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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



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FILE: EAC 07 230 52386 Office: VERMONT SERVICE CENTER Date: **MAR 09 2010**

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

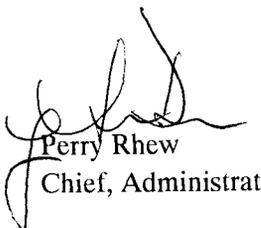
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

The petitioner describes itself as a software development and consulting services business and indicates that it currently employs 21 persons. It 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 because the petitioner failed to establish that it qualifies as a U.S. employer, that it has complied with the conditions of the labor condition application (LCA), and that the proffered position qualifies as a specialty occupation. The director also found that the record contains numerous material discrepancies.

On appeal, counsel states, in part, that the petitioner already submitted a contract with KForce Technology Staffing to show that the beneficiary will provide technical services to its end-client AT&T Mobility. Counsel also states that the beneficiary will work at the client location and at the petitioner's location, both of which are listed on the petitioner's LCA. Counsel states further that the director did not provide an opportunity to the petitioner to address the issue pertaining to its number of current employees compared to its number of H-1B petition filings. As supporting documentation, counsel submits: a letter dated September 8, 2008, from the technical recruiter of KFORCE, who states that the beneficiary, as an employee of the petitioner, will provide consulting services as a programmer analyst to AT&T Mobility, located in Bothell, Washington until December 2009; a second letter from the technical recruiter of KFORCE, dated September 11, 2008, stating, in part, that the beneficiary will provide consulting services at AT&T Mobility, located in Bothell, Washington, and "will be involved in Design, Development of Telecom Billing Application" and "Production Support & Co-coordinating with different teams namely Development, Test, Production and Business during Software Development Cycle"; the petitioner's payroll information and 2006 and 2007 W-2 forms; copies of the petitioner's LCAs; information related to the beneficiary's qualifications; and previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its July 26, 2007 letter of support as a leading provider of IT services.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on December 18, 2007. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director requested documentation such as: the petitioner's tax information and EIN; contractual agreements with the actual end-client firm where the beneficiary would work; the petitioner's lease agreement and photographs of its premises; and other evidence that the proffered position qualifies as a specialty occupation.

In a letter dated January 21, 2008, counsel stated that the beneficiary would work for the petitioner's end-client AT&T Mobility. Counsel submitted numerous additional documents, including: a contractor agreement dated August 13, 2007, between the petitioner and Kforce, Inc. (KFORCE), whereby the petitioner would provide programming, systems analysis, engineering, technical writing or other specialized services directly to the third party user client who has requested KFORCE to locate temporary staffing for the client's project; two work orders executed in accordance with the August 13, 2007 contractor agreement between the petitioner and KFORCE, signed by the petitioner on August 28, 2007 and January 8, 2008, respectively, naming the beneficiary to perform work for AT&T Mobility, beginning on August 20, 2007 and ending on December 31, 2007, and beginning on January 2, 2008 and ending on December 31, 2008, respectively.

On August 12, 2008, the director denied the petition. The director found that the petitioner had failed to establish it qualifies as a U.S. employer, that it has complied with the conditions of the labor condition application, and that the proffered position qualifies as a specialty occupation. The director also found that the record contains numerous material discrepancies.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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, the 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 are 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), U.S. Citizenship and Immigration Services (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.

In addressing whether the proffered position is a specialty occupation, the record is unclear as to whether the beneficiary’s services would be that of a programmer analyst.

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 letter of support dated July 26, 2007 listing the beneficiary's proposed duties has been reviewed. The proposed duties are paraphrased as follows:

1. Analyze, design, and develop detailed application software testing tools and technologies;
2. Utilize HTML to fine tune applications in web-based environment, and troubleshoot and maintain network and systems;
3. Evaluate project requests for enhancements to existing programs or creation of new programs;
4. Formulate a detailed plan outlining steps to develop programs;
5. Convert project specifications; and
6. Enter program codes into computer system, enter commands to run and test programs, and replace, delete or modify codes to fix errors and bugs.

The AAO acknowledges the additional documentation submitted in response to the director's December 18, 2007 RFE, namely a contractor agreement dated August 13, 2007, between the petitioner and Kforce, Inc. (KFORCE), and two related work orders, signed by the petitioner on August 28, 2007 and January 8, 2008, respectively, naming the beneficiary to perform work for AT&T Mobility. The contractor agreement, however, is dated after the filing of the petition on August 1, 2007. It is noted that USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 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).

In addition, the duties listed in the petitioner's July 26, 2007 letter are described only generically and differ from the duties described in counsel's response to the director's RFE, which pertain to a specific project. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by counsel in his response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the generic duties to a specific project.

Upon review of the record, the specific duties that the beneficiary would perform during the requested validity period are unclear. Even if the AAO were to accept the contractor agreement dated August 13, 2007, between the petitioner and KFORCE as timely, the submission would still be deficient, as the record contains insufficient details regarding the actual duties the beneficiary would perform in the context of the project involving the "Design, Development of Telecom Billing Application" and "Production Support & Co-coordinating with different teams namely Development, Test, Production and Business during Software Development Cycle." The project is

described only generically by the technical recruiter of KFORCE. In addition, the record does not contain a detailed description from an actual end-client, in this case, AT&T Mobility, of the beneficiary's proposed duties. Without a comprehensive description of the specific project to which the beneficiary would be assigned and a detailed description of the beneficiary's proposed duties in relation to this project from the entity that requires the beneficiary's services, in this case, AT&T Mobility, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. 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)).

In support of this analysis, USCIS cites to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) (hereinafter "*Defensor*"), 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 *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the proposed duties provided by the petitioner at the time of filing were described only generically. Despite the director's specific request for documentation to establish the actual job duties in relation to that project, however, the additional evidence submitted by the petitioner was insufficient. The AAO, therefore, cannot analyze whether the beneficiary's duties would 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 proposed position qualifies as a specialty occupation under any of the criteria 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

Although the director also denied the petition because petition contains unresolved deficiencies, the petitioner had not demonstrated that it qualifies as a U.S. employer, and that it is in compliance with

the conditions of the labor condition application, the AAO shall not discuss these additional issues because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

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 director's decision is affirmed. The petition is denied.