U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 258 51065 OFFICE: CALIFORNIA SERVICE CENTER DATE: OCT 0 8 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 avers that it is a software development and computer programming company that was established in 1998 with 135 current employees. It seeks permission to employ the beneficiary as a programmer analyst and, 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: (1) the petitioner failed to establish that the proffered position is a specialty occupation; (2) the petitioner does not meet either the definition of U.S. employer or agent; and (3) the petitioner has not established that the LCA it submitted is valid. On appeal, the petitioner submits copies of documents already included in the record as well as new evidence.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary issue, the AAO affirms the director's decision on the above issues regarding the failure to establish an employer-employee or agent relationship and to provide a valid LCA for the requested period of employment. The AAO will not, however, further address these issues because the petitioner has failed to establish that the proffered position is a specialty occupation. Since the classification of the position as a specialty occupation is the most crucial issue in the adjudication of an H-1B petition, this decision will focus solely on the petitioner's failure to establish that the proffered position requires the attainment of a bachelor's degree, or the equivalent, in a specific discipline.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it wished to employ the beneficiary as a programmer analyst for "in-house" projects at its business premises. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 28, 2007. In the request, the director noted the petitioner's business industry and requested, in part, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties, as well as evidence regarding its relationship with the beneficiary.

In its response, the petitioner submitted, in part, a copy of a contract between it and [redacted] and a letter from [redacted]. The letter from [redacted] was dated January 29, 2008, and stated that the beneficiary would be assigned to a project for another company called [redacted]. The [redacted] letter writer provided a description of its and [redacted] businesses, as well as a project timelines. The [redacted] letter writer stated that the beneficiary would be working at its offices, but it did not describe the duties that the beneficiary would perform.

On March 20, 2008, the director denied the petition. The director declined to find that the proffered position was a specialty occupation because, as an employment contractor, the petitioner was in the business of contracting its employees to client sites. While acknowledging the letter from [redacted], the director found it

insufficient because there was no information from [redacted] client, [redacted] regarding the beneficiary's specific duties, or a contract between [redacted] and [redacted] The director also noted an inconsistency in the record regarding the beneficiary's intended place of employment; when filing the petition the petitioner stated that the beneficiary would work on in-house projects, while in response to the RFE, the petitioner stated that the beneficiary would be working at [redacted] business premises. The director concluded that, without evidence regarding what duties the beneficiary would actually perform for the proffered position could not be classified as a specialty occupation.

On appeal, the petitioner submits a letter and additional evidence. The petitioner states that it is impossible "by virtue of simple contract law and business confidentiality rules" for it to obtain a contract between [redacted] and [redacted] and instead submits a printout from [redacted] website that lists [redacted] as one of its clients. The petitioner also states that there is no "clear reason" why a position that U.S. Citizenship and Immigration Services (USCIS) has approved in the past for the petitioner should now not be considered a specialty occupation.

Upon review of the record, the AAO agrees with the director's decision to deny the petition.

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 determined to be a specialty occupation. Therefore, of great importance to this proceeding 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 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), 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. 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.

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.*

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 AAO will first address a critical point that the director made in the denial letter regarding the change in the beneficiary's proposed duties and work location from the time that the petition was filed until the petitioner's response to the RFE. When filing the petition, the petitioner maintained that "the establishment, venue and location of the services that will be performed [by the beneficiary] are in-house in our office located at Farmington Hills, Michigan. Thus, it was clear at the time of filing the petition that the petitioner's intent was to employ the beneficiary on unnamed projects within its business premises. In response to the RFE, however, the petitioner made a material change to the terms and conditions of the beneficiary's employment. Instead of working within the petitioner's business premises, the beneficiary would be working at the office of [redacted] on a project that Tecra had procured from one of its clients, [redacted]

The issue with the petitioner changing the terms and conditions of the beneficiary's employment is not, as the petitioner asserts, related to the LCA but rather to the petitioner making material changes to this petition. These types of material changes require the filing of an amended petition with a new LCA. 8 C.F.R. 214.2(h)(2)(i)(E).

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As the petitioner asserted at the time of filing that it would employ the beneficiary on in-house projects, it is the evidence related to such an assertion that shall be assessed, not the evidence of work for the beneficiary that the petitioner submitted between [redacted][1]

In its initial letter of support, the petitioner provided a generic description of a programmer analyst with its company. Nothing in this generic description related to a particular project on which the petitioner intended the beneficiary to work. The petitioner also did not submit any evidence of the type and scope of in-house project(s) that it had secured for the beneficiary. 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's letter of support that contains only its generic programmer analyst position description, does not establish that any of the duties described 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 certification in the programs.

The record lacks any evidence to establish either that: (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. 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)). Accordingly, the petitioner has not established 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)*.

While the petitioner finds fault with the director for denying this petition because it has received H-1B approvals from USCIS for other programmer analyst positions within its company, the AAO notes that it is not required to approve applications or petitions where eligibility has not been demonstrated, merely because

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[1] Even if the AAO had accepted the evidence regarding the beneficiary's work for [redacted], it would not have been sufficient to meet the petitioner's burden of proof. There is no description of the beneficiary's duties from [redacted], the ultimate user of the beneficiary's services. The AAO also observes that the contract between the petitioner and [redacted] expired in May 2007. It is unclear how [redacted] was able to obtain the beneficiary's services from the petitioner for a project with [redacted] given the lack of a contractual agreement between the petitioner and [redacted]

of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The director's decision does not indicate whether she reviewed the prior approval of the petitioner's other nonimmigrant petitions. If, however, the previous nonimmigrant petitions were approved based on the same evidence that is contained in the current record, the approvals would constitute material and gross error on the part of the director. Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a prior nonimmigrant petition on behalf of a petitioner for a similarly titled position, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

ORDER: The appeal is dismissed. The petition is denied.