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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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By

FILE: WAC 08 147 52866 Office: CALIFORNIA SERVICE CENTER Date: **JAN 08 2010**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

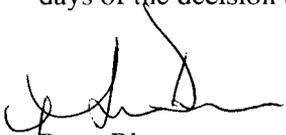
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 a Nonimmigrant Worker, the petitioner states that it provides systems support, that it was established in 2005, that it employs 15 persons, and that it had a gross annual income of \$670,000 in 2006. It seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 24, 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 September 19, 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; and (4) the proffered position is a specialty occupation.

On appeal, counsel asserts that the director improperly concluded, without providing any evidence, that the proposed employment involves subcontracting to another party. Counsel submits a brief and previously submitted documentation.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director’s request for evidence (RFE); (3) counsel for the petitioner’s response to the director’s RFE; (4) the director’s denial decision; (5) counsel’s brief in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in a March 27, 2008 letter appended to the petition that it “develops new systems and programs to enhance the performance and implement new systems in the production environment and stabilization of the new systems.” The petitioner emphasized that the proffered position is not an offsite or consulting position and that the beneficiary would perform work at the company’s office location. The petitioner stated that it planned to assign the beneficiary to very important programming work and that the beneficiary would be responsible for:

- Conducting business process and requirements gathering workshops;
- Identifying the solutions to map the business processes;
- Identifying gaps and workaround or custom development to address the gaps;
- Preparing test scenarios and test cases as per test plan;
- Writing and executing test case scripts, documenting detailed results and summary reports;
- Understanding requirements and functional specifications;
- Preparing test systems and test data; and
- Preparing defect logs and compiling metrics.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 23, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested an itinerary of services or engagements, 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; and requested copies of contractual agreements, statements of work, work orders, service agreements, and letters from the authorized officials of the ultimate client companies where the work will actually be performed that provide a comprehensive description of the beneficiary's proposed duties.

In a September 12, 2008 response to the director's RFE, the petitioner reiterated that it would be the beneficiary's employer, that the beneficiary would work in its office in San Jose, and that the beneficiary would perform work to "support current applications and systems and develop new data warehouse using latest technology and applications." The petitioner attached its marketing brochure and information from its website to demonstrate the services it provides. The petitioner also provided its Internet job advertisements for different programming analyst positions. Each advertisement provided a general overview of the advertised position's duties and listed a bachelor's degree in computer science or a related field or related experience as the education and experience requirements. The petitioner further provided a list of its nonimmigrant employees.

As observed above, the director denied the petition on September 19, 2008. The director found that it appeared from the record that the petitioner is not a computer programming or software firm that uses computer programmers or others to complete their own projects, but rather, subcontracts workers with a variety of computer skills to other companies that need computer programming services. The director concluded, as such, without the end contracts between the petitioner and the firms that ultimately define the work order of the beneficiary or a complete itinerary, the record did not contain sufficient information regarding the nature and scope of the beneficiary's services. The director found that 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 without an itinerary or other documentation, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could not be determined to be valid. The director further determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of valid contracts detailing the beneficiary's ultimate duties.

On appeal, the petitioner again reiterates that it does not seek to employ the beneficiary for subcontracting purposes, but that the beneficiary will be located 100% of the time at its office, performing in-house projects for it. The petitioner notes that although it has a consulting division, the position involved in the instant petition does not involve the consulting division or any consulting activities. The petitioner re-states the duties of the proffered position as previously provided.

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 AAO affirms, but will not discuss, the director's decision on the issues of whether an employer-employee relationship exists

and the validity of the LCA. The AAO observes, briefly however, that a petitioner that has a consulting division which subcontracts workers to work for its clients must provide some documentary evidence that it also has in-house work that needs to be completed. In conjunction with establishing that it routinely employs individuals to work on in-house projects, the petitioner must provide evidence of the contracts, proprietary software, or other specific active products that the beneficiary will be working on in order to meet its burden of proof. Otherwise, there is no information to substantiate that the petitioner's business relies on in-house work rather than subcontracting workers to other firms. The AAO finds that in this matter, the petition is not approvable on the crucial issue of failure to establish that the proffered position is a specialty occupation. 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 description 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.

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, 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 in this matter provided a general overview of the beneficiary's proposed duties but did not relate the generic duties to tasks the beneficiary would be expected to perform in conjunction with a specific project(s). Thus, USCIS had no specific information related to the beneficiary's actual duties so that it could ascertain whether those duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as 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)). To allow generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide disguises the nature of the proffered position.

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.*

Although the *Defensor* court noted that evidence of the client companies' job requirements is critical, where the work is performed for entities other than the petitioner, the AAO finds that as in this matter, when the record does not include a comprehensive description of the beneficiary's actual duties as they relate to specific project(s) for the duration of the requested employment period, even if for the petitioner, 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 user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

A comprehensive description of the duties as those duties relate to specific project(s) is of particular importance when petitioning for an individual as a generic computer programmer. The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a source routinely used by USCIS when reviewing specialty occupation position, reports that a bachelor's degree commonly is required for computer programming jobs, but also recognizes that a two-year degree or certificate may be adequate for some positions. The *Handbook* also notes that "[e]mployers favor applicants who already have relevant programming skills and experience" and that "[s]killed workers who keep up to date with the latest technology usually have good opportunities for advancement." The petitioner in this matter has provided a general outline of duties and skills but no specifics that would indicate that a bachelor's degree in a specific discipline is necessary. It is not possible to determine whether a general degree and/or certifications would be sufficient or whether the proffered position includes tasks that require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline.

The AAO acknowledges that the petitioner advertises many of its programming positions which include the same or similar general descriptions of duties and requires that the applicant have a bachelor's degree in computer science or a related field or related experience. However, the petitioner does not provide detailed descriptions of the duties such that it is possible to discern that their positions comprise the duties of a specialty occupation. It is the actual detailed job description that must be analyzed to determine whether a position is a specialty occupation. In this regard, the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. As the record does not include

a detailed description of the beneficiary's actual duties for the petitioner, the petitioner has not established the proffered position is a specialty occupation.

As noted above, the description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. Without evidence of statements of work or evidence of projects that include comprehensive descriptions of 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 the level of sophistication and complexity the job might entail. The AAO observes that without a meaningful 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. Absent a listing of specific duties the beneficiary would perform, the petitioner has not established that it employs only degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. To emphasize, 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).

Without a comprehensive description of the beneficiary's actual duties from the user of the beneficiary's services and the evidence supporting such a position exists for the entire requested employment period, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the AAO is precluded from determining that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petition will be denied and the appeal dismissed for the above stated reason. 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. Accordingly, the director's decision will be affirmed.

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