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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 53544 Office: VERMONT SERVICE CENTER Date: **OCT 29 2009**

IN RE: Petitioner:
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, 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is a mobile web portal for advertising-based casual gaming, that it was established in 2007, employs 12 persons, and has an estimated gross annual income of $254,818. It seeks to employ the beneficiary as an application developer from October 1, 2008 to September 13, 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 June 19, 2008, the director denied the petition. The director observed that the petitioner had not provided evidence that it had sufficient work to employ the beneficiary for the requested employment period in a specialty occupation. The director determined that the evidence of record did not establish that the proffered job qualified as specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation filed with USCIS on April 1, 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 14, 2008 letter appended to the petition that it was established to "provide a mobile gaming portal – developing multiplayer games for existing and next-generation web-enabled mobile phones. The petitioner indicated that it required the services of a "software developer" to design and develop games and infrastructure to support the company's portal over the mobile web environment." The petitioner further indicated:

> The duties of the position are to develop and write computer programs, multi-player games and applications; write, update and maintain programs; analyze the need for software modification; provide design, development, testing and implementation of internet applications and web-based software solutions.

The petitioner noted that the beneficiary would work at its offices in New York, New York.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 25, 2008. In a June 5, 2008 response to the director's RFE, counsel for the petitioner provided a game catalog listing that described the games created by the company's team of developers, a copy of its sublease and master lease agreement, a list of its employees, and draft financial statements, brochures and photographs of its facility.

As noted above, the director denied the petition on June 19, 2008. The director noted that the petitioner's game catalog listed only one game still in development and the petitioner's department summary listed four employees on the game development staff and two more employees in the

creative area. The director questioned whether the petitioner had sufficient work for the entire period of requested employment for the beneficiary. The director noted that the record did not include contracts, work orders, or statements of work to establish that the petitioner is in the business of providing goods and services. The director concluded that the record did not establish that the proffered position qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that the position of a software developer like a computer programmer and software engineer are specialty occupations, especially if the position involves custom design, modifications and problem solving software. Counsel cites an unpublished decision and a Service memorandum in support of his claim. Counsel also asserts that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) confirms that a bachelor's degree is the minimum educational requirement to be qualified for the position of Software Developer. Counsel asserts that the director's conclusion to the contrary is baseless and a clear abuse of discretion. Counsel contends that the director's questioning of the petitioner's ability to sustain another employee performing duties at a specialty occupational level is apparently tied to the petitioner's ability to pay and that the ability to pay is not a consideration in the adjudication of a H-1B petition. Counsel asserts that the evidence on record sufficiently establishes the *bona fides* of the job offer.

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 also observes 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 proffered position has been sufficiently described 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, contrary to counsel's assertion, 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 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 information in the record regarding the petitioner's computer gaming business. Upon review of this information, the AAO does not find that the petitioner has described specific projects to which the beneficiary would be assigned. The petitioner

does not allocate a specific number of its resources to any particular project(s) or describe the number of computer -related positions that will assist in working on any specific current or proposed project. The description of the beneficiary's generally-stated duties is not connected to any specific elements, applications, or endeavors related to the petitioner's gaming business. The record does not include any work product or other documentary evidence substantiating that the petitioner has ongoing and valid software applications. 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)).

Without statements of work 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 petitioner has not provided the underlying documentation necessary to substantiate that the beneficiary would perform the claimed duties set out in the petitioner's letter of support. The AAO acknowledges the petitioner's assertion that the position of software developer requires a theoretical and practical application of highly specialized knowledge. However, an assertion without the underlying description of actual duties and evidence is insufficient. General statements and vague descriptions of an occupation do not establish that a specific proffered position is a specialty occupation. The description the petitioner provides is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. The AAO observes that the *Handbook* reports that a bachelor's degree commonly is required for computer programming jobs, but the *Handbook* 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 has not provided sufficient evidence to establish that the general outline of duties set out in its description 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 certifications in the programs.

The AAO notes counsel's reference to an unpublished decision and a Service memorandum in support of his claim that software developers, like computer programmers and software engineers, are specialty occupations. The AAO finds, however, that without a comprehensive description of the beneficiary's actual duties, the petitioner has not provided sufficient information to establish whether the proffered position encompasses the duties of a computer programmer, applications programmer, software developer, or software engineer. The record lacks sufficient substantive

evidence demonstrating that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Moreover, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO has considered the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position and as observed above, finds that the petitioner has not provided a specific description of duties that establishes the criterion. In that the record offers no comprehensive description of the duties the beneficiary would perform, the petitioner is precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the specific duties the beneficiary would perform, the petitioner has not established that it previously employed degreed individuals to perform similar duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. Again, without a meaningful job description, the petitioner has not established any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. The petition will be denied and the appeal dismissed for the above stated reason. 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.

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