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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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FILE: EAC 08 143 51245 Office: VERMONT SERVICE CENTER Date: OCT 26 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).

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 business 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.

On appeal, counsel states, in part, that the proffered position meets all four of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also states that the beneficiary will work with the petitioner's IT consultants "on assignments to analyze client businesses and devise business process and information systems solutions to enhance business operations" and "will be assigned to consulting assignments at client sites and will develop consulting analyses, workflow diagrams, business process diagrams, and strategic plans in furtherance of client consulting projects." Counsel states further that the beneficiary will be included on the team for its in-house "Motor Vehicle Tracking System" project as a business analyst and, upon the project's completion, "will be called upon [along with the petitioner's marketing/sales staff] to create relationships with potential clients and [future] users of this new software project." As supporting documentation, counsel submits an evaluation from [redacted] from the Frank G. Zarb School of Business at Hofstra University, concluding that the proffered position "is clearly a professional consulting position for which an MBA or a related degree would be required." Counsel also submits copies of previously submitted documentation, including the petitioner's in-house "Motor Vehicle Tracking System" project.

When filing the I-129 petition, the petitioner described itself in its March 31, 2008 letter of support as "a leading provider of IT services, offering specialized solutions and resources to meet the evolving needs of business."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 7, 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 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 16, 2008 from the petitioner submitted in response to the director's RFE, the beneficiary's duties are described as working on the petitioner's in-house project "Motor Vehicle Tracking System" for the duration of her entire stay in the United States. Counsel submitted

additional documentation, including: a publication listing the petitioner among "America's Fastest Growing Private Companies 2007"; a description of the petitioner's in-house "Vehicle Tracking System" project; copies of the petitioner's various contracts and related documentation; a lease agreement, floor plan and office photographs; a list of the petitioner's employees and related documentation; an organizational chart; copies of the petitioner's job advertisements; and financial and tax-related documentation pertaining to the petitioner.

On February 9, 2009, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation.

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), 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 is unclear as to whether the beneficiary's services would be that of a business 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 31, 2008 listing the beneficiary's proposed duties has been reviewed. The proposed duties are summarized as follows: preparing business related analyses and forecasts; analyzing trends in banking, manufacturing, sales, finance, general business conditions, and other related areas; compiling and preparing reports, graphs, and charts; assisting in

the development of business policies; conducting special business-related studies; identifying, qualifying, and securing business opportunities; collecting marketing information about customers; ensuring the capture, utilization, storage, and dissemination of IT domain knowledge; planning and implementing a domain competency road map and business plan; supporting the sales team; coordinating the planning and development for market research; guiding and mentoring project execution teams; and preparing budgets, collaterals and sales support materials.

On appeal, counsel does not specify the specific duties that the beneficiary would perform during the requested validity period. The AAO acknowledges the petitioner's June 16, 2008 letter, in which counsel asserts that the beneficiary would be assigned to the in-house "Motor Vehicle Tracking System" project during her entire stay in the United States. The description of the petitioner's "Motor Vehicle Tracking System" project, however, does not contain a breakdown of the duties assigned specifically to the beneficiary. 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)). It is also noted that the duties listed in the petitioner's March 31, 2008 letter are described only generically and differ from the duties described in the petitioner's response to the director's RFE, which pertain to a specific project. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the generic duties to a specific project.

The record is also inconsistent regarding the job location. Counsel's statement on appeal that the beneficiary "will be assigned to consulting assignments at client sites and will develop consulting analyses, workflow diagrams, business process diagrams, and strategic plans in furtherance of client consulting projects" conflicts with the description of the proposed duties in the petitioner's June 16, 2008 letter, indicating that the beneficiary would be assigned to the petitioner's in-house "Motor Vehicle Tacking System" project, which "does not require any on-site visits, and thus the beneficiary will be working on the Motor Vehicle Tracking System project directly at [the petitioner's] corporate offices for the full length of the H-1B validity period." The record contains no explanation for this inconsistency. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The opinion rendered by the professor is not probative, as the opinion is based upon insufficient information about the particular position proposed here. The professor describes the duties in exclusively general and generic terms that reveal nothing about the actual work that the beneficiary would perform within the context of this particular petitioner's business. The professor does not

demonstrate knowledge of the petitioner's particular business operations. He does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Specifically, [redacted] does not discuss the duties that the beneficiary would perform in the context of the petitioner's in-house "Motor Vehicle Tracking System" project, to which, according to the petitioner's June 16, 2008 letter, the beneficiary would be assigned during her entire stay in the United States. Moreover, the professor's opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record contains insufficient information regarding the nature of the beneficiary's proposed position and accompanying duties. As mentioned above, the record is inconsistent regarding the exact duties of the beneficiary. 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 descriptions provided by counsel and the petitioner indicate 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)*.

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.