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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
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 02 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:

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, with a fee of \$585. 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 Michael T. Kelly
Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director of the Nebraska 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 petitioner is a provider of information technology services. 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, finding that the petitioner sought to extend the validity of the previously approved H-1B petition and the beneficiary's authorized period of stay beyond the maximum six-year period of stay in the United States in a specialty occupation. On appeal, counsel submits a brief.

The record of proceeding before the AAO contains: (1) Form I-129 with 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. On Form I-129, the petitioner indicated that it seeks to continue the beneficiary's previously approved employment without change, and extend or amend the stay of the beneficiary in the United States. The petitioner indicated that the beneficiary's H-1B status would expire on August 3, 2002 – the expiration of the beneficiary's six-year limitation of authorized stay in the United States. However, the petitioner asserts that the beneficiary is entitled to recapture at least 311 days he spent outside the United States during the validity of his H-1B petition.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that “[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years.” [Emphasis added.] The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, that:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless [emphasis added].

Section 101(a)(13)(A) of the Act states that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.” The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic

Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. *Cf.* 8 C.F.R. § 214.2(h)(13)(v) (requiring "clear and convincing proof that the alien qualifies" for an exception to the limitation on admission). The petitioner must submit supporting documentary evidence to meet this burden of proof. *See 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 denying the petition, the director found that the beneficiary's current stay in the United States, valid until August 3, 2002, represented the remainder of the six-year maximum authorized period of admission as an H-1B nonimmigrant. The director determined that the petitioner could not recapture the period of time that the beneficiary had spent outside the United States during H-1B status because the beneficiary's trips abroad were for personal reasons such as visiting an ailing relative. The director found that each of the beneficiary's absences from the United States was less than one year in duration and, therefore, the beneficiary had not been physically outside the United States for the immediate year prior to seeking the extension of the nonimmigrant stay. The director further mentioned that there is no provision in the regulations to allow for a "day to day" accounting of the authorized period of nonimmigrant stay in the United States.

On appeal, counsel contends that the petitioner should be allowed to recapture the 311 days that the beneficiary spent outside the United States. Counsel states that it is the practice of U.S. Citizenship and Immigration Services (USCIS) permits the recapture of time spent outside of the United States when it is "meaningfully interruptive" of the beneficiary's employment. Counsel contends that the 311 days the beneficiary spent outside of the country were spent visiting his mother, who was suffering from asthma and encenofilia. Consequently, counsel concludes that the beneficiary should be permitted to recapture this time.

Upon review of the record, the AAO finds that the petitioner has demonstrated that the beneficiary is eligible to recapture some of the time he spent outside of the United States.

Counsel for the petitioner, in a response to the request for evidence dated November 12, 2002, submitted a chart pertaining to the beneficiary's physical presence outside the United States. The days requested for recapture (inclusive) are as follows:

Date Left united States	Date Returned to United States	Total Days
22 nd March 1998	29 th March 1998	7 days
9 th May 1998	27 th May 1998	18 days
18 th March 1999	9 th September 1999	175 days
3 rd May 2000	25 th May 2000	24 days

18th April 2001

1st September 2001

104 days

311 total days

The record also contains copies of the beneficiary's passport, which includes various arrival and departure stamps. However, many of the stamps are illegible due to the poor quality of the photocopies provided. Upon review, the AAO finds that the following stamps pertaining to the period above are legible on the beneficiary's passport:

Arrival at Chennai Airport	9 May 1998
Arrival at Chennai Airport	20 March 1999
U.S. Immigration	September 9, 1999
Arrival at Chennai Airport	20 April 2001
U.S. Immigration	1 September 2001

In accordance with the statutory and regulatory provisions previously cited, the judicial decision in *Nair*, and the Aytes memorandum, the time the beneficiary spends in the United States after lawful admission in H-1B status is the time that counts toward the maximum six-year period of authorized stay. The Aytes memorandum, which concerns the recapture¹ of time, states:

[A]ny days spent outside of the United States during the validity period of an H-1B or L-1 petition will not be counted toward the maximum period of stay in the United States in H-1B or L-1 status, provided that the alien is able to submit independent documentary evidence establishing that he or she was in fact physically outside of the United States during the day(s) for which the alien is seeking recapture. The burden of proof rests with the alien to establish his or her eligibility for any recapture benefits. This memorandum supersedes all previous guidance on requests pertaining to "recapturing" time for nonimmigrant workers admitted pursuant to INA § 101(a)(15)(H)(i)(b) and INA § 101(a)(15)(L).

