counsel contends that the position proffered requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in the specific specialty and thus is a specialty occupation.

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. Although the director could have better articulated the reasons for denying the petition, the AAO affirms the director's ultimate conclusion that the record is insufficient to substantiate the beneficiary's eligibility for this benefit. The AAO acknowledges that the petitioner has provided evidence of an in-house project, but finds that evidence of an in-house project alone is insufficient to establish that the specific position offered to the beneficiary qualifies as a specialty occupation. The AAO observes 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 descriptions 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. The AAO observes that the issue is whether the petitioner has established that the beneficiary's actual duties for the ultimate user of the beneficiary's services comprise the duties of 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 has provided a general overview of the beneficiary’s proposed duties. As 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 petitioner’s information regarding its Project Storage in-house product. The AAO first observes that the petitioner did not initially provide information indicating that the beneficiary would work on an in-house project. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material

changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The AAO also notes that the petitioner's project plan provided in response to the director's RFE is dated March 2008 and the project plan submitted on appeal, although containing the same in content is dated August 2007. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon further review, the AAO does not find that the petitioner initially provided specific duties the beneficiary would perform on the project. The petitioner's initial indication that the beneficiary's responsibilities would include "analysis, design and evaluation of existing and proposed micro-architecture and system architecture of System On-Chip Applications," "design and develop[ment] communications processors," and would "work with a team dedicated to design, develop and formulate validation test plans customized Systems on Chip modules" does not appear to correspond with the description of the petitioner's in-house project submitted in response to the director's RFE and on appeal. Although the petitioner notes that its in-house project will initially require eight hardware and embedded engineers, the petitioner does not further identify the duties of the proffered position as it relates to the specific project to which the beneficiary will be assigned. Rather, the petitioner apparently relies only on the generic overview of the occupation initially submitted to identify the beneficiary's proposed duties. The AAO observes that the 2008-2009 edition of the *Handbook* describes the occupation of a hardware engineer as:

Computer hardware engineers research, design, develop, test, and oversee the manufacture and installation of computer hardware. Hardware includes computer chips, circuit boards, computer systems, and related equipment such as keyboards, modems, and printers. . . . The work of computer hardware engineers is very similar to that of electronics engineers in that they may design and test circuits and other electronic components, but computer hardware engineers do that work only as it relates to computers and computer-related equipment. The rapid advances in computer technology are largely a result of the research, development, and design efforts of these engineers.

The petitioner's use of similar terms as those terms are set out in the *Handbook* to describe the beneficiary's proposed duties is insufficient. A petitioner may not establish a proffered position is a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook*. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests or in this matter to its specific project. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. 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 the Project Storage hardware. 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 the petitioner's claim that its software developers and computer programmers are technically qualified from prestigious technical colleges and have development and implementation experience across a wide array of cutting edge technologies and solutions. However, the petitioner does not describe the duties of its hardware engineers in this statement and moreover does not provide the underlying documentation that the petitioner's computer personnel only work on assignments that require a theoretical and practical application of highly specialized knowledge. General statements and an overview of proposed work are insufficient to establish that a specific proffered position is a specialty occupation. The general outline of proposed duties is insufficient to establish that the beneficiary's actual duties as they relate to the petitioner's project comprise the duties of a specialty occupation. 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.

Without evidence of 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, USCIS is unable to discern the nature of the position and 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, and most significantly 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.

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.