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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE: EAC 08 140 52852 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:



**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 an information technology and software services business and indicates that it currently employs 40 persons. It seeks to employ the beneficiary as an “SQA Analyst-SAS/Biotech Applications.” 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 the proffered position qualifies as a specialty occupation and that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation.

On appeal, counsel states, in part, that the petition should be granted because the petitioner “has provided controvertible proof that it could employ [the] Beneficiary in a specialty occupation and has done so in the past, and will continue to do so in the future.” Counsel also states that the petitioner has already submitted its agreement with Spectrum Chemicals and Laboratory Products (a Division of Spectrum Chemical Manufacturing Corp.<sup>1</sup>) for product development, and that the beneficiary is specifically named in this agreement. Counsel states further: “Contrary to the Service’s opinion, [the] Petitioner did submit evidence that [the] Beneficiary would be employed in South Windsor, Connecticut at [the] Petitioner’s office.” As supporting documentation, counsel submits copies of previously submitted documentation.

In its March 20, 2008 letter, the petitioner described itself as a “software development and professional services company specializing in ERP Implementation and Project Management, for mid-size and Fortune 500 Companies.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on April 25, 2008. In the request, the director asked the petitioner to submit additional evidence, including a detailed itinerary for the beneficiary. The director requested documentation such as: the petitioner’s tax documentation; the petitioner’s business contracts; the petitioner’s lease agreement and organizational chart; photographs of the petitioner’s premises; and additional evidence that the proffered position qualifies as a specialty occupation.

In his June 5, 2008 letter submitted in response to the director’s RFE, counsel stated, in part, that the beneficiary “will not be assigned to an off site location.” Counsel also stated that the beneficiary was assigned to work on an in-house software development project for Spectrum Chemicals and Laboratory Products. Counsel submitted various supporting documents, including: a letter dated

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<sup>1</sup> A Business Search on February 22, 2010 at the California Secretary of State website at: <http://kepler.sos.ca.gov/cbs.aspx> lists the status of Spectrum Chemical Manufacturing Corp. as “suspended.”

August 1, 2007, from [REDACTED] of Spectrum Chemicals & Laboratory Products (Spectrum), stating that Spectrum had awarded a software development project to the petitioner, to be completed within two years; an itinerary for the beneficiary; and a schedule of duties for the beneficiary.

The director found this additional evidence insufficient to establish eligibility for the benefit sought, and issued a second RFE on June 23, 2008. In the request, the director asked the petitioner to submit additional evidence, including an end-client contract or a master services agreement with the petitioner's actual end-client, Spectrum.

In his July 22, 2008 letter submitted in response to the director's RFE, counsel stated, in part, that the petitioner has a contract with Spectrum for product development, which is being developed in-house at the petitioner's office in South Windsor, Connecticut. As supporting documentation, counsel submitted the following: excerpts pertaining to systems analysts from the Department of Labor's (DOL) *Occupational Outlook Handbook*; a professional services agreement between the petitioner and Spectrum, signed on March 19, 2008, for the petitioner to provide the beneficiary for "technical related services" from October 1, 2008; copies of email messages between the petitioner and Spectrum; photographs of "screen shots of the Spectrum project and project related meetings held at the Petitioner's work location"; and copies of previously submitted documentation.

On September 15, 2008, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation and that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation.

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 (5<sup>th</sup> 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 an “SQA Analyst-SAS/Biotech Applications.”

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’s description of the proposed duties in its March 20, 2008 letter is paraphrased as follows:

Perform duties of a validation analyst on SAS-Biotech Applications; work on projects related to Quality Assurance on Statistical Data and Biotech-based applications used for clinical data collection and compilation following routine measurement studies; perform visual modeling using SAS and SAS-based tools; program in SAS for analyzing data and producing tables for safety and efficacy analysis; review performance logs and monitor software performance; troubleshoot and resolve software and data problems; create shell programs and utility scripts; perform configurations and adjustments to enhance database file capacity; perform automated and manual backup and restore processes; configure and test software packages; provide user support; conduct user software training; work with project managers to formulate technology solutions and ensure the effective safeguarding and sharing of data; evaluate requests for software; research and recommend solutions to technology needs; assist in drafting software proposals; and contribute to the development and implementation of long-term plans, goals and objectives.

On appeal and in response to the RFEs, counsel states that the beneficiary will be assigned to work on an in-house software development project for Spectrum. It is noted, however, that the duties listed in the petitioner’s March 20, 2008 letter are described only generically and differ from the duties described in counsel’s responses to the director’s RFEs, 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 responses to the director’s requests 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.

In addition, even if the petitioner had indicated at the time of filing that the beneficiary would be assigned to the in-house project for its client Spectrum, the record still contains insufficient details regarding this in-house project and the actual duties the beneficiary would perform in the context of this project. The AAO acknowledges the professional services agreement between the petitioner and Spectrum that calls for the petitioner to provide the beneficiary for “technical related services” from October 1, 2008, the copies of email messages between the petitioner and Spectrum, and the photographs of “screen shots of the Spectrum project and project related meetings held at the Petitioner’s work location.” The record, however, does not contain a detailed, comprehensive

description of the software development project and the beneficiary's exact duties in the context of this project. As such, the record contains insufficient evidence of the specific duties to which the beneficiary would be assigned.

In this matter, the petitioner's CEO indicated in his March 20, 2008 letter that the beneficiary would be working on client projects. Despite the director's specific request for documentation to establish the actual job duties in relation to those projects, 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 as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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.