

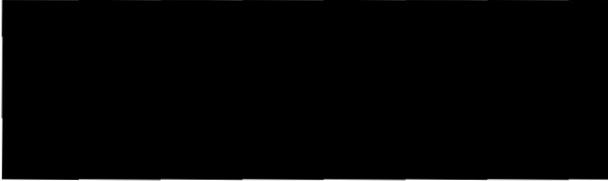


U.S. Citizenship
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Services

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FILE: WAC 08 145 51836 Office: CALIFORNIA SERVICE CENTER Date: **NOV 09 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

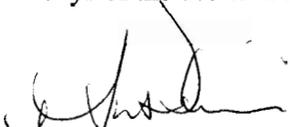
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides software development and computer consulting services, that it was established in 2006, that it employs 7 persons, and that it has an estimated gross annual income of \$2,300,000 and a net annual income of \$50,000. It seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 1, 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 27, 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) it submitted a valid labor condition application (LCA) for all work locations; or (4) the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits a brief and documentation in support of the Form I-290B, and contends that the director’s decision is erroneous.

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) 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 for the petitioner’s brief and 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 its March 31, 2008 letter appended to the petition that it offers “a highly qualified pool of consultants to handle the information technology needs of our clients so that they could focus on their core business activities.” The petitioner noted that it included onsite, offsite, and offshore options to its clients in many different industries. The petitioner indicated that the beneficiary would be employed as a programmer analyst and in the proffered position would: “design and develop web-based software applications in distributed environment; study and define user requirements; translate functional requirements into technical specifications; perform coding and programming; implement completed applications; prepare test plans; conduct testing; identify and resolve technical programs; and perform application upgrade.” The petitioner stated that the minimum education requirement for the position offered to the beneficiary is that of a bachelor’s degree in computer science and engineering or a related field of study.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 28, 2008. In the request, among other things, the director: asked that the petitioner clarify its employer-employee relationship with the beneficiary; submit copies of

contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed that provide a comprehensive description of the beneficiary's proposed duties; an itinerary 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; asked for documentary examples of the petitioner's products or services; 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 response dated July 17, 2008, counsel for the petitioner asserted that the director's RFE appeared to be outside of the requirements that need to be met under the regulations, was overly broad and burdensome, and did not articulate specific reasons for the requests. Counsel submitted evidence that the petitioner was incorporated and doing business, the petitioner's 2007 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, and other tax documentation, the petitioner's lease agreement, copies of the petitioner's Internet web pages, and a service agreement dated December 5, 2007 between the petitioner and Incentone, a New Jersey corporation. The service agreement included two Exhibits "A" as part of the master contract with Incentone. The Exhibits "A" named two employees and indicated short term employment of six plus months. Neither Exhibit "A" listed the beneficiary.

On August 27, 2008 the director denied the petition. The director noted that the petitioner had provided a copy of a master service agreement but observed that the contract did not request the services of the beneficiary and that the petitioner had not shown that the contract was still valid. The director found that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services. The director concluded that, without complete valid contracts relating to the beneficiary, the petitioner had not established that it had control of the beneficiary's actual work and the record did not contain sufficient information regarding the nature and scope of the beneficiary's services. The director found that the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that without an itinerary or contracts with end client firms for the period of employment, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could not be determined valid. The director further determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of valid contracts detailing the beneficiary's ultimate duties.

On appeal, counsel for the petitioner submits an undated document labeled "itinerary" that identifies the beneficiary as "employee" and indicates his designation is programmer analyst and that he will work at Simplion Technologies, Inc. (Simplion) in San Jose, California. The "itinerary" provides the following description of the project and responsibilities:

Simplion's proprietary software, swift framework, is a suite of reusable software components, applications adapters, monitoring tools and how-to guidelines, bases [sic] on such enterprise technologies as Java, J2ee, webservices, weblogic, websphere

and other related technologies that allow for faster SOA implementation cycles, a flexible platform and reuse, [sic] easy extensibility and an improved ROI. The consultant shall provide software design, development, maintenance and testing services using Java and related technologies.

The itinerary listed the duration of services as “Services will be utilized till the project is implemented.” The petitioner also includes its service agreement with Simplion dated July 25, 2007. The Exhibit “A” to the contract identifies the beneficiary as the individual to be assigned to this purchase order and describes his duties as: shall provide software design, development, maintenance and testing services using Java and related technologies. The Exhibit “A” indicates the purchase order shall cover services for 24 months beginning October 2008 and thereafter shall extend on a month-to-month basis unless terminated by any of the parties.

