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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
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Services

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FILE: WAC 08 146 51691 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 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)

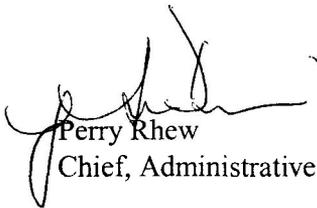
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 information technologies services, that it was established in 1994, that it employs 7 persons, and that it has a gross annual income of \$1,700,000. It seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 15, 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 September 23, 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 locations; or (4) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement and re-submits documentation already in the record.

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 and the petitioner’s statement 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 28, 2008 letter appended to the petition that it “specializes [in] providing development, consulting services and support to a broad range of companies” and it is “committed to perfecting seamless innovative technology solutions for business worldwide.” The petitioner noted that the proffered position requires the incumbent to design, develop, and analyze various software and database applications and that the “majority of the job duties entail the analysis, design, development, modification, testing of software applications and related meetings and discussions with project team members and clients.” The petitioner asserted that the proffered position required an individual with “knowledge of computer software applications associated with the completion of a Bachelor’s Degree in Science, engineering, a related analytic or scientific discipline, or the equivalent thereof with a background in programming and systems analysis.”

The petitioner also provided an outline of the beneficiary’s proposed job duties as a programmer/analyst as follows:

- Obtain system requirements for design, development and implementation of commercial software applications as per user requirements – 15 %

- Provide object oriented programming analysis and design using Java, J2EE, JSP, Servlets, Jbuilder, Struts, J2SE, Web Services, Eclipse, and Apache Tomcat on UNIX/HP, WindowsNT and Linux Platforms – 35%
- Program software applications for advanced client/server environments and database design – 15%
- Analyze, review, and alter programs to increase operating efficiency and or adapt to new requirements and provide documentation to describe program development, logic and coding – 15%
- Plan, develop, test and document computer programs applying programming techniques – 10%
- Optimize system performance and maintain compliance with user requirements – 10%

The petitioner provided a signed employment agreement with the beneficiary and an LCA for a work location at the petitioner's offices in Valparaiso, Indiana.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 10, 2008. In the request, among other things, the director: asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner clarify the employer-employee relationship with 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 federal tax reports, a copy of its lease agreement and floor plan. 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 letter, the petitioner noted that it shares an office with Physicians Healthcare of Northwest, Indiana in Merrillville, Indiana and thus does not have a lease and there is no formal rental agreement. The petitioner also noted that it uses the shared offices for an occasional meeting and to house its corporate files. The petitioner further noted that its accounting records and official corporate mailing address are located at a home office in Valparaiso, Indiana.

The record includes a master subcontracting agreement between the petitioner and Pomeroy IT Solutions, Inc. (Pomeroy) located in Hebron, Kentucky dated December 27, 2005. The record further includes a new LCA certified on October 17, 2008 for programmer analyst work to be performed in Hebron, Kentucky and Merrillville, Indiana.

As noted above, the director denied the petition on September 23, 2008. The director noted the contract the petitioner had provided and observed that the contract did not request the services of the beneficiary and in addition, the petitioner had not provided evidence that the contract was still in effect. 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 documentation establishing the validity of the submitted contract, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could not be determined valid. The director further found 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.

The AAO finds that the principle issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, the director's decision on the issues of whether an employer-employee relationship exists and the validity of the LCA, the AAO affirms but will not discuss 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.

On appeal, the petitioner asserts that it maintains actual control over the beneficiary and thus it qualifies as an agent functioning as an employer with IBM at the Hebron, Kentucky and Merrillville, Indiana client locations. The petitioner also provides a different yet still general overview of the beneficiary's proposed duties and a different allocation of time to the generic tasks outlined on appeal. The petitioner contends that the proffered position of programmer analyst qualifies as a specialty occupation. The petitioner also asserts that the beneficiary has a master's degree in computer science with four years of experience in the computer and software development field and submits an evaluation of her education and work experience.

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. The AAO observes that an individual's education does not establish that a position is 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)(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 petitioner’s initial evidence submitted in support of the petition provided an overview of the myriad number of types of duties that a programmer analyst might perform. In response to the director’s RFE, the petitioner included a contract with a third party company. The contract did not

include an addendum or any evidence that the beneficiary would be assigned to work for the third party company. Moreover, the contract did not detail the beneficiary's duties and the time period the beneficiary would work pursuant to the contract.

On appeal, the petitioner indicates that it is an agent functioning as an employer but does not provide an itinerary or a statement of work or scope of work for the beneficiary's services. Thus, the record on appeal also fails to include the detailed information necessary to establish where the beneficiary would work and a comprehensive description of the beneficiary's duties by the ultimate user of the beneficiary's services.

The AAO acknowledges the petitioner's assertion that the position of programmer analyst is a specialty occupation. However, an assertion without the underlying detailed description of duties from the actual user of the beneficiary's services is insufficient. Generic descriptions and general statements regarding 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 proposed duties is the outline initially provided and the different outline submitted on appeal. These disparate outlined descriptions are insufficient to establish that the beneficiary's actual duties as they relate to work for a third party company comprise the duties of a specialty occupation. Again, the descriptions are 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 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. There is nothing in the record that actually describes the beneficiary's proposed work for the third party company.

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 work for a third party 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 description of a computer-related position. 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 the specific projects for the third party company, 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 as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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.