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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



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FILE: WAC 08 144 53256 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

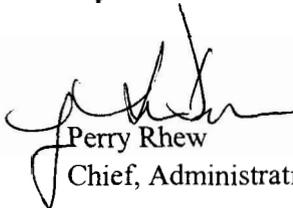
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[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, 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides information technology products and services, that it was established in 1997, employs 55+ persons, and has an estimated gross annual income of \$4,000,000. It seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 22, 2011. Accordingly, the petitioner 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).

On August 15, 2008, the director denied the petition. The director observed that the petitioner was in the business of locating persons for placement with third party organizations to complete computer projects. The director noted that the petitioner must submit a description of the conditions of employment from the authorized officials of the ultimate end user company describing in detail the duties the beneficiary would perform. The director determined that without valid contracts establishing the beneficiary's computer related duties, the petitioner had not established that the proffered position is a specialty occupation. The director concluded that the record was insufficient to establish eligibility for the benefit sought.

The AAO observes preliminarily, that the director incorrectly identified the petitioner by name and location in the second paragraph of her decision; however, the remaining information in the decision relates directly to the petitioner. The AAO finds that the director's typographical error has not adversely impacted the notice given to the petitioner of the director's determinations in the denial decision.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and counsel's brief in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its March 28, 2008 letter appended to the petition that the "majority of [its] revenues are generated through IT staffing services consultants who provide technical consulting services to clients including Chrysler, Microsoft." The petitioner noted that the resulting profits generated by providing services are reinvested to support a major software product, Manpower Utilization Improvement System (MUIS), being developed at its facility in Bingham Farms, Michigan. The petitioner indicated that its MUIS software project required professional programmers to continue the internal testing and analysis of project requirements and modules, as the MUIS system is further developed. The petitioner indicated the beneficiary would perform the following duties for the MUIS software:

- Responsible for the technical design, development, testing, and analysis of our MUIS software application system internal product development project.
- Will test[,] gather, analyze, and interpret functional specifications and application requirements.
- Will design and evaluate the feasibility if [sic] interface between MUIS Software and various systems such as Corporate Attendance Tracking Systems (CATS), Performance Feedback Systems (PFS) and Automated Manufacturing Planning Systems (AMPS).
- Will analyze software requirements and program various system modules including Absenteeism, Assignment, Training, Quality Quotient, Overtime Equalization, Scarp, Injury and Launch Readiness. In addition, [the beneficiary] will build security interface between MUIS and corporate security systems with single sign-on capability.
- Will test and troubleshoot all use cases within the various MUIS modules, as well as integrate enhancements into existing system features.
- Will perform data migration of end users training and technical support to end users during pilot, launch, and maintenance phase of the production deployment of MUIS software at the client location.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 10, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested evidence that a specialty occupation exists for the beneficiary; requested an itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested copies of contractual agreements, statements of work, work orders, service agreements, and letters from authorized officials of the ultimate client companies where the work will actually be performed that provides a comprehensive description of the beneficiary's proposed duties; requested documentary examples of the petitioner's products or services; and asked for documentation of past employment practices showing H-1B employees routinely met conditions of employment.

In a July 18, 2008 response to the director's RFE, counsel for the petitioner provided the petitioner's February 7, 2008 employment offer signed by the beneficiary on February 15, 2008. Counsel also submitted a document titled "Itinerary of the Services" that indicated the beneficiary "is expected to be employed in the development of MUIS product" and that this is "not a specific project based on contracted work from other end clients." The petitioner indicated on the itinerary that the product development is ongoing and that in terms of the projected work load to support the current development and modules to be developed the next year, the petitioner has enough work for more than three years. The record also included copies of the petitioner's advertisements for a myriad number of computer-related jobs in which the petitioner expected bachelor or master's degrees (or foreign education equivalent of same) and/or experience of the successful candidates. The record further included information regarding the petitioner's MUIS software product, including a product presentation, scope of work, market potential and analysis, etc.

As noted above, the director denied the petition on August 15, 2008. The director observed that in response to her RFE, the petitioner had indicated that the beneficiary's work would be performed at the petitioner's facility in Bingham Farms, Michigan but had not provided contracts to show specialty occupation work with the actual end client companies. The director also observed that in the petitioner's initial description of the beneficiary's duties, the petitioner indicated that the beneficiary "[w]ill perform data migration of end users training and technical support to end users during pilot, launch, and maintenance phase of the production deployment of MUIS software at the client location." The director then determined that the petitioner had not provided valid contracts between the petitioner and the end users of the beneficiary's services and thus had not established that the beneficiary's duties to be performed comprised the duties of a specialty occupation. The director further determined that the petitioner had not established that it had sufficient work for the requested period of intended employment.

