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U.S. Citizenship and Immigration Services

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FILE: WAC 08 150 52264 Office: CALIFORNIA SERVICE CENTER Date: **JAN 2 5 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:

SELF-REPRESENTED

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 service center director denied the immigrant 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.

The petitioner is a software design, development, customization, and service company that seeks to employ the beneficiary as a programmer-analyst. The petitioner, therefore, 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).

The director denied the petition on the basis of her determination that the petitioner had failed to establish: (1) that it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) that it meets the regulatory definition of an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) that it had submitted a valid labor condition application (LCA); and (4) that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first address the director's determination that the petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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.

Upon review of the entire record of proceeding, the AAO finds that the director was correct in her determination that the record before her failed to establish the existence of a specialty occupation position, and also finds that the documents submitted on appeal have not remedied that failure.

The petitioner filed the petition on April 14, 2008. In its March 22, 2008 letter of support, the petitioner stated that the beneficiary would perform the following tasks:

- Planning, developing, testing, and documenting computer programs;
- Evaluating user requests for new or modified programs;
- Consulting with users to identify current operating procedures;
- Reading manuals, periodicals, and technical reports to learn ways of developing programs, using structured analysis and design;
- Submitting plans to users for approval;
- Preparing flowcharts and diagrams to illustrate sequence of steps;
- Designing computer terminal screen displays to accomplish goals of user requests;
- Converting project specifications, using flowcharts and diagrams, into a sequence of detailed instructions and logical steps for coding into language processable by computers;
- Entering commands into computers to run and test programs;
- Reading computer printouts, or observing display screen, to detect syntax of logic errors during program testing;
- Using diagnostic software to increase operating efficiency or adapt to new requirements;
- Analyzing reviews and altering programs to increase operating efficiency or adapt to new requirements;
- Writing documentation to describe program development, logic, coding, and corrections;
- Writing manuals for users to describe installation and operating procedures;
- Using computer-aided software tools, such as flowchart design and code generation;
- Overseeing installation of new hardware and software;
- Providing technical assistance to program users;
- Installing and testing programs at user sites;
- Monitoring performance of program after implementation; and
- Specializing in developing programs for business or technical applications.

The petitioner did not identify any particular project or program upon which the beneficiary would work. The director issued a request for additional evidence on July 23, 2008 and requested, among other items, further information regarding the duties proposed for the beneficiary. According to the director, the petitioner's initial submission was insufficient to establish the existence of a specialty occupation and bona fide job offer. The director requested that the petitioner clarify its employer-employee relationship with the beneficiary and submit: (1) copies of signed contracts between the petitioner and the beneficiary; (2) a complete itinerary of services or engagements listing the dates of each service or engagement, names and addresses of the actual employers, and names and addresses of the establishment, venues, or locations where services would be performed for the

period of time requested; and (3) copies of signed contractual agreements, statements of work, work orders, etc., specifically naming the beneficiary and describing his proposed duties.

The petitioner responded to the director's request on August 25, 2008, and submitted none of the above-mentioned evidence. Rather, the petitioner stated that it has always maintained employer-employee relationships with its employees, and that it has always complied with its statutory duties and obligations. The petitioner, however, did not discuss the beneficiary's duties in specific relation to any particular product or project, or to any particular client.

The director denied the petition on August 29, 2008. In part, the director's denial was based upon her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

On appeal, the petitioner states that the beneficiary will be the actual employer of the beneficiary, and that the beneficiary will be working on the petitioner's own products during the period of requested employment. The petitioner also provides a "software customization agreement" with Advanced American Technology (AAT).

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the record lacks documentary evidence as to where and for whom the beneficiary would be performing his services for the entire period of requested employment, and therefore whether his services would actually be those of a programmer-analyst for that entire period of time.

The duties outlined by the petitioner in its letter of support were vague, overly broad, and generic. Although the petitioner asserts on appeal that the beneficiary would be working for the petitioner directly, it has failed to identify any particular project upon which the beneficiary would work. The agreement with AAT does not reference the beneficiary by name, nor does the petitioner indicate that the beneficiary would be working on the AAT project. The petitioner has also failed to describe the beneficiary's duties in specific relation to the petitioner's business. The AAO, therefore, cannot assess whether an actual position exists for the beneficiary. Providing a generic job description that speculates what the beneficiary may or may not do is insufficient. Simply 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes finding a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second

alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). 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). For this reason also, the appeal will be denied.

As the petitioner's failure to demonstrate the existence of H-1B caliber work for the beneficiary to perform precludes approval of this petition, the AAO need not address the remaining grounds of the director's denial of the petition. The AAO affirms, but will not discuss, those grounds of the director's decision.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.