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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

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[redacted]

FILE: EAC 08 138 51675 Office: VERMONT SERVICE CENTER Date: OCT 22 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:

[redacted]

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, Vermont 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 software development and consulting business and indicates that it currently employs 352 persons. It seeks to employ the beneficiary as a programmer 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 the proffered position qualifies as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, that the petitioner will act as the beneficiary's employer, and that the petitioner has complied with the conditions of the labor condition application.

On appeal, the petitioner's president states, in part, that, for the year 2007, the petitioner's gross annual income was more than $28 million and the petitioner paid more than $21 million in salaries and wages, and thus the petitioner has demonstrated that it possesses the financial ability to support all of its current employees and any incoming employees, including the beneficiary. The petitioner's president also states that the petitioner hires many "Masters Students" from many universities, and that the beneficiary holds a Master of Science degree from a U.S. university. As supporting documentation, the petitioner submits copies of previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its July 27, 2007 letter of support as a business engaged in "software development, manufacturing, training and computer consulting services." The petitioner also stated that "probably the most critical task of an analyst is identification and clear definition of [the] needs of the customer."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on April 21, 2008. In the request, the director asked the petitioner to submit additional evidence, including a detailed 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 latest federal income tax return; the petitioner's quarterly state tax returns for 2006 and 2007; the petitioner's business contracts; the petitioner's lease agreement and photographs of the interior and exterior of its business premises; the petitioner's organizational chart; and a list of the petitioner's employees.

In a letter dated June 3, 2008 from the petitioner's counsel submitted in response to the director's RFE, the beneficiary's duties are described as working "for the entire duration of the H1B period" on the petitioner's in-house project, "Job Portal Business Case Brief." Counsel submitted additional documentation, including: the petitioner's Certificate of Incorporation and related documentation; a company profile; a description of the "JOB Portal Business Case Brief" project; copies of the petitioner's various contracts, work orders, and projects; a lease agreement, floor plan and office

photographs; a list of the petitioner's employees; copies of job advertisements; and financial and tax-related documentation pertaining to the petitioner.

On June 18, 2008, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation, that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation, that the petitioner will act as the beneficiary's employer, and that the petitioner has complied with the conditions of the labor condition application.

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 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 July 27, 2007 listing the beneficiary's proposed duties has been reviewed. The proposed duties are summarized as follows: identifying the process re-engineering needs of the petitioner's clients; designing new process structures and information systems; programming and implementing software applications and packages; training the petitioner's clients on the use of information systems; and providing technical support.

On appeal, the petitioner does not specify the specific duties that the beneficiary would perform during the requested validity period. The AAO acknowledges counsel's June 3, 2008 letter, in

which counsel asserts that the beneficiary would be assigned to the "Job Portal Business Case Brief" project for the entire H-1B period of employment. The record, however, contains insufficient details regarding the actual duties the beneficiary would perform in the context of this project. Moreover, counsel's assertion that the beneficiary would be assigned exclusively to the petitioner's in-house project conflicts with the petitioner's July 27, 2007 letter of support, in which the beneficiary's proposed duties include performing services for the petitioner's clients. 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). As discussed above, the proposed duties indicate that the beneficiary would be performing services for the petitioner's clients. The record, however, does not contain a detailed description from an actual end-client of the beneficiary's proposed duties. 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. As mentioned above, the petitioner does not indicate on appeal to which specific project the beneficiary would be assigned. 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*.

Although the director also denied the petition because the petitioner had not demonstrated that it will act as the beneficiary's employer and that it is in compliance with the conditions of the labor condition application, the AAO affirms, but shall not discuss, whether the petitioner meets the definition of a U.S. employer and has complied with the conditions of the labor condition application 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.