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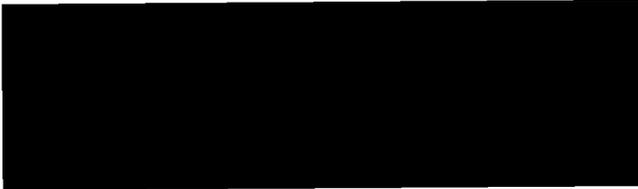
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: EAC 07 148 51334 Office: VERMONT SERVICE CENTER Date: JAN 11 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, 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 provides software development and consulting services, that it was established in 2002, that it employs 70+ persons, and that it has an estimated gross annual income of \$6,500,000 and an estimated net annual income of \$600,000. It seeks to employ the beneficiary as a computer programmer from October 1, 2007 to September 30, 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 September 5, 2008, the director denied the petition. The director observed that the petitioner indicated in response to one of the requests for evidence (RFE) that the beneficiary would be working on in-house projects. The director found that the information provided in connection with the petitioner's in-house projects did not include sufficient information to establish the validity of the projects and was a material change to the initial petition. The director also noted that the petitioner had provided a new Form ETA 9035E, Labor Condition Application, (LCA) in response to an RFE that indicated the beneficiary would be working in South Plainfield, New Jersey not in Nashua, New Hampshire and that it was certified subsequent to filing the petition. The director concluded that as the beneficiary's work location listed on the new LCA was not certified prior to filing the petition, the beneficiary was not eligible for the benefit sought as of the date of filing. The director further concluded that the evidence of record did not include sufficient documentation that the job offered is a specialty occupation.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 1, 2008; (2) the director's RFEs; (3) the petitioner's and prior counsel for the petitioner's responses to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and 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 its April 1, 2007 letter appended to the petition that it "is a computer consulting company that provides computer consulting and software development services" and that it "needs to hire professional staff, to satisfy the needs of our clients." The petitioner indicated further that it provides "services to clients in various industries," that its "contracts may not necessarily be for the services of a particular, designated consultant," and that the "staffing of these projects is generally within the discretion of the company." The petitioner noted that computer professionals are assigned to a specific project upon employment and remain there unless the individual's expertise is needed in another client's project. The petitioner noted further that it delivers solutions and services in custom software development, project consulting, and software product development. The petitioner also provided an overview of the duties of a computer programming position and listed the percentage of time the beneficiary would perform the

duties outlined.¹ The petitioner acknowledged that a “computer programmer” is a broad classification and “only outlines the nature of duties performed by professionals in the field and do[es] not reveal the diversity of specific tasks performed by professionals in the field.” The petitioner concluded that because computers encompass a variety of human endeavors, “the individual attempting to accomplish customized application of computer based solutions to ‘problems’ it is imperative that the individual possess a thorough understanding of the theoretical knowledge underlying such endeavors, in addition to substantial theoretical and practical knowledge of computer sciences.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued RFEs on May 1, 2008, May 16, 2008 and June 25, 2008. In the requests, among other things, the director: requested that the petitioner clarify the petitioner’s employment relationship with the beneficiary; asked that the petitioner submit a complete itinerary of the beneficiary’s proposed employment, copies of contracts, agreements and/or work orders between the petitioner and the end client companies where the work will be performed, as well as a letter from the ultimate user of the beneficiary’s services describing the proposed employment; and requested information regarding in-house employment.

In a June 12, 2008 response to the director’s RFE, the petitioner stated:

We want to emphasize that we seek to employ the beneficiary as a Computer Programmer for a period of three years. [The petitioner] is the only actual employer and we retain complete control over all employees. We control all day-to-day activities and discretionary decisions [sic] making, such as hiring and firing and performance. We retain managerial authority over our employees. Our employees always remain on our payroll and are paid by us whether [we] are engaged in productive projects or otherwise. They are computer experts with specialized knowledge and skills, and they design, develop and implement customized computer software. In sum, at all times, the beneficiary will be a direct employee of [the petitioner]. If there is a material change in the conditions of the beneficiary’s employment, an amended petition will be filed on her [sic] behalf.

The petitioner attached a number of consulting agreements and work orders and statements of work. None of the consulting agreements, the work orders, or the statements of work identified the beneficiary as the consultant. Neither did the documentation provide a description of the beneficiary’s duties. The record also included the petitioner’s 2007 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to its employees in a number of states. The petitioner also indicated: “in-house projects are vital to the company’s success” and “[a]t any given time, we always have some consultants working on in-house projects.” The petitioner acknowledged that “there is generally no agreement to supply a particular individual for a particular job” and that the client does not know which professional will be assigned to a particular job site. The petitioner

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

further acknowledged that it gave priority to clients' projects over in-house projects and that individuals generally begin work on in-house projects when first employed and as needed are scheduled to work on client projects. The petitioner provided marketing and project plans for two in-house projects. The project plans do not identify the number or type of human resources that are needed for the projects. The petitioner also noted that "[t]he beneficiary will be working at our head offices involving and coordinating various ongoing projects undertaken by the company on behalf of our clientele at [the petitioner's] Development Center in New Jersey for the entire period of duration."

In response to the director's RFE requesting more information on the petitioner's in-house projects, the petitioner noted that the beneficiary would "initially be employed as the key programmer tasked with developing two modules of the EZ Migrator" and once the software modules are complete he would perform post product development, programming, and support by writing modifications to the program based on clients' requests, required customizations, or specific problems.

