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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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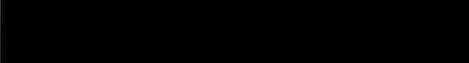


U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 151 51080 Office: CALIFORNIA SERVICE CENTER Date: **OCT 06 2009**

IN RE: Petitioner: 
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)

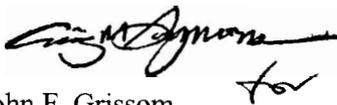
ON BEHALF OF PETITIONER:



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).



John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the record remanded for the entry of a new decision based upon all the evidence on the record.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of programmer analyst as an H-1B nonimmigrant 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 petitioner describes itself as being engaged in computer based information technology, imaging, document management, simulation, proprietary databases, programming, and business consultation services.

The director denied the petition because 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); or (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, counsel for the petitioner contends that the denial was erroneous, and submits a brief in support of these assertions.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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.

When filing the I-129 petition, the petitioner averred in its March 29, 2007 letter of support that it "designs, develops, markets and provides technical support for computer software and products." It further contended that it had 60 employees and approximately \$6 million in annual revenue. Regarding the beneficiary, the petitioner claimed that the beneficiary "will be responsible for custom program development and implementation, and system analysis and design." Additionally, the petitioner stated that her duties would also include providing software support to clients including testing, debugging, and modifying software to meet customer specifications.

The director found the initial evidence insufficient, and issued a request for evidence on June 11, 2007. In the request, the director asked the petitioner to submit evidence demonstrating who the actual employer of the

beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must be submitted.

In a response dated August 29, 2007, counsel for the petitioner addressed the director's queries. Counsel contended that it was the beneficiary's employer, and not an agent, because it would be responsible for the hiring and termination of the beneficiary. The offer of employment between the petitioner and beneficiary, dated April 2, 2007, indicated that the beneficiary would be assigned to projects requiring software services for the petitioner, or for clients who were "located at various geographical locations within the country." In addition, the petitioner submitted a copy of a work order between the petitioner and DMX Group, dated March 15, 2007, enlisting the beneficiary's services for a period of two years beginning October 1, 2007. Finally, the petitioner submitted a copy of the first and last page of a consulting agreement it entered into with DMX Group. The petitioner also submitted additional documentation in the form of corporate tax returns and quarterly wage reports in support of the contention that the petitioner would be the beneficiary's employer.

On September 28, 2007, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, it was required to submit the "end-contracts" between DMX and its actual clients in order to demonstrate the nature of the beneficiary's duties and employment in the United States.

The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Upon review, the record establishes that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn. The petitioner is a software consultancy firm that, with regard to the beneficiary in this matter, will more likely than not provide direct computer programming services to its client as opposed to simply outsourcing the personnel in question. At all times, therefore, the services to be provided for this particular project are performed by the petitioner's employees, and the petitioner is responsible for, and controls all aspects of employment for the personnel it assigns to this client project. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have and maintain direct control over the beneficiary's work at the client's worksite. Based on the evidence submitted, the fact that the beneficiary will perform services at the client facility does not appear in this instance to significantly affect the employer/employee relationship that will exist between the petitioner and the beneficiary. The petitioner will engage the beneficiary to work in the United States for at least a two-year period, will create and maintain an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner therefore qualifies as a United States employer in this instance, and the director's finding to the contrary is withdrawn.

The next issue to be determined is whether the petitioner provided a complete itinerary¹ for the beneficiary's work to be performed from October 1, 2007 to September 14, 2010. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location. As noted by the petitioner in its letter of March 29, 2007, it provides software consulting and support services for a number of clients pursuant to contracts entered into with those clients.

