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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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[redacted]

FILE: WAC 08 149 53772 OFFICE: CALIFORNIA SERVICE CENTER DATE: SEP 0 3 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:

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).

John F. Grissom
Acting 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 engaged in software development and consulting. It seeks to employ the beneficiary as a business systems analyst 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 September 10, 2008, the director denied the petition because the petitioner failed to establish that the proffered position is a specialty occupation, it meets the definition of either a U.S. employer or agent, and the Labor Condition Application (LCA) is valid for all work locations. On appeal, the petitioner 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 business systems analyst. The petitioner indicated on the LCA that the beneficiary would work in the Chicago, Illinois metro area. The LCA was certified by the Department of Labor on March 28, 2008.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 16, 2008. In the RFE, 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 July 28, 2008, the petitioner submitted, among other items, a letter, copies of its Wage and Tax Statements (Form W-2) for 2006 and 2007, a position description for the beneficiary and a document called "Clarient Server." The petitioner claimed that the beneficiary would be working on its premises on the Clarient Server project, which is in its development phase.[1]

On September 10, 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. In addition, the director concluded that the petitioner could not be classified as a U.S. employer or agent because without the requested contracts, it was not possible to determine who would control the beneficiary's work or for whom the beneficiary would be performing

[1] Although the petitioner claimed in its letter that it was submitted a copy of its employment contract with the beneficiary, the petitioner failed to provide the contract. Instead, the petitioner submitted a copy of a credentials evaluation for the beneficiary.

services. Similarly, the director declined to find that the LCA was valid for all work locations because the petitioner was in the business of outsourcing its employees to other companies.

On appeal, the petitioner submits a letter. The petitioner states that it is an employer because it pays wages to its employees and it will control the beneficiary's work. In rebuttal to the director's conclusions regarding the LCA, the petitioner reiterates that it will employ the beneficiary on its premises on the Clarient Server project and, therefore, the LCA is valid. Regarding the specialty occupation determination of the director, the petitioner states that it provided a detailed description of "all job duties [of] the beneficiary . . . which undoubtedly qualify his position of Programmer Analyst as a specialty occupation."[2]

Upon review of the record, the AAO agrees with the director's decision to deny the petition. Because the most important issue in 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, the AAO shall address this reason for denial first. 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.

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,

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[2] The AAO notes that the director referred to the beneficiary's job as "his position" and has throughout the record of proceeding referred to the beneficiary as "he," "his," or "him." Evidence in the record, however, clearly shows that the beneficiary is female.

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), 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 (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.*

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.

In its initial letter of support, the petitioner described the beneficiary's duties as follows:

> [The beneficiary] will utilize her training and industry expertise as [s]he performs a broad range of business analysis and programming duties. [The beneficiary] will liaise with business and data processing management to formulate and define system scope and objectives through research and fact-finding to develop and modify information systems.
>
> [The beneficiary] will be employed in a temporary full time position as a Business Systems Analyst . . and will perform the following duties:
>
> 1. Analysis, design, implementation, consultation into corporate accounting, Financial systems, data analysis, Management analysis, Preliminary investigation and analysis of technological opportunity to meet corporate needs.
>
> 2. Conduct organizational studies and evaluations, design systems and procedures, conduct work simplifications and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively.

3. Designs and develops report formats to meet management information needs; works with information systems to develop or modify systems to provide required data.

4. Monitor budget expenditures and prepare written reports and analyses to management setting forth progress adverse trends and appropriate recommendations or conclusions.

5. Evaluates findings recommends changes or modifications in procedures utilizing knowledge of functions of operating units.

When the director questioned the petitioner in her RFE about the specific nature of the beneficiary's job, particularly where the beneficiary would be working, the petitioner claimed that the beneficiary would be working on the Clarient Server project, which was an in-house project, for the duration of her time in H-1B status. The petitioner also submitted a job description for the beneficiary that listed the beneficiary's title as "programmer analyst." The job duties that the petitioner listed were not in any way similar to those tasks that the petitioner ascribed to the beneficiary in its initial letter of support. For example, the petitioner stated that the beneficiary would spend: 35 percent of her time analyzing software requirements and programming; 10 percent of her time evaluating interface feasibility between hardware and software; 20 percent of her time designing software systems; 25 percent of her time doing unit and integration testing; five percent of her time performing system installation; and five percent of her time performing system maintenance. On appeal, the petitioner also reiterates that the beneficiary's title is programmer analyst.

The evidence that the petitioner has submitted to support its claims that the position is a specialty occupation is unpersuasive. As a preliminary matter, the AAO finds the petitioner's evidence problematic regarding the beneficiary's job title and, therefore, her job duties.

Initially, the petitioner stated in the petition and its letter of support that the beneficiary would be working as a business systems analyst; however, other documentation in the file, including the petitioner's letter in response to the RFE, and the letter submitted on appeal, lists her title as programmer analyst. The AAO does not concede that the job titles of business systems analyst and programmer analyst are interchangeable or that, based upon either job title alone, the position could be classified as a specialty occupation. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, there is no clarifying evidence regarding the beneficiary's job title and, therefore, the AAO questions whether the job duties that the petitioner has ascribed to the beneficiary also accurately reflect the work she will be doing, particularly since the job duties changed so dramatically from the time of the initial petition to the time of the petitioner's RFE response.[3]

As noted in the previous paragraph, the petitioner submitted two entirely different job descriptions for the beneficiary. In one description, the beneficiary would be performing business system analysis such as conducting organizational studies; in the other description, the beneficiary would work as a programmer analyst designing and developing applications. The petitioner maintains that the beneficiary will work on an in-house project only called Clarient Server and submits a document called "Clarient Server" as evidence that

[3] The AAO notes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

such a project exists. The document, however, is not acceptable evidence of such an in-house project; it provides no information regarding when the project began or is slated to begin, when the petitioner anticipates the project will be completed, or whether it has any clients for whom to develop such an application. Even if the AAO were to accept the document as evidence that the petitioner has an in-house project, the document would not establish that the beneficiary would be working in a specialty occupation. The document does not depict the tasks that are associated with developing the Clarient Server application so that USCIS can determine that they are at a level of sophistication normally associated with the attainment of a bachelor's degree in a specific field of study. This is particularly critical in light of the discrepant information that the petitioner has provided regarding the beneficiary's title and associated duties.

We repeat that the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, *Id.* Looking at both position descriptions, neither depicts a position that would require the incumbent to possess a bachelor's degree or its equivalent in a specific field of study. The AAO notes that the petitioner claims that a degree in computer science, engineering, electronics, technology, commerce or a "related analytic or scientific discipline" is sufficient for the incumbent to possess. These fields are not, however, closely related, as the courses that a person would take to obtain a degree in computer science would not be the same or similar courses needed for a degree in commerce (business). Thus, if a degree in either field is acceptable, then the job does not require the application of a body of specialized knowledge associated with a degree in a *specific specialty*. (Emphasis added).

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)). Here, the petitioner has not presented any evidence to establish that the beneficiary will perform tasks that only a person who holds a bachelor's degree or the equivalent in a specific field of study could execute. Instead, the evidence that the petitioner has presented shows that there is no specifically defined position for the beneficiary. 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)*(1)*.

The director also denied the petition for two additional reasons that relate to the LCA and the petitioner's status as either a U.S. employer or an agent. The AAO affirms, but will not address these issues, because the petitioner has failed to establish that the job is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition.

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.