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FILE: WAC 08 150 51200 Office: CALIFORNIA SERVICE CENTER Date:

FEB 03 2010

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)

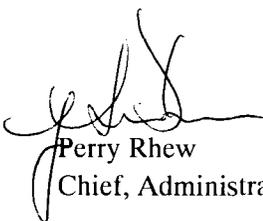
ON BEHALF OF PETITIONER:



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 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 Nonimmigrant Worker, the petitioner states that it engages in aerospace engineering, that it was established in 1992, and that it employs seven persons. The petitioner does not list its annual gross or net income. The petitioner seeks to employ the beneficiary as an engineering technician. 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 September 18, 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.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker, 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, counsel’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 appended an Iowa Workforce Development Prevailing Wage Request Form that outlined the duties of the proffered position as:

Modifying, developing & testing aerospace software. Running and testing simulations of aerospace flow fields and analyzing simulation results. Developing, analyzing and testing calibration systems and design systems for aircraft and wind turbine machinery. Inputs data into computer. Compiles and writes documentation of program development and subsequent revisions.

In a March 26, 2008 employment offer, the petitioner labeled the position as a mechanical engineering technician and described the beneficiary’s duties as:

Your duties will include modifying, developing and testing software under direction of our engineering staff as well as setting up, running and monitoring simulations of aerospace flow fields and analyzing simulation results. In addition, you will be required to document the data obtained and modify and rerun the analysis for modified conditions to calibrate and achieve specific objectives.

The petitioner noted on the Iowa Workforce Development Prevailing Wage Request Form that the position required a four-year degree in a computer-related field or engineering. The petitioner’s offer of employment indicated that a four-year degree in engineering was required.

In response to the director's RFE, the petitioner repeated the above listed duties and noted that it expected 20 percent of the beneficiary's time would be spent in developing software while the rest of the time (80 percent) would involve setting up and running specific computational simulations, all while under the supervision of other engineering staff. The petitioner also noted that the proffered position falls under the supervision of senior engineers and mechanical engineering developers on its organizational chart. The petitioner noted that the position required a four-year college degree in engineering or computer science.

The petitioner explained that it develops specialized software for the government and the aerospace industry and that the beneficiary would work on its current government contracts and SBIR Projects at the company's [REDACTED] Iowa office location. The record includes the petitioner's floor plan and photographs of its offices at the [REDACTED] location. The record also includes a subcontract task order between AMS, LLC and the petitioner. The subcontract task order does not provide substantive information regarding a particular project or the specific duties or tasks that the beneficiary would be required to perform to effectuate the task order. The petitioner also provided its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for the 2006 year and IRS Forms W-2, Wage and Tax Statement, issued in 2007 to individuals located in Iowa, Massachusetts, Minnesota, and Washington.

On September 18, 2008, the director denied the petition. The director found, based on the record, that the petitioner did not complete its own projects but rather subcontracted workers to other companies that need services. The director determined that without the contract to which the beneficiary would ultimately be assigned showing that the petitioner had control over the beneficiary's work or duties, the petitioner had not established that it qualified as a United States employer. The director also determined that without end contracts U.S. Citizenship and Immigration Services (USCIS) could not verify the condition and scope of the beneficiary's services, thus the petitioner had not established that it qualified as an agent. The director further determined that without contracts, USCIS could not determine if the LCA submitted would cover all the beneficiary's work locations. Finally, the director found that without a valid contract from the end-client company ultimately defining the beneficiary's duties, the petitioner had not established that the duties of the proffered position comprise the duties of a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner is not a "job-shop" that farms out its workers. Counsel contends that the beneficiary will work at the petitioner's office location at [REDACTED] in Ames, Iowa and that work is done in Ames, Iowa when another company orders particular work. Counsel attaches the petitioner's letter in which the petitioner emphasizes that it is not a staffing company and does not subcontract workers to other companies and that the beneficiary will be working at its offices in Ames, Iowa assisting more senior employees. The petitioner includes another task order identifying a third party company as the prime contractor and the petitioner as the subcontractor.