Upon review, the petitioner has not provided contracts for the period of time requested on the petition. As stated above, the requested validity period set forth on Form I-129 is from October 1, 2007 to September 14, 2010. While the petitioner did provide a copy of its contract with DMX and its work order for the beneficiary's services with DMX for a period of two years, the petitioner did not provide work orders establishing where the beneficiary would be working after the termination of the work order with DMX. The AAO, therefore, concludes that the petitioner has not provided an itinerary for the beneficiary's work to be performed from the expiration of the DMX agreement in October 2009 through September 14, 2010. Therefore, the record lacks evidence to demonstrate the beneficiary's itinerary for the entire period of requested stay in the United States.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for copies of contracts between the petitioner/beneficiary and clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries whether or not it may be deemed initial required evidence to establish eligibility for the benefit sought, e.g., to determine when, where, and for whom the beneficiary will provide services and to be able to analyze whether the services to be performed by the beneficiary will be in a specialty occupation. Upon review, the director properly exercised his discretion to request the contracts described above.² In response to the director's request for evidence, the petitioner provided the contract and work order with DMX. As noted above, however, this one contract does not cover the entire validity period requested in the petition. Therefore, once the DMX agreement terminates, there is no evidence indicating specifically where the beneficiary will be employed, or the specific duties to be performed by the beneficiary, thereafter. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that the itinerary shall establish the dates and locations of employment. The documentation submitted by the petitioner does not provide that information. The record does not establish the locations of employment for the beneficiary during his *entire* requested period of stay in the United States. Therefore, if the instant petition otherwise met the requirements for approval, the petition could have been approved not for the period requested by the petitioner, but for the period covered by the DMX agreement.

¹ Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. § 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

Nevertheless, there are additional issues not addressed by the director that preclude a finding of eligibility in this matter.

First, it does not appear that the beneficiary will be employed in a specialty occupation.

It should be noted that 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 viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is 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 Immigration and Nationality Act (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.

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 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), U.S. Citizenship and Immigration Services (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 contains insufficient evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a programmer 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 29, 2007 provided a vague overview of the beneficiary’s proposed duties. Specifically, the petitioner stated:

As a Programmer Analyst with [the petitioner], [the beneficiary] will be responsible for custom program development and implementation, and system analysis and design. Additionally, she will provide software support to our clients which will include testing, debugging and modifying software to meet customer specifications. This position requires an individual with a degree in computer science, physics, engineering, mathematics, or a related field. [The beneficiary] will work as a member of a team and will be supervised by a Team

Leader/Project Manager; and will use established methods and procedures to implement the project.

In addition, the work order outlining the project description for DMX, dated March 15, 2007, identifies the following duties of the beneficiary:

[The beneficiary] will be involved in the software development lifecycle of the YAPA Business Application, including: developing the project strategy; gathering the user requirements; and designing, developing, and deploying the application. She will have a special focus on all issues involving automated testing, QA work and tasks, and user support and training. . . .

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director's specific request for these documents, the petitioner failed to comply. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Upon review of the evidence, the AAO concurs with the director's findings. The letter of support provides a generic overview of the beneficiary's duties. Moreover, the work order with DMX provides no specifics with regard to the beneficiary's actual duties. Therefore, the record contains no definitive statement of the beneficiary's duties while working for DMX or alternatively for other yet to be determined or yet to be identified clients. It is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. It is necessary, therefore, to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

As discussed above, the record contains simply the letter of support which outlines the proposed duties of the beneficiary, and the work order for DMX which provides vague information regarding one end-client and its requirements for the beneficiary. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. 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. at 165.

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 *Defensor*, the court found 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, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites as necessary. However, the work order submitted for the project through DMX provides little detail regarding the specific nature of the duties of the proffered position. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

In addition, there are discrepancies in the proffered salary and the prevailing wage for the position of programmer analyst. For example, on Form I-129, the petitioner contends that the beneficiary’s annual salary will be \$49,712. However, the petitioner’s Offer of Employment indicates in Section III, entitled “Compensation and Other Benefits,” that the beneficiary’s annual salary will be \$61,027. Moreover, the labor condition application (LCA) with a work location of Bellevue, WA lists the prevailing wage as \$61,027, whereas the LCA for Fremont, CA lists the prevailing wage as \$49,712. These discrepancies have not been resolved. 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). Therefore, it cannot be found that the petitioner will pay the beneficiary the required prevailing wage. It also cannot be found that LCAs have been submitted for all of the beneficiary’s potential worksites. For these additional reasons, the petition cannot be approved.

Accordingly, the AAO is unable to find the proffered position qualifies as a specialty occupation, and finds unresolved issues regarding the proffered wage to be paid to the beneficiary and the petitioner’s compliance with the law’s prevailing wage and LCA requirements. The director did not address these issues. Therefore, the director’s decision will be withdrawn and the matter remanded for the entry of a new decision. The director in her discretion may afford the petitioner reasonable time to provide additional evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of this specialty occupation. The

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director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision dated September 28, 2007 shall be withdrawn and the record remanded for the entry of a new decision.