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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

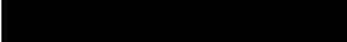


U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 170 51193 Office: CALIFORNIA SERVICE CENTER Date: **SEP 23 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:

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 IT consulting and development, that it was established in 2004, employs 70 persons, and has an estimated gross annual income of \$7,000,000 and an estimated net annual income of \$429,527. It seeks to employ the beneficiary as a programmer analyst from May 26, 2008 to May 25, 2011. 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 July 11, 2008, 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); (3) it submitted a valid labor condition application (LCA) for all locations; or (4) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement and documentation in support of the Form-I-290B, and contends that the director’s decision is erroneous.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on May 29, 2008; (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 brief and 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 its May 8, 2008 letter appended to the petition that it was founded “with the objective of providing top quality services in software engineering, systems design and development, system integration, web development, e-commerce, Internet solutions, and technical support.” The petitioner listed a number of clients and noted that the proffered position of programmer analyst is highly complex and professional in nature. The petitioner listed the duties of the proffered position as:

- System Analysis and Design – 40% (16 hours a week)
- Write code and Develop programs – 40% (16 hours per week)
- Unit and System Testing and attending meetings – 20% (8 hours per week)

The petitioner also noted that the beneficiary would be working in PL/SQL, MySQL, MS Access, Oracle 8.i databases and in the Java, C#, COBOL, Prolog, LISP languages, and would use Visual C++, Visual Basic GUI and would use .Net, J2EE, J2ME, Adobe Photoshop, Apache, Tomcat, IIS 6 tools and packages.

In a second letter, dated May 19, 2008, also appended to the petition, the petitioner added that the beneficiary would work in Naperville, Illinois from May 26, 2008 for one year and then work at the petitioner's offices in Alpharetta, Georgia. The petitioner noted that it had a three-year contract with the beneficiary and would pay the beneficiary irrespective of whether it had client work.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 5, 2008. In the request, among other things, the director: asked the petitioner to identify the beneficiary's work locations and the various kinds of job duties required for each client or project; requested that the petitioner submit contract(s) between the petitioner and the actual end-client company or companies that clearly shows the computer related work that would be performed by the beneficiary for the entire period of employment requested; requested evidence that a specialty occupation exists for the beneficiary; requested copies of signed contracts between the petitioner and the client companies; requested 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; and requested copies of its state and federal quarterly wage reports.

In a response dated June 26, 2008, the petitioner noted that the beneficiary would work for Tekhub, Inc. from May 26, 2008 for 12 months on an Oracle Data Warehouse implementation project and that his responsibilities would include:

- Create requested DataStream Enhancements or Dimensional Layer Enhancements (DSEs/DLEs)
- Create Custom Structures
 - Create new/edit existing business areas and update custom documentation
 - Provide subject matter expertise for consultation on business area development
 - Develop report requirements documents
- Conduct data analysis with the network project team(s) to identify the required site-specific configurations for the data structures to support the reports
- Build reports, modify existing reports, and provide report writing consultation support
- Develop end user training curriculum and provide training support which includes moderating weekly power user teleconferences and conducting user training courses

The petitioner noted the working environment would be "Data Warehouse4.0, PL/SQL, Oracle 9i/10g, Oracle BI Discoverer, Toad 8.5."

The petitioner also provided a “Corp to Corp – Confidentiality and Non-Compete Agreement” between the petitioner and Tekhub, Inc. dated May 5, 2008 and an attached purchase order to the agreement. The purchase order, also dated May 5, 2008, indicated that the end client would be Tekhub, Inc. and that the beneficiary would be assigned to the contract for a 12-month period beginning May 15, 2008. The purchase order provided the same description of responsibilities and working environment as the petitioner reported in the response to the RFE.

The record also included a letter dated May 5, 2008 signed by the president of Tekhub Inc. (Tekhub). In the letter, the president of Tekhub certified that the beneficiary had a 12-month contract with Tekhub to work as a contractor from May 26, 2008 in the role of a programmer analyst. The Tekhub president further stated that the beneficiary would be responsible for developing and enhancing the data structures and business areas in the end user health care enterprise, implemented on a relational database management system (RDBMS), a system designed to support the type of population-based analytical processing that is required to measure and improve database structures.

On July 11, 2008, the director denied the petition. 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 end user contracts establishing the complete chain from the petitioner to the client to the end user organization or a complete itinerary for the use of the beneficiary’s services. 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. Moreover, the director determined that the lack of documentation pertaining to an actual work location where work existed for the beneficiary to perform rendered the LCA invalid. 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 and the validity of the LCA 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.

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 (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. 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 has provided an overview of the beneficiary’s proposed duties for Tekhub, an overview that is also included on Tekhub’s purchase order. The record also includes Tekhub’s indication that the beneficiary will develop and enhance the data structures and business areas in the end user health care enterprise implementing on RDBMS. The petitioner, however, has not provided the detailed information necessary to establish the beneficiary’s actual duties for Tekhub. In addition, it is not clear from Tekhub’s letter that Tekhub is the ultimate end user of the beneficiary’s services. It appears that the beneficiary may be working on the REBMS project for another entity.

The AAO notes that despite the director's specific request for evidence, in the form of contracts, statements from the ultimate end user of the beneficiary's services, or an itinerary, the petitioner failed to submit complete information that relates specifically to the beneficiary. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, the petitioner in this matter requests the beneficiary's services for a three-year employment period but has not provided evidence that it has work for the beneficiary to perform for the entire requested employment period. The AAO is unable to discern from the record, the nature of the beneficiary's purported duties while ostensibly located at the petitioner's offices in Alpharetta, Georgia. The record does not include any substantive evidence that the petitioner's regular business involves creating data stream enhancements, dimensional layer enhancements, or custom structures or any other service listed on the beneficiary's proposed list of responsibilities. 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 AAO does not find any information in the record that demonstrates that the petitioner has a specialty occupation position on in-house projects for the beneficiary to work on once his assignment to Tekhub is completed.

The AAO observes that the petitioner in this matter notes that it has a three-year contract with the beneficiary and would pay the beneficiary irrespective of client's work. However, 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.

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 from the ultimate end user of the beneficiary's services, 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. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various client worksites when contracts are executed. The petitioner has not provided substantive evidence of in-house projects to which the beneficiary would be assigned or described the work the beneficiary would perform in-house. The petitioner’s failure to provide evidence of work orders or employment contracts between the petitioner and its clients throughout the requested employment period renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, is unable to analyze whether the beneficiary’s duties at each worksite 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 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.