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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 and Immigration Services

[redacted]

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FILE: WAC 08 146 53128 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 2009

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

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.

The petitioner describes itself as a provider of IT consulting services and indicates that it currently employs 22 persons. It seeks to employ the beneficiary as a systems analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

On appeal, the petitioner's vice president states, in part, that the petitioner qualifies as an employer and as an agent, that the proffered position qualifies as a specialty occupation, and that the beneficiary will work in the following locations: Newton Square, Pennsylvania; Alpharetta, Georgia; and Bolingbrook, Illinois. As supporting documentation, the petitioner submits copies of previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its March 27, 2008 letter of support as "a provider of information technology consulting services to major corporations."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 9, 2008. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director requested documentation such as contractual agreements with the actual end-client firm where the beneficiary would work. The director also requested documentation such as: the petitioner's business licenses and articles of incorporation; the petitioner's state and federal quarterly wage reports for 2007 and the first quarter of 2008; the petitioner's federal income tax return for 2007; the petitioner's payroll summary; the petitioner's lease agreement, floor plan, and photographs of its business premises; and evidence pertaining to the beneficiary's educational background.

In a letter dated July 7, 2008 from the petitioner's vice president submitted in response to the director's RFE, the beneficiary's duties are described as initially working for "about six months" at the petitioner's work site in Oak Brook, Illinois, "to get familiar with our clients, our consulting approach, and methodologies that we practice while providing our services to our clients." The petitioner's vice president states that the beneficiary will then work through the petitioner's vendor, B2B Workforce (B2B), at SAP America located in Newtown Square, Pennsylvania, and at Wipro in Bolingbrook, Illinois, through Vajra Infotech LLC. The petitioner submitted additional documentation, including: an employment agreement between the petitioner and the beneficiary; a company brochure and tax and business documentation for the petitioner; a contract between the petitioner and B2B dated April 28, 2008, for B2B to act as a brokering agent for the petitioner to

provide information systems services to B2B's clients at "Customer SAP AGS," and a related work order assigning another of the petitioner's employees to the "SAP AGS" project; a purchase order dated October 18, 2007, signed by the petitioner and the president of Vajra Infotech, LLC, assigning another of the petitioner's employees to work at Wipro in Bolingbrook, Illinois; and the petitioner's lease agreement.

On October 1, 2008, the director denied the petition. The director found that the petitioner had failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the record is unclear as to whether the beneficiary's services would be that of a systems analyst.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner's letter of support dated March 27, 2008 listing the beneficiary's proposed duties has been reviewed. The proposed duties are summarized as follows: obtain system requirements for the design, development, and implementation of commercial software applications pursuant to user requirements; provide object network programming analysis and design; analyze, review, and alter programs to increase operating efficiency and/or to adapt to new requirements; plan, develop, test,

and document computer programs; and optimize system performance and maintain compliance with user requirements.

On appeal, the petitioner states that the beneficiary will work in the following locations: Newton Square, Pennsylvania; Alpharetta, Georgia; and Bolingbrook, Illinois. The AAO acknowledges the contract between the petitioner and B2B dated April 28, 2008, for B2B to act as a brokering agent for the petitioner to provide information systems services to B2B's clients at "Customer SAP AGS," and the related work order assigning another of the petitioner's employees to the "SAP AGS" project. The AAO also acknowledges the purchase order dated October 18, 2007, signed by the petitioner and the president of Vajra Infotech, LLC, assigning another of the petitioner's employees to work at Wipro in Bolingbrook, Illinois. The record, however, does not contain any work orders for the beneficiary. Nor does the record contain sufficient details regarding the actual duties the beneficiary would perform in the context of his assigned work in Newton Square, Pennsylvania, Alpharetta, Georgia and Bolingbrook, Illinois. As such, the record contains insufficient evidence of the specific duties to which the beneficiary would be assigned.

The record contains insufficient information regarding the nature of the beneficiary's proposed position and accompanying duties. The record does not contain a detailed description of the beneficiary's duties from the actual end-clients. Without a comprehensive description of the specific project to which the beneficiary would be assigned and a detailed description of the beneficiary's proposed duties in relation to this project from the entity that requires the beneficiary's services, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

In support of this analysis, USCIS cites to *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000) (hereinafter "*Defensor*"), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor,* the court found that that evidence of the client

companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the job description provided by the petitioner indicates that the beneficiary would be working on client projects. Despite the director's specific request for documentation to establish the actual job duties in relation to those projects, however, the additional evidence submitted by the petitioner was insufficient. The AAO, therefore, cannot analyze whether the beneficiary's duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Although the director also denied the petition because the petitioner had not demonstrated it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, and that the petitioner has sufficient work for the requested period of intended employment, the AAO affirms, but shall not discuss, these additional issues because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.