

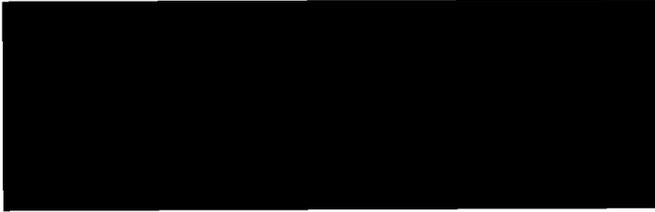
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 146 53755 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 is a software implementing and consulting firm, that it was established in 2003, and that it employs 16 persons. It seeks to employ the beneficiary as a computer programmer from October 1, 2008 to September 26, 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 26, 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); or (3) it had complied with the terms and conditions of employment.

On appeal, counsel for the petitioner submits a statement and documentation in support of the appeal 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 April 14, 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 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 averred in its March 31, 2008 letter appended to the petition that it “is an International Information Technology [IT] solutions provider” and that it “recruit[s] [its] professionals to meet any challenge in order to satisfy the requirements of the job.” The petitioner noted generally that the beneficiary would be “involved in converting project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language”; and “develop and write computer programs to store, locate, and retrieve specific documents, data, and information.” The petitioner also provided an overview of the duties and responsibilities of a programming position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 10, 2008. In the request, among other things, the director: asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit 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 that the petitioner submit 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 list the beneficiary by name on the contracts and provide a detailed

description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In a response dated August 22, 2008, the petitioner provided a number of contracts with companies located in California, New York, Georgia, and New Jersey and two purchase orders for services to be performed in Georgia and in Massachusetts. Neither purchase order identified the beneficiary as the proposed consultant. The petitioner also provided a document labeled "job itinerary" that noted the work location for a project titled "One-e-App (Medical) system" would be at the petitioner's offices in Sioux Falls, South Dakota. The petitioner noted the beneficiary's technical responsibilities as:

- Will be Involved in analyzing and optimizing ABAP/4 programs
- Development of SAP scripts
- Preparation of Technical Specifications
- Implementation of Customized client specific reports
- Performing code review for the development objects

As noted above, the director denied the petition on September 26, 2008. The director noted the number of contracts the petitioner had provided and observed that the petitioner had not provided purchase orders or statements of work that requested the services of the beneficiary. The director noted the petitioner had provided an itinerary for the beneficiary but had not provided evidence of the project listed on the itinerary. The director found that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services. The director concluded that, without the end contracts that ultimately define the work order of the beneficiary, the petitioner had not established that it had control of the beneficiary's actual work and 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 found that the number of employees listed on the petitioner's quarterly wage reports and the number of employees listed on the Form I-129 did not correspond and that its gross annual income listed on its federal tax return and the Form I-129 did not correspond. The director concluded that the petitioner had not provided accurate and true information casting doubt on the remaining evidence offered.

The AAO notes that the petitioner provided explanations regarding the discrepancies between the Form I-129 and the state and federal tax documentation it had filed; accordingly the AAO withdraws the director's conclusion regarding these inconsistencies. The AAO affirms the director's decision on the issue of failing to establish an employer-employee relationship. The AAO, however, will not further address this issue because the petitioner has failed to establish that the proffered position is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition. 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 various descriptions of the proffered employment and beyond the decision of the director ascertain whether the description of the beneficiary's actual duties comprise the duties of a specialty occupation.

The AAO observes that the petitioner clarifies on appeal that it does not have in-house projects that need to be completed and that the petitioner emphasizes that as a consulting company it provides services for other companies to complete their projects. The petitioner states that software consulting companies: "hire consultants and send them to complete various software and technological tasks required by the client companies, be it development, repair, technical assistance, streamlining or maintenance" and to "facilitate this, software consultants are often sent on projects with varying geographic locations." The petitioner again provides copies of contracts with various third parties, as well as purchase orders and statements of work and notes that it had provided purchase orders and statements of work for some of the projects in response to the director's RFE.

Preliminarily, the AAO finds that despite the director's RFE requesting contracts and statements of work from the ultimate end user of the beneficiary's services, the petitioner failed to fully comply with the request. The director specifically requested that the petitioner provide documentation such as 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 list the beneficiary by name on the contracts and provide a detailed description of the duties the beneficiary will perform. The petitioner has not provided detailed information regarding the specific project to which the beneficiary would be assigned and has not provided the underlying documentation from the actual user of the beneficiary's services to substantiate that the proffered position would include duties that 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’s initial evidence submitted in support of the petition provided an overview of the myriad number of types of duties that a computer programmer might perform. In response to the director’s RFE, the petitioner included a basic outline of duties associated with an ill-defined project identified as “One-e-App (Medical) system.” The petitioner did not include a contract with the third party company for the project and did not include a purchase order further describing the beneficiary’s specific duties for the project. The AAO finds that the basic information outlined on the petitioner’s document labeled “itinerary” without the underlying description of actual duties and evidence from the actual user of the beneficiary’s services of the proposed duties is insufficient. General statements and vague descriptions of an occupation and an outline of technical duties do not establish that a specific proffered position is 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 AAO finds that the petitioner has not provided information for the record regarding the end user of the beneficiary’s services. The petitioner’s outline of technical duties is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to

perform. The AAO observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* 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 has not provided sufficient evidence to establish that the general outline of duties set out in its description of the beneficiary's assignment would require a degree beyond that of an associate degree and/or certifications in a particular programming language or platform. The description shows, at most, that the beneficiary should have a basic understanding of particular computer programs, an understanding that could be attained with a lower-level degree or certifications in the programs.

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 the listed project 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 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 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. 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 petitioner provided evidence that it had contracts with third party companies to provide technical consulting services and that it had purchase orders for the services of specific individuals, not the beneficiary. However, this documentation does not reference the beneficiary's actual assignment or substantiate that the petitioner has a contract or purchase order for the beneficiary. Without the underlying statements of work that establish the project exists and that comprehensively describe the work to which the beneficiary will be assigned as that work relates to the specific project, the AAO is unable to analyze whether the beneficiary's duties 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 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons. 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.