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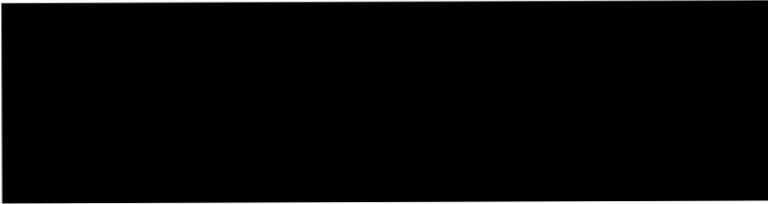
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: WAC 06 067 50438 Office: CALIFORNIA SERVICE CENTER Date: **JAN 06 2010**

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:



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 service center director denied the immigrant visa petition and the Administrative Appeals Office (AAO) remanded a subsequent appeal to the director for entry of a new decision. The director has denied the petition and certified her decision to the AAO for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a software development and production services company that seeks to employ the beneficiary as a computer systems 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 petitioner filed the instant petition on December 19, 2005. The director denied the petition on April 6, 2006, on the basis of her determination that the petitioner had failed to establish: (1) that it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); and (2) that it meets the regulatory definition of an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F). The petitioner appealed the director's decision to the AAO. In its August 16, 2007 decision, the AAO withdrew the director's decision and remanded the matter for further consideration as to whether the proposed position qualifies for classification as a specialty occupation.

The director issued a request for additional evidence on September 11, 2007. The petitioner responded to the director's request on December 4, 2007, and submitted additional documentation into the record. The director, however, found the additional documentation insufficient to establish eligibility. Accordingly, the director denied the petition on March 5, 2008, and certified her decision to the AAO for review. The director has denied the petition on three grounds: (1) that the proposed position does not qualify for classification as a specialty occupation; (2) that the evidence submitted by the petitioner is not credible; and (3) that the petitioner has not established that the beneficiary is eligible for an additional year in H-1B status, pursuant to the American Competitiveness in the Twenty-First Century Act¹, as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act.²

The AAO will first address the director's determination that the proposed position does not qualify for classification as a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (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

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

- (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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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, a proposed 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 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.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record lacks documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment, and therefore whether his services would actually be those of a software engineer for that entire period of time.

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.

As noted previously, the petitioner initially filed the instant petition on December 19, 2005, and outlined the duties proposed for the beneficiary in an attachment to the Form I-129. In her September 11, 2007 request for additional evidence, the director requested, among other items, the following: (1) copies of signed contracts between the petitioner and the beneficiary; (2) a complete itinerary of services or engagements listing the dates of each service or engagement, names and addresses of the actual employers, and names and addresses of the establishment, venues, or locations where services would be performed for the period of time requested; and (3) copies of signed contractual agreements, statements of work, work orders, etc., specifically naming the beneficiary and describing his proposed duties.

The petitioner responded on December 4, 2007 and submitted, among other items, a June 19, 2006 service agreement between [REDACTED] and [REDACTED] which called for [REDACTED] to provide consulting services to Countrywide. The

relevancy of this document to this proceeding, however, is unclear, as the beneficiary's relationship to [REDACTED] has not been established.³

The petitioner also submitted two documents entitled "Order for Goods and/or Services Under Master Agreement" issued by Countrywide, and signed by representatives of Countrywide and the petitioner: one dated June 14, 2006, and one dated September 1, 2006. This document, however, did not reference the beneficiary or any duties he would perform.

The petitioner also submitted an "Extension of Letter of Intent to Personnel Services Agreements" between the petitioner and Countrywide, dated August 30, 2005, which purported to extend an earlier letter of intent between the two companies through September 16, 2005. However, as the earlier letter of intent was not submitted, these two extensions are of little probative value, as they are general in nature.

Finally, the petitioner also submitted information regarding duties to be performed for Countrywide by S-B-⁴, another of the petitioner's employees. However, as such documentation relates to the duties of S-B-, and not those of the beneficiary, they are of little assistance to the petitioner in establishing that the duties of the beneficiary constitute those of a specialty occupation.

Finding this evidence, insufficient to demonstrate the existence of a specialty occupation, a determination with which the AAO agrees, the director denied the petition and certified her decision to the AAO for review.

On certification, the petitioner submits, among other items, a January 1, 2006 "Services Agreement" between the petitioner and Countrywide, which called for the petitioner to perform "certain services" pursuant to statements of work to be attached to the Agreement, as well as a statement of work issued pursuant to that agreement. The AAO notes that although the statement of work called for the beneficiary to perform services for Countrywide in Agoura Hills, California, it did not discuss the duties he would perform in any meaningful way. The petitioner also submits a letter from Countrywide, dated October 25, 2007, which discusses, in very general terminology, the duties of the beneficiary.

Upon review, the AAO finds that the petitioner has failed to demonstrate the existence of a specialty occupation. As a preliminary matter, the AAO notes that the services agreement and

³ The AAO notes that the petitioner's managing director appears to also be the point of contact for [REDACTED]. According to the petitioner, [REDACTED] is its subsidiary. However, as noted, the beneficiary's relationship to [REDACTED] has not been established. Both companies appear to be operating from [REDACTED] in Arcadia, California, which a satellite image from Google Maps indicates to be a home residence.

[REDACTED] (accessed December 18, 2009).

⁴ Name withheld to protect individual's identity.

accompanying statement or work between Countrywide and the petitioner were both prepared after the filing of this petition on December 19, 2005. As such, neither document existed at the time the petition was filed. The petitioner has failed to establish that when it filed the petition the petitioner had secured work for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. at 176, “[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition.”

However, even if such were not the case, the record of proceeding is still insufficient to establish that the proposed position is a specialty occupation, as it still lacks a meaningful description of the duties performed by the beneficiary from Countrywide, the actual end-user of his services. Although the record contains an October 25, 2007 letter from Countrywide, the AAO finds that letter to be vague and generic, and lacking in meaningful information regarding the actual duties to be performed by the beneficiary in relation to the petitioner’s specific business.

Accordingly, the AAO finds that the record fails to contain substantive evidence about any particular project on which the beneficiary would work during the period of requested employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 proposed 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.*

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes finding a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

In accordance with its previous discussion, the AAO finds that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks evidence that when the petitioner filed the petition, the petitioner had secured work for the beneficiary to perform during the requested period of employment. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this reason also, the petition must be denied.

As the petitioner fails to demonstrate the existence of H-1B caliber work for the beneficiary to perform precludes approval of this petition, the AAO need not address the remaining grounds of the director's certification. The AAO affirms, but will not discuss, those grounds of the director's decision.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). See also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g., *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the director's decision affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 to deny the petition is affirmed. The petition is denied.