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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

D2

FILE: WAC 08 069 50656 OFFICE: CALIFORNIA SERVICE CENTER DATE: SEP 03 2009

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:

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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 offers information technology consulting services. It seeks to employ the beneficiary as a senior 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).

On February 28, 2008, the director denied the petition because the petitioner failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a letter.

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 would employ the beneficiary as a senior software engineer. The petitioner indicated on the LCA that the beneficiary would work in San Jose, California. The LCA was certified by the Department of Labor on December 28, 2007.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 23, 2008. In the request, the director noted that the petitioner was engaged in the business of software consultancy and requested, in part, evidence such as contracts, statements of work, work orders or other documentation that could provide a comprehensive description of the beneficiary's proposed duties.

In a response dated February 15, 2008, the petitioner submitted, among other items, a letter, a copy of a contract it had entered into with Oracle, Inc. (Oracle), and a Statement of Work (SOW) it had entered into with GeekSoft LLC (Geeksoft). In its letter, the petitioner stated that it "contracts with clients who need specialized technology expertise and [its] employees provide that expertise for a set hourly fee." The petitioner claimed that the Oracle contract in particular required it to "increase our staff with highly skilled computer technology professionals."

On February 28, 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 and the record did not contain any evidence regarding the type of duties that the beneficiary would perform for these various clients. The director concluded that, without evidence regarding what duties the beneficiary would actually perform for the clients, the proffered position could not be classified as a specialty occupation.

On appeal, counsel submits a letter. Counsel states that the director's conclusions were erroneous because the Geeksoft SOW was submitted to establish the beneficiary's duties. Counsel states further that the Oracle contract was submitted to show that the petitioner also had other work for the beneficiary to perform, if necessary. Counsel states that the petitioner has specialty occupation work for the beneficiary.

Upon review of the record, the AAO agrees with the director's decision to deny the petition.

It should be noted that 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. Therefore, of great importance to this proceeding is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those 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 (5<sup>th</sup> 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.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> 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*.

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.

On the Form I-129, the petitioner stated that the proffered position is that of a senior software engineer. In its letter of support, the petitioner described the beneficiary’s duties as follows:

In this capacity, [the beneficiary] will be responsible for planning, developing, testing and documenting computer programs, applying knowledge of programming techniques and computer systems. Her duties will include developing enterprise solutions using C++ and the design of JAVA components for internet applications. She will also provide virtual support for customers and will maintain the applications. She will evaluate user requests for new or modified programs for various computer software systems, to determine feasibility, cost and time required. She will evaluate the capability of various software systems with the current system. She will consult with users to identify current operating procedures and clarify program objectives. She will formulate plans outlining steps required to develop programs, using structured analysis and design. She will submit plans to user for approval. She will prepare flowcharts and diagrams to illustrate sequence of steps a program must follow and describe logical operations involved.

The AAO notes that the petitioner submitted a generic position description that did not necessarily pertain to a particular project. For this reason, the director requested contracts or work orders so that she could assess whether these duties realistically depicted the type of work to which the beneficiary would be assigned for one of the petitioner’s clients. In response to the RFE, the petitioner claimed that its SOW with Geeksoft and the Oracle contract formed the bases of the beneficiary’s position. The petitioner did not, however, specifically state for which contract the beneficiary would be working; although on appeal, counsel claims that the project relates to the Geeksoft SOW.

Neither the Oracle contract nor the Geeksoft SOW contains evidence of the existence of a specialty occupation. As stated earlier in this decision, the *Defensor* court held that the 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. The Geeksoft SOW was entered into between the petitioner and Geeksoft; however, according to the SOW, the petitioner is providing a consultant to work on a project that Geeksoft contracted with another company, Conversion Services International (Conversion). Ultimately, the beneficiary is

performing services for Conversion, not Geeksoft or the petitioner. Therefore the requirements of the job that Conversion has for the beneficiary are controlling. The SOW does not list any specific duties associated with the Conversion project. According to the SOW, the petitioner, through the beneficiary, will provide the following services: “Assist with testing and functional aspects of the Financial Software Applications.” The petitioner has not established how a position that would require the beneficiary to merely “assist” with software application testing could be considered a specialty occupation. 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)).

Similarly, the Oracle contract is not evidence that the petitioner has a specialty occupation position for the beneficiary to occupy. The Oracle contract is neither signed by a representative from Oracle nor dated. The AAO, thus, questions its authenticity. Furthermore, the contract states that Oracle is retaining the petitioner “to provide software-related consulting services to Oracle or on behalf of Oracle for an Oracle customer.” This statement indicates that that the ultimate user of the beneficiary’s service may be Oracle or it may be a client of Oracle. The contract, however, does not have any information regarding the duties that an employee of the petitioner would be providing to Oracle or to one of Oracle’s clients, or what qualifications the petitioner’s employee would need to possess in order to successfully perform the job. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, Id.* (citing *Matter of Treasure Craft of California, Id.*).

The petitioner’s failure to provide evidence of the tasks and assignments that the beneficiary would perform for the actual client renders USCIS unable to assess 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 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).

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.