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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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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 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:

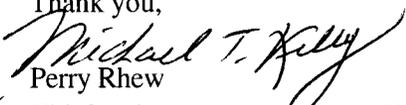
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 visa petition the petitioner stated that it is a software development and consulting firm with 24 employees. To employ the beneficiary in a position it designates as a programmer analyst position, the petitioner endeavors to classify him 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). To support the visa petition, the petitioner provided a certified Labor Condition Application (LCA) that states that the beneficiary would work at the petitioner's offices in Fremont, California and in San Jose, California. The LCA is not approved for work at any other location.

The appeal is filed to contest each of the three independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and (3) that the petitioner is a United States employer within the meaning of within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent within the meaning of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

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.

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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.

A letter from the petitioner’s president, dated June 21, 2008, accompanied the visa petition. It includes an itemized list of the duties of the proffered position, as proposed by the petitioner, and also states, “The Beneficiary will be actively involved in various roles, including, but not limited to, providing services at Petitioner’s headquarters or when required at client locations.” What duties the proffered position would entail, other than providing services at the petitioner’s headquarters and providing them at client locations, is unclear.

A document dated June 21, 2008 and headed, “Itinerary of Definite Employment” also accompanied the visa petition. That letter states, “The Beneficiary will be providing software development and implementation services to our client companies located here in Fremont and San Jose.” It also states:

Specifically, the Petitioner is to provide the following services, inter alia, to Cisco:

1. Process unlimited number of records through household text mining
2. Convert the indeed data from XMK to SAS data files
3. Convert McGraw Hill data from XML to SAS data files
4. Create audit reports on all receiving data such as, indeed, D7B, Cisco customer data, and other external data

The petitioner’s president thus implied that the end-user of the beneficiary’s services would be Cisco. The petitioner’s president also provided a list of the beneficiary’s duties and stated that he, the petitioner’s president, would personally supervise the beneficiary’s performance of his duties. The AAO notes that, unless that document is interpreted to mean that the beneficiary would be working for Cisco at its location throughout the period of requested employment, it is not an itinerary, as it does not state when the beneficiary would work at what location and for what company.

Because the evidence submitted did not demonstrate that the visa petition was approvable, the service center issued an RFE in this matter on May 16, 2009. The service center requested, *inter*

alia, (1) a floor plan of the petitioner's offices, (2) copies of signed and valid work orders between the petitioner and end-users of the beneficiary's services specifically stating that the beneficiary would work pursuant to those work orders, detailing his duties under them, and stating the qualifications the end-user requires to perform those duties.

The service center also requested,

a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested”

In his response to the request for evidence, counsel cited previous AAO decisions, implying that the salient facts of those cases are substantially similar to the facts of the instant case.

Counsel's references to AAO non-precedent decisions have no persuasive impact. While 8 C.F.R. 103.3(c) provides that USCIS precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding, *see* 8 C.F.R. § 103.2(b)(16)(ii), and the issue presently before the AAO is whether the record in the instant case establishes that the proffered position qualifies as a specialty occupation.

With his response, counsel provided a new “Itinerary of Definite Employment,” dated June 26, 2009. That document states:

Initially, the Beneficiary will be working as a Programmer Analyst at Petitioner's direct client, Pari Networks, located at [REDACTED] Milpitas, California 95035. At the Pari worksite, the Beneficiary will be assisting in the design, development and testing of projects and computer programs. Please see Exhibits 2A and 2B. The Beneficiary's approximate start date was May 15, 2009 or as soon as the petition is approved and the expected end date is March 30, 2012.

That document is labeled Exhibit 2. No exhibits in the record are labeled 2A or 2B. The record does, however, contain a contracting services agreement between the petitioner and [REDACTED] of the address noted by counsel, and a Statement of Work (SOW) also between the petitioner and [REDACTED]. The contracting services agreement indicates that [REDACTED] and the petitioner agreed that the petitioner would provide computer services to [REDACTED]. The SOW specifically names the beneficiary as the contract worker who would perform under that SOW, and contains a list of the duties the beneficiary would perform under that agreement. Neither the contracting services agreement nor the SOW, however, states whether [REDACTED] requires that the beneficiary have a minimum of a bachelor's degree or the equivalent in a specific specialty in order to perform those duties.

The AAO notes that, although the visa petition in this matter was submitted on July 7, 2008, that contracting services agreement was signed by a representative of [REDACTED] on May 6, 2009 and ratified by the petitioner's president on May 15, 2009. The SOW is dated May 15, 2009.

In his response to the request for evidence, counsel stated that the petitioner would be the beneficiary's employer, and not an agent. Counsel further stated that "even though Beneficiary may temporarily be located at client sites, no contractual or employment relationship exists between Petitioner's clients and the Beneficiary."

A floor plan of the petitioner's business office shows that it has seven work stations. As was noted above, the petitioner claims to have 24 employees. Clearly, some of the petitioner's employees, if they work regularly, are assigned to other locations.

Evidence in the instant case shows that the petitioner does not intend to assign the beneficiary to specific duties. Rather, it intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

Because the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that client of the petitioner who will be the end user of the beneficiary's services.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

The evidence in the record is contradictory as to where and for whom the beneficiary would work. In the June 21, 2008 "Itinerary," the petitioner implied that the end-user of the beneficiary's services would be Cisco. In the June 26, 2009 "Itinerary," however, the petitioner's president flatly stated not only that the beneficiary would be working at the [REDACTED] worksite in Milpitas, on [REDACTED] projects, but that the beneficiary's work for Pari was expected to last through the end of the requested period of employment.

This contradiction between the June 21, 2008 "Itinerary" and the "Itinerary" of June 26, 2009, is sufficient, in itself, to render the visa petition deniable. Because the petitioner has not established for whom the beneficiary would perform his services, who would assign those duties to him is unknown, and the nature of those duties is therefore unknown.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any

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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. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

However, the AAO will assume, *arguendo*, that the second projection pertinent to the beneficiary's proposed employment is correct, that he would work throughout the requested period for ██████████ in Milpitas. Even if that assertion is taken as true, the visa petition could not be approved.

Pari provided no indication that it requires that the duties listed on the SOW be performed by a person with a bachelor's degree in any specific specialty related to the substantive work. As was noted above, the requirements of the end-user are the more salient issue, rather than the requirements of the company supplying workers to the end-user.

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)(12). 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 record contains no evidence that either ██████████ had agreed to use the beneficiary's services when the petitioner submitted the visa petition on July 7, 2008. The petitioner has not demonstrated that when it filed the visa petition, it had any work for the beneficiary to do, let alone work in a specialty occupation. For this reason also, the appeal will be dismissed and the petition denied.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish its standing to file this petition as either a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F), and the director's finding that the petitioner has not established that the LCA submitted corresponds to the visa petition and may be used to support it.

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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. The appeal will be dismissed and the petition denied.

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