As observed above, the director denied the petition on September 5, 2008.

On appeal, counsel for the petitioner reiterates that the beneficiary will be working on two of the modules of the petitioner's EZ Migrator product and asserts that the proffered position is a specialty occupation. Counsel notes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* and *Online O*NET (O*NET)* recognize that a computer programmer position commonly requires a bachelor's degree. Counsel references prior unpublished AAO decisions that recognized a programming position as a specialty occupation and notes that a majority of approved H-1B petitions in 2005 were for computer programming and system analysis positions. Counsel asserts that the petitioner's product is a novel product and that the petitioner is responding to a need in the marketplace for such a product as set out in the marketing and project plan for the EZ Migrator product. Counsel also contends that the petitioner did not make material changes to the petition, that the proffered position is a specialty occupation and that the petitioner's LCA certified subsequent to the filing date of the petition simply reflects the petitioner's new primary office, the location where the beneficiary will work.

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. While the AAO affirms the director's decision on the issue of the validity of the certified LCA, the principle issue in this matter is whether the petitioner has provided sufficient evidence that the proffered position is a specialty occupation. The AAO finds that the petitioner provided evidence of in-house projects, in response to the director's RFEs, but that evidence of an in-house project(s) without an allocation of resources and the specific duties of each resource on the project is insufficient to establish that the specific position offered to the beneficiary qualifies as a specialty occupation. Moreover, as the director observed, the petitioner in this matter has changed the terms of proposed employment from employment with a third party company to employment on an undefined in-house project. 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

petitioner did not initially provide any substantiating evidence that the beneficiary would be assigned to work in-house, rather it noted that it gave high priority to work for its clients. However, even if considering the petitioner's in-house project, the AAO determines 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 or in-house work to which the beneficiary may be assigned but is 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 description of the proffered employment in an effort to ascertain the beneficiary's actual duties for the actual user of the beneficiary's services 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)(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 provided a general overview of the beneficiary's proposed duties. Providing a generic statement of the duties of a computer programmer and then allocating a certain amount of time to each duty does not provide the information necessary to ascertain the beneficiary's actual duties. USCIS in this matter 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 will provide.

In that regard, the AAO has reviewed the nature of the petitioner's business and observes that the petitioner indicated that it provides computer consulting and software development services and that it needed “to hire professional staff, to satisfy the needs of our clients.” Moreover, the petitioner acknowledged that its “contracts may not necessarily be for the services of a particular, designated consultant,” and that its employees always remain on its payroll and are paid whether it is engaged in productive projects or otherwise. Thus, the petitioner's initial information did not provide information or evidence of the beneficiary's actual duties and for whom the beneficiary would perform services. Rather, the petitioner's initial information suggested that the petitioner did not have a position available for the beneficiary when he entered the United States but would assign the beneficiary to such a position once he entered the United States. The petitioner's overview of possible programming duties fails to establish that the beneficiary would be performing duties in a specialty occupation.

In response to the director's RFEs, the petitioner provided copies of contracts and work orders that did not identify the beneficiary as the consultant and the petitioner acknowledged that it made assignments within its discretion and that often the consultant was not identified prior to being assigned. The petitioner also provided a marketing and project plan for two in-house projects and later noted that the beneficiary would be assigned to developing modules for one of the products. Upon review of the in-house project plans, the AAO does not find that the petitioner has allocated a specific number of resources to the project or described the number of programmer analysts or other computer-related positions that will assist in working on the project. Only upon a third request for

evidence, and the second RFE that specifically requested information regarding the beneficiary's duties, did the petitioner indicate that the beneficiary would work on two specific modules on the EZ Migrator project. However, even then the petitioner did not detail the actual duties the beneficiary would perform and did not provide information or evidence that would elevate the general statements regarding the beneficiary's work to statements that correspond to the duties of a specialty occupation. Submitting a detailed description of duties as those duties relate to specific elements of a project is of particular importance when petitioning for an individual as a generic computer programmer.

The AAO acknowledges that the Department of Labor's *Handbook* reports that a bachelor's degree commonly is required for computer programming jobs, but it 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 programming duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language is necessary for the specific position to which the beneficiary will be assigned. 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. The petitioner acknowledges that a "computer programmer" is a broad classification. The AAO finds that such an overview or outline of the duties of an 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 has not provided a description of the beneficiary's daily duties that is specifically connected to particular detailed services related to the petitioner's development of its proprietary software or to specific and particular contracts, work orders, or statements of work. 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)). Nor does the petitioner provide sufficient information regarding the allocation of its human resources to this specific project or other projects.

The AAO also acknowledges counsel's reference to the Department of Labor's *O*NET* and to unpublished decisions of the AAO. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. The record does not demonstrate that the occupation of a computer programmer would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The AAO also acknowledges counsel's reference to unpublished decisions but finds that an overview of an occupation cannot establish that the facts of this petition are analogous to those in the unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, it is because the petitioner fails to provide consistent detailed information regarding the specific position to which the beneficiary will be assigned that precludes an approval of the computer programming position in this petition.

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.*

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 ultimate user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

The AAO, therefore, 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).

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 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. Again, 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).

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.