

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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**

**PUBLIC COPY**

b2



FILE: WAC 07 149 53564 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 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)

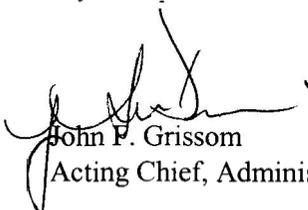
ON BEHALF OF PETITIONER:

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).

  
John F. Grissom  
Acting 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software development and consulting, that it was established in 2000, that it employs 18 persons, and that it has an estimated gross annual income of \$2,650,000 and an estimated net annual income of \$52,000. It seeks to employ the beneficiary as a programmer analyst from October 1, 2007 to September 26, 2010. Accordingly, the petitioner 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 December 20, 2007, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); or (3) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement and re-submits documentation previously provided.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on April 2, 2007; (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 and the petitioner’s statement 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 its March 27, 2007 letter appended to the petition that it provided “world class consulting and information technology services to [F]ortune 1000 companies in [the] USA and around the world.” The petitioner also stated that it relied: “on sound in[-]house practices and processes for delivering value-added services that suit our client’s requirements” and that it attended to “a number of in-house software development projects at our corporate offices in Farmington Hills, Michigan.” The petitioner indicated that the beneficiary would be working in the position of programmer analyst and listed the duties and responsibilities of the proffered position as:

- Analyzing the existing Products and prepare the documentation
- Meet with the concerned managers to collect data
- Involves in design and implementation of product development
- Write programs, code and debug
- Use database tools to develop various requirements
- Use design tools to design and document
- Use various methodologies in implementing the product
- Design the specifications for the Management team

The petitioner divided the proffered position’s daily tasks as follows:

Requirement Analysis	30%
Develop programs and debug	30%
Systems Design	10%
Unit and Systems Testing	20%
Attending Meetings	10%

The petitioner also provided an itinerary for the beneficiary's proposed employment. The petitioner indicated that the beneficiary would work at the petitioner's premises in Farmington Hills, Michigan 90 percent of the time and would spend the remaining 10 percent of time at the location of the petitioner's partner company, Softex Corp., located in Ontario, Canada. The petitioner referenced its development of an undefined product on the itinerary and listed the anticipated dates and steps to begin the project through its release and post production support.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 24, 2007. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested copies of signed contracts between the petitioner and the beneficiary; asked that the petitioner provide a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; asked for evidence showing the specialty occupation work for the beneficiary with the actual end-client company; and requested copies of the petitioner's state and federal quarterly wage reports.

In an undated response, the petitioner emphasized that it is not just a consulting or agency company but is also "an IT company involved in project implementations for various clients along with on-site professional services." The petitioner noted: "[w]e generate more than half of our revenue thru [sic] subcontracting where in [sic] we use the funds in sourcing our in-house projects." The petitioner referenced a client, Smart Data Technologies, Ltd., located in the United Kingdom that had engaged the petitioner to "execute a product for their own usage and implementation." The petitioner noted that the beneficiary's services would be used for system designing and to "develop/code system modules on the project." The petitioner identified the product as iMON and stated that the product would be completed in-house.

The record includes a service agreement dated February 12, 2007 between the petitioner and Smart Data Technologies, Ltd., and a work order also dated February 12, 2007 describing the petitioner's deliverables as: "Implementation & Development of iMON. Provide configuration and programming support for staged release and post implementation support" and described the work to be performed as: "Implementing, Documenting, Developing of iMON, Configuration, Programming

and Post Implementation support.” The work order identified the beneficiary as one of the programmer analysts for the project.

As noted above, the director denied the petition on December 20, 2007. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director determined that the petitioner had not provided the end user contract(s) with Smart Data Technologies and the firms that ultimately define the work order of the beneficiary and had not established who had actual control over the beneficiary’s work or duties. The director concluded that, without this information, the petitioner had not established that it is the beneficiary’s employer and that it met the definition of United States employer or agent. The director observed as the petitioner placed beneficiaries with other firms it would be expected that the beneficiary would work in multiple locations. The director observed, without making a determination on the validity of the LCA, that the LCA showed the beneficiary’s work location as Farmington Hills, Michigan. Finally, the director determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of contracts detailing the beneficiary’s ultimate duties.

The AAO finds that the primary issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, the director’s decision on the issues of whether an employer-employee relationship exists will not be discussed as the petition is not approvable on the basic issue of failure to establish that the proffered position is a specialty occupation.

On appeal, the petitioner simply asserts that the proffered position is a specialty occupation “due to the nature of complexity of the design and implementation of the software.”

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, the AAO will specifically review 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), 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 initially provided a broad generic statement of the beneficiary’s proposed duties as a programmer analyst. Although the petitioner provided an itinerary for the beneficiary’s services, the petitioner did not identify the specific project to which the beneficiary would be assigned. In addition, the petitioner referenced a partner company, Softex Corp., located in Ontario, Canada and indicated that the beneficiary would spend 10 percent of his time at the partner’s location in Canada. In response to the director’s RFE, the petitioner identifies a different “partner” company, Smart Data Technologies, Ltd., with a specific project and indicates that the beneficiary will be assigned to that project. Thus, it is unclear whether the petitioner had a specialty occupation position available for the beneficiary when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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, when reviewing the beneficiary’s proposed duties and responsibilities for either Softex Corp., on an unidentified project or Smart Data Technologies, Ltd., on the iMON project, the

descriptions provided are vague and do not provide a comprehensive understanding of the beneficiary's actual duties. Without the evidence of the actual work the beneficiary would be required to perform for the petitioner, the petitioner's clients or the petitioner's client's clients, USCIS is unable to determine whether the beneficiary's actual duties comprise the duties of 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)).

The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the project(s) the beneficiary will work on for the duration of the requested employment period, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties on the specific project(s) and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the petitioner or the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. The petitioner's overview of the duties of a generic occupation will not suffice. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.*

In this matter, the record demonstrates that the petitioner acts as an employment contractor, as well as suggests that the petitioner may develop some software products. The job description provided by the petitioner, however, fails to describe the specifics of the beneficiary's work on any specific project. In addition, the record does not include substantive evidence of the actual in-house project(s) to which the beneficiary would be assigned or describe the beneficiary's specific work as it relates to the proposed project(s). Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A)(iii) or 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 petition will be denied and the appeal dismissed for the above stated reason. 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 appeal is dismissed. The petition is denied.