U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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[redacted]

FILE: EAC 07 247 51389 Office: VERMONT SERVICE CENTER Date: OCT 0 2 2009
[redacted]

IN RE: Petitioner:
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 service center director denied the immigrant 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 is a software development, engineering, and consulting company that seeks to employ the beneficiary as a "computer programmer/software engineer." 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 on the basis of his determination that the petitioner had failed to establish: (1) that the proposed position qualifies for classification as a specialty occupation; and (2) that it had submitted a valid labor condition application (LCA).

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *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, a proposed 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 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.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director's determination that the record lacks documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment, and therefore whether his services would actually be those of a "computer programmer/software engineer" for that entire period of time.

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 filed the instant petition on August 23, 2007, and outlined the duties proposed for the beneficiary in its August 22, 2007 letter of support. According to the petitioner, the beneficiary would be responsible for performing the following tasks:

- Planning, developing, testing, and documenting computer programs;
- Evaluate user requests for new or modified programs, compatibility with current systems, and computer capabilities;
- Consult with users to identify current operating procedures and clarifying program objectives;
- Formulating plans;
- Submitting plans to users for approval;
- Preparing flowcharts and diagrams to illustrate the sequence of steps programs must follow;
- Describing the logical steps for coding and computer language;
- Entering codes and commands to run and test programs;
- Detecting and modifying syntax or logic errors;
- Writing documentation to describe program development, logic, coding, and corrections;
- Assisting users in solving operating problems; and
- Providing technical assistance to user group.

In his December 17, 2007 request for additional evidence, the director requested, among other items, a detailed itinerary with the dates and locations of services to be performed, as well as a copy of the contract with the end user of the beneficiary's services which specifically mentions the beneficiary and the duties he would perform for that end user.

The petitioner responded to the director's request for additional evidence on January 29, 2008. In its January 28, 2008 letter, the petitioner stated that the beneficiary would perform services for AARP in Rockville, Maryland, pursuant to a contract between the petitioner and Convergenz, LLC (Convergenz). The petitioner submitted a copy of a June 13, 2006 "independent contractor agreement between the petitioner and Convergenz. The AAO notes that the language of this agreement specifically stated that the agreement would be valid for only year. The petitioner also submitted an undated "work memo," which called for the beneficiary to perform services for

AARP from July 9, 2007 until July 31, 2008.[1] The AAO notes that the undated "work memo" was not issued pursuant to the June 13, 2006 independent contractor agreement; rather, it was issued pursuant to a July 9, 2007 independent contractor agreement that is not contained in the record of proceeding. Finally, the petitioner submitted a January 24, 2008 letter from AARP, the end-user of the beneficiary's services, which stated that the beneficiary was presently working at its site in Rockville, Maryland.

In his July 1, 2008 denial, the director found AARP's letter deficient. According to the director, AARP's letter failed to contain "a proper description of the work duties to be performed" at its site. As noted by the director, AARP's letter failed to describe "the specific duties the beneficiary would perform."

The AAO agrees. AARP's January 24, 2008 letter states only that the beneficiary is working as a software engineer consultant, that he is working with its "BSM team," and that he is involved in multiple projects. No further meaningful information regarding his duties was provided. As such, the record lacks meaningful information, from the actual end-user of the beneficiary's services, regarding the actual duties proposed for the beneficiary. The AAO, therefore, cannot make a determination as to whether the proposed position qualifies for classification as a specialty occupation, as the record is devoid of information regarding his duties.

Moreover, even if such were not the case, the record would still be deficient, as it does not indicate that the petitioner has secured work for the beneficiary to perform during the entire period of requested employment (August 30, 2007 through August 30, 2010). As was noted previously, the undated "work memo" that the petitioner submitted in response to the director's request for additional evidence called for the beneficiary to perform services for AARP from July 9, 2007 until July 31, 2008. The AAO also notes that the document entitled "Work Order #662702," which the petitioner submits on appeal, also lists a July 31, 2008 "end date" for the project.

For all of these reasons, the AAO finds that the record fails to contain substantive evidence about any particular project on which the beneficiary would work during the entire period of requested employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not

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[1] The AAO acknowledges the existence of a second "work memo" in the record of proceeding which calls for the beneficiary to work for AARP, pursuant to the agreement between the petitioner and Convergenz beginning June 26, 2006, and naming the "estimated end date" as "open." However, the record indicates that this "work memo" was no longer valid at the time the petition was filed. This "work memo" specifically states that it was issued pursuant to the June 13, 2006 agreement between the petitioner and Convergenz. As noted previously, that agreement specifically stated that it was valid for one year only and, accordingly, was no longer in force at the time the petition was filed. The "work memo" that named July 31, 2008 as the project end date states that it was issued pursuant to a July 9, 2007 agreement between the petitioner and Convergenz, which indicates it is the most current "work memo."

constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 proposed 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.*

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes finding a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the petitioner's failure to establish that the proposed position qualifies for classification as a specialty occupation precludes approval of the petition, no purpose would be served discussing the remaining grounds of the director's denial.

In accordance with its previous discussion, the AAO agrees with the director's determination that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks evidence that when the petitioner filed the petition, the petitioner had secured work for the beneficiary to perform during the requested period of

employment. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). 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). For this reason also, the appeal must be denied.

Although the director also denied the petition on the basis of his determination that the petitioner had failed to submit a valid LCA, the AAO shall not discuss this issue, as the petitioner's failure to establish the existence of specialty occupation precludes approval of the petition.

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.