The AAO finds that the principle 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, the AAO affirms but will not discuss, as the petition is not approvable on the crucial issue of failure to

establish that the proffered position is a specialty occupation. The AAO observes, however, that information contained in the petitioner's IRS Forms W-2 issued to employees in several different states undermines the petitioner's claim that its employees work only in the Ames, Iowa work location. The AAO also observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients, but whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the petitioner's descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties and whether those duties comprise the duties 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.

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, and determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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.

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 AAO first turns to the Department of Labor’s *Occupational Outlook Handbook (Handbook)* for information regarding the proffered position of engineering technician. The AAO observes that the petitioner’s overview of the duties of the proffered position coincide with the *Handbook’s* discussion of the occupation of an engineering technician. The *Handbook* reports:

Engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection, and maintenance. Their work is more narrowly focused and application-oriented than that of scientists and engineers. Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control, inspecting products and processes, conducting tests, or collecting data. In manufacturing, they may assist in product design, development, or production.

Engineering technicians who work in research and development build or set up equipment, prepare and conduct experiments, collect data, calculate or record results, and help engineers or scientists in other ways, such as making prototype versions of newly designed equipment. They also assist in design work, often using computer-aided design and drafting (CADD) equipment.

Aerospace engineering and operations technicians operate and maintain equipment used to test aircraft and spacecraft. New aircraft designs are subjected to years of testing before they are put into service, since failure of key components during flight can be fatal. Technicians may calibrate test equipment, such as wind tunnels, and determine causes of equipment malfunctions. They may also program and run computer simulations that test new designs virtually. Using computer and communications systems, aerospace engineering and operations technicians often record and interpret test data.

In regard to the education and training required for the position of an engineering technician, the *Handbook* reports:

Most employers prefer to hire engineering technicians with an associate degree or other postsecondary training in engineering technology. Training is available at technical institutes, at community colleges, at extension divisions of colleges and universities, at public and private vocational-technical schools, and in the Armed Forces.

Education and training. Although it may be possible to qualify for certain engineering technician jobs without formal training, most employers prefer to hire

someone with a 2-year associate degree or other postsecondary training in engineering technology. Workers with less formal engineering technology training need more time to learn skills while on the job. Prospective engineering technicians should take as many high school science and math courses as possible to prepare for programs in engineering technology after high school.

Thus, the *Handbook* does not report that a bachelor's or higher degree is normally the minimum requirement for entry into an engineering technician position.

The AAO has reviewed the petitioner's initial description of the position and notes that the proffered position is a position that will assist the more senior engineers and mechanical engineering developers. Although the petitioner claims that the beneficiary in the proffered position will spend 20 percent of her time developing software, the petitioner provides no further details and moreover does not substantiate the sort of development the beneficiary would be involved in with end contracts, task orders, or other contractual instruments detailing the beneficiary's actual duties. Going on the 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 190 (Reg. Comm. 1972)). When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In this matter, the record does not contain details of the actual work to be performed for this position. The AAO cannot determine the actual duties involved in performing the tasks of the position from the petitioner's generalized description. The record does not contain a description sufficient to determine that the beneficiary's daily tasks would require specialized knowledge obtained only through study that results in a bachelor's or higher degree in a specific discipline. The record does not include contracts or work orders that describe in detail the beneficiary's actual duties in assisting senior engineers or mechanical engineering developers. Accordingly, the record does not establish that the occupation of an engineering technician satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. The petitioner has not provided a meaningful job description and absent such a job description the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Again, going on the 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. at 165. A review of the record finds it insufficient to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO normally reviews the petitioner's past employment

practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner does not indicate that it has previously hired individuals to fill this position. The AAO notes further that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. The petitioner has not provided sufficient evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Again, the AAO observes that the petitioner has not provided a detailed description of the proposed duties. The AAO cannot conclude that the overview of the beneficiary's tasks includes duties that are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the specific duties that the beneficiary will perform as they relate to work for the petitioner or a third party for the duration of the requested employment period, the petition must be denied. Without evidence of work orders or statements of work describing the specific duties the petitioner and/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.

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 that the record offers no specific description of the duties the beneficiary would perform for the petitioner or for the petitioner's clients, the petitioner is precluded from meeting the requirements of any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. The petition will be denied and the appeal dismissed for the above stated reasons. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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