The record on appeal also includes a September 16, 2008 letter written on Simplion letterhead that provides the same description of the project as listed on the itinerary and indicates Simplion’s understanding that the beneficiary will be assigned to the project. The Simplion vice-president also notes that the company does not hire computer consulting professionals unless the individuals possesses at least a bachelor’s degree in computer science, computer engineering, or a related field due to the sophistication of its computer system.

Counsel for the petitioner asserts that as the description of job duties of the proffered position of programmer analyst includes analysis, modification and testing of computer system software, the position rises to the level of specialty occupation, based on past guidance provided to USCIS adjudicators.

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. Thus, the AAO will affirm but will not discuss, the director’s decision on the issues of whether an employer-employee relationship exists and whether the LCA is valid for all work locations, as the petition is not approvable on the crucial issue of failure to establish that the proffered position is a specialty occupation. The AAO also 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, but 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 various descriptions of the proffered employment in an effort to ascertain the beneficiary’s actual duties and whether those duties comprise the duties of a specialty occupation.

Preliminarily, the AAO finds that despite the director’s RFE requesting contracts and statements of work from the ultimate end user of the beneficiary’s services, the petitioner failed to fully comply with the request and submits for the first time on appeal, a contract with Simplion and a purchase order for the beneficiary’s services. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this matter,

however, even if considering the brief description of the beneficiary's duties and assuming the outline of duties relates to the broadly described Swift Framework project, the AAO does not find the description sufficiently comprehensive to establish that the actual position is 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. Therefore, the AAO will specifically review whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those 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 AAO specifically notes the regulation at 8 C.F.R. § 214.2(h)(4)(iv) which 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. Thus, the director’s request for this information is not outside the regulatory or statutory requirements.

The petitioner’s initial evidence submitted in support of the petition provided an overview of the duties of a programmer analyst. The petitioner did not relate any of the generally described duties to specific projects. In response to the director’s RFE, the petitioner failed to elaborate upon the beneficiary’s proposed duties and failed to provide any information regarding the ultimate user of the beneficiary’s services or the ultimate user’s expectation from the beneficiary’s performance in relation to specifically described work. Only on appeal does the petitioner provide a contract and a purchase order for the beneficiary’s services. The late submission of such a contract and purchase order naming the beneficiary casts doubt on its existence when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, even if considered, the brief and general description of the petitioner’s client’s project to which the beneficiary would purportedly be assigned and the terse one-sentence description of the beneficiary’s duties in support of the project, preclude a determination that the position comprises the duties of a specialty occupation. The AAO acknowledges counsel’s assertion that if a programmer analyst’s work includes analysis, modification and testing of computer system software,¹ the work is the work of a specialty occupation. However, to allow the brief description of the beneficiary’s services noted in the purchase order unsupported by documentation and evidence of the actual daily duties expected of the beneficiary, would allow any petitioner to insert such language in order to obtain H-1B classification. The AAO finds that general statements and vague descriptions of an occupation do not establish that a specific proffered position is a specialty occupation. 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 only information in the record regarding the beneficiary’s actual duties is the initial brief and broad description in support of the petition and the even shorter description of duties provided on appeal. This outline of an occupation is insufficient to establish that the beneficiary’s actual duties

¹ Although the September 16, 2008 letter signed by Simplion’s representative notes that its contract with the petitioner is for the petitioner to provide “computer system analysis and programming, as well as software modification and testing,” the purchase order describes the beneficiary’s services as “software design, development, maintenance and testing services using Java and related technologies.”

as they relate to the petitioner's client's proposed 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. 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, however, has not provided sufficient evidence to establish that the general outline of duties set out in its description would require a degree beyond that of an associate degree and/or certifications in a particular programming language. The description shows, at most, that the beneficiary should have a basic understanding of particular computer programs, an understanding that could be attained with a lower-level degree or certifications in the programs.

Similarly, the petitioner's client's indication that it only hires individuals with bachelor's degrees in specific disciplines to work on its computer system is insufficient to establish that the proffered position is a specialty occupation. The AAO observes that if USCIS were limited to reviewing a petitioner's or its client's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. As the record does not include a detailed description of the beneficiary's actual duties for the petitioner or its client, the petitioner has not established the proffered position is a specialty occupation.

The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the specific duties that the beneficiary will perform as they relate to the listed project(s) the beneficiary will work on for the duration of the requested employment period, 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, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of work orders or statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, 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.*

In this matter, the petitioner provides a generic statement regarding the duties of a programmer analyst. Without the underlying statements of work that comprehensively describe the work to which the beneficiary will be assigned and describe the beneficiary’s actual duties as those duties relate to a specific project, the AAO 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The petition will be denied and the appeal dismissed for the above stated reason. 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 appeal is dismissed. The petition is denied.