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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

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

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FILE: WAC 08 085 51081 OFFICE: CALIFORNIA SERVICE CENTER DATE: **NOV 09 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:

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 service center director 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 avers that it is a software consulting business that was established in 2003 and currently has four employees. It seeks permission to employ the beneficiary as a software engineer and, 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 did not submit a job description from the client for whom the beneficiary would perform his services and, therefore, there was insufficient evidence that the beneficiary would be working in a specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it wished to employ the beneficiary as a software engineer. The petitioner submitted a generalized description of the duties that the beneficiary would perform, and the Labor Condition Application (LCA) that the petitioner had certified showed a work location of St. Louis, Missouri. According to the petitioner, the beneficiary would work on a project for [REDACTED] in St. Louis.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 22, 2008. In the request, the director asked the petitioner to submit, among other items, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties, as well as evidence regarding its relationship with the beneficiary.

In its response, the petitioner submitted an Offer of Employment letter relating to the beneficiary, and several contracts. The petitioner also submitted a June 11, 2008 letter from [REDACTED] that stated it had a contract with [REDACTED] to provide a consultant. The [REDACTED] letter stated further that it had a contract with the petitioner for the petitioner to provide a consultant to [REDACTED]. The [REDACTED] letter listed the beneficiary as the consultant and stated that the beneficiary had started working on the project in April 2007.

On July 14, 2008 the director denied the petition. The director declined to find that the proffered position was a specialty occupation because, as an employment contractor, the petitioner was in the business of contracting its employees to client sites. **While acknowledging the [REDACTED] letter and noting some apparent inconsistencies,** the director ultimately found the evidence insufficient to establish that the ultimate user of the beneficiary's services would employ him in a specialty occupation position.

On appeal, the petitioner disagrees with the director's findings and attempts to clarify some apparent inconsistencies. The petitioner also submits additional evidence. The petitioner states on appeal that, when

the beneficiary began working on the [REDACTED] contract in April 2007, he was an employee of another company, not the petitioner. The petitioner clarifies further that in April 2008 after filing the I-129 petition, it hired the beneficiary and the beneficiary remained working on the [REDACTED] project. The petitioner maintains that the beneficiary is working in a specialty occupation position and submits a letter from [REDACTED]. According to the [REDACTED] letter, dated August 1, 2008, the beneficiary's duties include:

- Analyze, design, develop and support custom SAP ABAP solutions for FICO and PS as assigned
- Functional specifications, technical specifications, change control documentation as required by the AB process.

The letter indicates that the project on which the beneficiary is working started on April 2, 2007 and has a projected end date of December 31, 2008.¹

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."

¹ The dates requested on the I-129 petition for the beneficiary's intended employment are March 3, 2008 until March 3, 2011.

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), 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. 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 claimed that the work performed by the beneficiary for [REDACTED] requires a bachelor's degree in engineering or science, with five years of employment experience. Therefore, the AAO shall assess the duties associated with the beneficiary's particular position, as described in the [REDACTED] letter, to determine whether they involve the theoretical and practical application of a body of highly specialized knowledge that are usually associated with a degree in a specific specialty. 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 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.* For this reason, it is the [REDACTED] letter that is critical, not the petitioner's own description of the beneficiary's job.

The duties listed in the [REDACTED] letter are quite generic and do not shed light on the skills that would be required to execute them. For example, out of the two "roles and responsibilities" listed in the [REDACTED] letter, there is one described as "functional specifications, technical specifications, change control documentation as required by the AB process." There is no context provided for this responsibility; it is not clear what role the beneficiary would have executing the tasks of this responsibility or the level of software engineering experience he would be required to possess. Furthermore, the [REDACTED] letter lists several "tools and technologies" that the beneficiary allegedly possesses knowledge of and uses. However, there is no evidence that the knowledge of these tools and technologies can only be gained by possessing a bachelor's degree or its equivalent in a specific specialty. Finally, although the [REDACTED] letter lists that a "Bachelor's degree and 6+ years of SAP and related experience" are required for the position, there is no evidence to support why such a degree and experience are a requirement, and not merely a preference of [REDACTED]. Overall, the letter from [REDACTED] is deficient because it does not provide any evidence to support its conclusions. 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)).

Upon review of the [REDACTED] letter, there is insufficient evidence to satisfy any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petitioner has not established 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)(I).

The AAO also notes, beyond the director's decision, that the petitioner's evidence does not establish that, at the time of filing the petition, it had specialty occupation work to occupy the beneficiary for the dates of requested employment, from October 1, 2008 until September 3, 2011. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The [REDACTED] letter provides a start date of April 2, 2007 for the beneficiary's contract and an end date of December 31, 2008; yet, the petitioner is seeking to employ the beneficiary until September 3, 2011. The petitioner did not submit any evidence that it could employ the beneficiary in a specialty occupation position after the [REDACTED] project was set to end, as its evidence refers only to the [REDACTED] project. Although this issue was not raised by the director, it is an additional reason why the petition cannot be approved.

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).

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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