

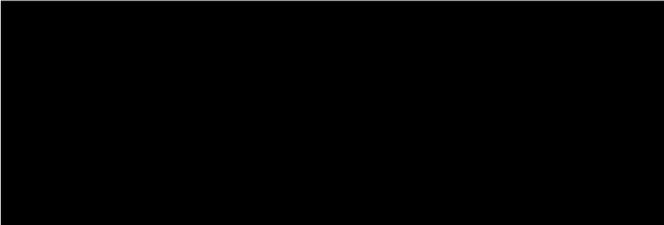
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Services**

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FILE: EAC 07 216 52524 Office: VERMONT SERVICE CENTER Date: **JAN 08 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

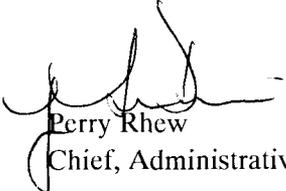
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

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, Vermont 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 engaged in information technology professional services consulting, that it was established in 2004, that it employs 27 persons, and that it has a gross annual income of \$4,050,000. It seeks to employ the beneficiary as a computer programmer from July 6, 2007 to July 5, 2010. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On May 21, 2008, the director denied the petition, determining that the petitioner had not established that the proffered position is a specialty occupation and that the petitioner had failed to submit a Department of Labor Form ETA 9035E, Labor Condition Application (LCA) for the work location where the petitioner intended to employ the beneficiary.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on July 20, 2007; (2) the director's 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 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 its July 6, 2007 letter appended to the petition that it "is a leading provider of enterprise system consulting services in the areas of eBusiness, enterprise resource planning (ERP) and customer relationship management (CRM)" and that it provides consulting services to clients spread across many industries. The petitioner noted its desire to employ the beneficiary as a programmer analyst and provided an overview of the typical duties of a programmer analyst.¹ The petitioner also indicated that the minimum requirement for the position is a bachelor's degree in computer science, engineering, information systems or the equivalent. The initial record included an LCA certified by the Department of Labor on July 6, 2007 for a work location in Reston, Virginia.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 31, 2008. In the request, among other things, the director: requested a copy of the contract with the end user which specifically mentions the beneficiary and the duties he will perform with that end user; and asked for additional evidence that the position qualifies as a "specialty occupation," which includes a detailed statement setting forth the beneficiary's proposed duties and responsibilities.

In a May 14, 2008 response to the director's RFE, counsel provided copies of several different contracts with third party companies, including a contract between the petitioner and [REDACTED]

¹ As the petitioner's description of duties is not particular to any position, the AAO will not list the duties here.

[REDACTED] (O2) dated November 19, 2007. The petitioner also included a statement of work attached to the O2 contract signed by the petitioner on November 19, 2007 and signed by O2 on November 26, 2007. The statement of work identified the beneficiary as the consultant, indicated the client would be Maricopa County, the work location would be Arizona, and the project start date would be November 26, 2007 for a duration of "6+ months."

As observed above, the director denied the petition on May 21, 2008.

On appeal, counsel for the petitioner provides a letter from Maricopa County on its letterhead, dated July 14, 2008, that indicates that the beneficiary is working on a project to automate its human resources department. The PeopleSoft/ADP Project Manager at the Office of Enterprise Technology in Maricopa County provides a detailed description of the beneficiary's specific duties. Counsel further provides a new LCA certified by the Department of Labor on April 17, 2008 for a work location in Phoenix, Arizona. Counsel asserts that the newly-submitted LCA should suffice as an itinerary.

Preliminarily, the AAO finds that despite the director's RFE requesting the contract with the end user which specifically mentions the beneficiary and the duties he will perform for that end user and additional evidence demonstrating that the position qualified as a "specialty occupation," the petitioner failed to fully comply with the request. Although the petitioner submitted a contract with a statement of work attached naming the beneficiary, the statement of work did not describe the duties the beneficiary would be expected to perform. The petitioner submits for the first time on appeal a July 14, 2008 letter from Maricopa County providing the detailed description that had been previously requested. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not consider evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this matter, however, even if considering the description of duties Maricopa County set out on appeal as the ultimate user of the beneficiary's services, the contract and statement of work the petitioner entered into with O2 (the petitioner's client that further assigned the beneficiary's services to Maricopa County) were entered into subsequent to the date the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. 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)(I) 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 initially provided a general overview of the beneficiary’s proposed duties. Providing a generic statement of the duties of a programmer analyst does not provide the information necessary to ascertain the beneficiary’s actual duties. USCIS must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in

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.

In that regard, the AAO has reviewed the nature of the petitioner's business and finds that it is an employment contractor that assigns computer personnel to various third party clients or as in this matter, to the client of a third party. The petitioner did not provide evidence of the specific duties the beneficiary would perform for the third party and again in this instance did not provide evidence of work for the beneficiary that existed when the petition was filed. The AAO finds an overview or outline of the duties of a broadly described occupation insufficient without the specific detail provided to individualize the particular beneficiary's duties as they relate to specific projects or work orders. As observed above, the petitioner did not provide a description of the beneficiary's daily duties that is specifically connected to identified elements, applications, or endeavors related to specific and particular contracts, work orders, or statements of work for a project or projects existing when the petition was filed. 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)).

Without evidence of the particular duties of the beneficiary or statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, as those duties relate to specific projects, the petitioner has not established 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.*

As the petitioner failed to comply with the director's specific requests in the RFE and further the petitioner's limited response to the RFE demonstrated that the contract for the beneficiary's services was not in effect when the petition was filed, the AAO affirms the director's decision in this matter. 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 petitioner has not established that the proffered position is a specialty occupation. The petitioner 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. Without a meaningful job description, the petitioner has not established any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and has not established 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 AAO has also reviewed the validity of the LCA submitted in this matter.² The initial LCA was submitted for a location in Reston, Virginia. On appeal, the petitioner submits an LCA certified subsequent to the filing of the petition for a location in Phoenix, Arizona.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(b)(1), in pertinent part, as follows:

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed

The regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed and for the location the beneficiary will be

² The AAO notes but will not discuss the petitioner's failure to submit an itinerary of the beneficiary's services. The AAO determines, however, that an LCA that has not been certified for the duration of the requested employment period and that does not identify all of the beneficiary's work locations, is insufficient as a substitute for an itinerary.

employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner filed the Form I-129 with USCIS on July 20, 2007. As noted above, the LCA provided at the time of filing indicated the beneficiary's work location would be in Reston, Virginia and was dated July 6, 2007. On appeal, the petitioner submits a Form ETA 9035E, certified by the Department of Labor on April 17, 2008 for a work location in Phoenix, Arizona. Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment period for the beneficiary's actual work location. Therefore, as determined by the director, the petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

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. Accordingly, the director's decision will be affirmed.

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