On appeal, counsel for the petitioner asserts:

[The beneficiary] will not be stationed at any of [the petitioner's] client's worksites during his assignment. Instead, [the petitioner] requires [the beneficiary's] services to further design, develop, refine and eventually launch their MUIS software application. As a Programmer/Analyst with [the petitioner], [the beneficiary] will be responsible for providing professional programming, testing and analysis support and services as [the petitioner] continues to move their in-house product development software project into final launch phase and eventual implementation into Chrysler manufacturing facilities throughout the U.S.

Counsel notes that the petitioner's MUIS software application is still being developed internally at their headquarters in Michigan and that the beneficiary's services are not required at any of Chrysler's manufacturing facilities at this time. Counsel acknowledges that the beneficiary's job duties include the eventual "data migration of end users training and technical support to end users during pilot, launch, and maintenance phase of the production deployment of MUIS software at the client location" but contends that this would encompass approximately ten percent of the beneficiary's job duties. Counsel adds that as the MUIS software application is still in product development, testing and refinement phases, no specific arrangements for any on-site implementation of the product has been made at this time. Counsel further adds that it is anticipated that implementation of the product at Chrysler is tentatively set for early 2009 but that no concrete plans have been approved and/or finalized between Chrysler and the petitioner. Counsel provides a July 14, 2008 letter on Chrysler letterhead signed by a senior manager and a manager that indicates: "the first production implementation is expected to take place early 2009. In the meantime, [the petitioner] is expected to complete the production interfaces before end of 2008, working in coordination with IT department, to ensure that the product is production ready for the plant floor." Counsel asserts that even during the implementation and testing phases of the MUIS application at Chrysler's manufacturing sites, the petitioner will still be the direct employer of the beneficiary with the sole authority to direct his daily work related duties and responsibilities.

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Although the director could have better articulated the reasons for denying the petition, the AAO affirms the director's ultimate conclusion that the record is insufficient to substantiate the beneficiary's eligibility for this benefit. The AAO finds that the petitioner has provided evidence of an in-house project, but that evidence of an in-house project without an allocation of resources and the specific duties of each resource on the project, is insufficient to establish that the general position of programmer analyst offered to the beneficiary qualifies as a specialty occupation. The AAO determines that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the actual duties of the proffered position have been sufficiently described by the petitioner to establish the position as a specialty occupation. In that regard, the AAO will examine the descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties and whether those duties comprise the duties of a specialty occupation.

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. The AAO observes that the issue is whether the petitioner has established that the beneficiary's actual duties for the ultimate user of the beneficiary's services comprise the duties 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), 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.

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 in this matter has provided a general overview of the beneficiary's proposed duties. As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the petitioner's information regarding its MUIS software product. Upon review, the AAO does not find that the petitioner has allocated a specific number of resources to the project or described the number of programmer analysts or other computer-related positions that will assist in working on the project. The petitioner provides an overview of general programming duties but does not indicate the specific duties the beneficiary will perform on the project. The petitioner does not identify a team to which the beneficiary will be assigned and does not include the roles of the team members. This is of particular importance when petitioning for an individual as a generic programmer analyst. 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 in this matter has provided a general outline of programming duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language is necessary. 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 certifications in the programs.

In addition, the petitioner has not provided a description of the beneficiary's daily duties that is specifically connected to particular elements, applications, or endeavors related to the petitioner's development of the MUIS software. 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)).

The AAO acknowledges the information in the record that shows the petitioner regularly recruits individuals with a baccalaureate or higher degree. However, the record does not provide the underlying documentation that the petitioner's computer personnel only work on assignments that require a theoretical and practical application of highly specialized knowledge. General statements and an overview of proposed work are insufficient to establish that a specific proffered position is a specialty occupation. The general outline of programming duties is insufficient to establish that the beneficiary's actual duties as they relate to the MUIS project comprise the duties of a specialty occupation. The description is broadly stated and vague regarding details of the level of support and actual daily actions that the beneficiary will be expected to perform.

Without evidence describing the specific duties the petitioner requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, 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. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO observes that the petitioner's self-imposed standards in its recruitment of computer personnel without the specific details necessary to ascertain that the actual work to be performed is work that actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, does not establish that the position is a specialty occupation. The AAO finds that if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees or the equivalent. The petitioner in this matter does not provide the underlying statements of work or descriptions of actual work that adequately describe and detail the specific duties the beneficiary will perform as his work relates to the MUIS project. The AAO, therefore, is unable to analyze whether the beneficiary's duties 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 position meets any of the requirements for a specialty occupation set forth 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).

The AAO also notes the director's observation that a portion of the described duties suggest that the beneficiary may be assigned to work on implementing the MUIS project at Chrysler manufacturing plants and the petitioner's response that this would only take 10 percent of the beneficiary's time. The AAO finds that the nature of the petitioner's business primarily as a staffing company and the petitioner's acknowledgement that the beneficiary may work at a location other than the petitioner's office raises questions regarding the validity of the LCA submitted for the beneficiary for Bingham Farms, Michigan. Without further information regarding the assignment of the beneficiary to various manufacturing locations, the AAO finds that for this additional reason the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed.

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