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U.S. Citizenship and Immigration Services

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FILE: WAC 08 146 51804 Office: CALIFORNIA SERVICE CENTER Date: JAN 12 2010

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:

SELF-REPRESENTED

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.

The petitioner describes itself as a software and financial consultancy business, and indicates that it currently employs two persons. It seeks to employ the beneficiary as a software engineer. 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 employment offer is authentic.

On appeal, the petitioner states, in part, that the petitioner "is involved in [the] development of products for [redacted]" on the petitioner's premises. As supporting documentation, the petitioner submits: a Fictitious Business Name Statement from the registrant [redacted] for the fictitious business name of [redacted]; documentation related to the beneficiary's qualifications; the petitioner's quarterly federal tax returns for the first two quarters of 2008, reflecting one employee; the petitioner's computer-generated payroll information for its one employee; and information from the California Tax Education Council verifying the petitioner's employee as a tax preparer.

When filing the I-129 petition, the petitioner described itself in its March 26, 2008 letter of support as a provider of IT, consultancy, and accounting services, business solutions, and technology consulting.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 9, 2008. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director also requested contractual agreements with the actual end-client firm where the beneficiary would work and the petitioner's lease agreement and floor plan.

In response to the director's RFE, the petitioner submitted the following: the petitioner's offer of employment to the beneficiary, dated March 10, 1008; a Business Protection Agreement signed by the petitioner and the beneficiary on March 25, 2008; an itinerary for the beneficiary, indicating that she will be performing the duties of a software engineer until September 25, 2011, at the petitioner's worksite in Newark, California; a professional services agreement between [redacted] and the petitioner, for the petitioner to provide consultancy services for [redacted] pursuant to a Scope of Work Description signed by the [redacted] president (who is also the petitioner's president) and the petitioner's sole employee (in the capacity of "Manager") on March 22, 2008; a purchase order between [redacted] and the petitioner, again signed by president (who is also the petitioner's president) and the petitioner's sole employee (in the capacity of "Manager") on March 22, 2008, assigning the beneficiary to work on-site at the petitioner's premises, developing

customized modules for the clients of [redacted]; and the petitioner's lease agreement and floor plan.

On August 11, 2008, the director denied the petition. The director denied the petition because the petitioner failed to establish that the employment offer is authentic.

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 employment offer is authentic and/or a specialty occupation exists for the beneficiary, the record is unclear as to whether the beneficiary's services would be that of a software engineer.

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 26, 2008 listing the beneficiary's proposed duties has been reviewed. The petitioner's president states that the beneficiary would perform the duties of a software engineer at its business premises in Newark, California, and describes the proposed duties as follows: convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language; and develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

The AAO acknowledges the petitioner's president's statements on appeal that the petitioner has undertaken "Scanning and Archiving" and "Stock Transactions Importer" projects for [redacted], and that the beneficiary will be involved in the development of

these products. The record, however, does not contain a comprehensive description of the projects listed above or of the beneficiary's proposed duties in relation to those projects. Despite the director's specific request for documentation to establish the actual job duties in relation to the petitioner's client projects, 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 employment offer is authentic and/or 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 as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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.