While the Aytes memorandum provides that any time spent outside of the United States during the validity period of an H-1B petition will not be counted toward the maximum period of stay in the United States in H-1B status, it also requires documentary evidence establishing that the beneficiary was outside the United States as claimed. In this matter, upon comparison of the list of dates the beneficiary claims to have spent outside the United States with the beneficiary's passport, the beneficiary's absences from the United States sufficiently substantiated by the supporting documentation in the record are as follows:

- 18th March 1999 to 9th September 1999 (as evidenced by passport stamps): 175 days

¹ In a footnote the Aytes memorandum stated "[t]he term recapture in this memo is used as a short-hand for the period of time spent outside the United States that an alien seeks to have subtracted from their maximum period of stay in H-1B status, as governed by INA § 214(g)(4), in order to have that period of time added back (i.e., "recaptured") when the alien requests an extension of their H-1B status."

- 18th April 2001 to 1st September 2001 (as evidenced by passport stamps): 104 days

The total time listed above that the AAO will credit to the beneficiary is 279 days.

Although the AAO can also read the arrival stamp confirming the beneficiary's arrival at Chennai Airport on May 9, 1999, there is no corresponding stamp documenting his return to the United States. In addition, there is no evidence to support the petitioner's claim that the beneficiary was also absent from the United States from March 22, 1998 to March 29, 1998; from May 9, 1998 to May 27, 1998; and from May 3, 2000 to May 25, 2000. The burden is on the beneficiary to establish methods of sufficiently documenting his time outside the United States.

In view of the foregoing, the record contains insufficient evidence to support counsel's assertion on appeal that the beneficiary is entitled to recapture at least 311 days he spent outside the United States during the validity of his H-1B petition. The total proven number of days the beneficiary spent outside the United States is 279.

The petition's request for approval until October 1, 2002, which requires 58 additional days from the August 3, 2002 expiration of beneficiary's stay in H-1B status, is warranted, since the petitioner has demonstrated that the beneficiary was absent from the United States for 279 days. However, upon review of the record, the petitioner has failed to establish that the proffered position is that of a specialty occupation. Despite demonstrating that the beneficiary is eligible to recapture time spent outside of the United States, the petition may not be approved for this additional reason.

It should be noted that for purposes of the H-1B adjudication, the issue of the bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Therefore, the AAO must determine whether the petitioner provided sufficient evidence to establish that the services to be performed by the beneficiary are those 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 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), 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 devoid of any documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his 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) indicates that contracts are 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 April 24, 2002 stated that the petitioner is a “burgeoning innovative provider of high value Information Technology services and solutions to a diversified customer base.” It further contended that it provided “highly qualified and experienced professionals” to work on a variety of specialties, such as information technology and software development, and claimed that its clients included leading banks and financial institutions.

With regard to the duties of the proffered position, the petitioner stated:

The position will involve the qualified candidate to (1) design, develop, and implement client application software using SAP and other current technology; (2) analyze and review system resources; (3) conduct business analysis; (4) perform various types of tests including performance, stress, volume and compatibility tests[;] (5) code assignment modules[;] (6) participate in team meetings[;] (7) train clients in the utilization and implementation of various applications[;] and (8) provide detailed progress reports to management.

The petitioner concluded by stating that only those candidates possessing a minimum of a bachelor’s degree in computer science, information systems, mathematics, engineering or equivalent could be eligible to fill the proffered position.

However, no independent documentation to further explain the nature and scope of these duties was submitted. The AAO notes that, as an information technology service provider, the petitioner is engaged in an industry that typically outsources its personnel to client sites to work on particular projects. However, the record does not contain additional evidence, such as contracts and/or work orders and letters or memoranda from entities to whose project the beneficiary would be assigned, outlining for whom the beneficiary would render services, what his duties would include, and any correlation between these duties and a need for at least a bachelor’s degree level of knowledge in a specific specialty.²

The record contains simply the petitioner’s letter of support, which provides a generic description of the job of a programmer analyst. However, this document provides no details regarding the nature of the beneficiary’s proposed position and accompanying duties. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going

² In this regard, the AAO notes that the information on programmer analysts in the 2010-2011 edition of the Department of Labor’s *Occupational Outlook Handbook* indicates that these workers do not constitute an occupational group for which at least a bachelor’s degree, or its equivalent, in a specific specialty is normally a minimum entry requirement.

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.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), for guidance, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), is 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.”

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.” 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. 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.

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description and company overview provided by the petitioner suggest that the beneficiary will be working on client projects and will be assigned to various clients worksites when contracts are executed. There is no documentation in the record to establish the ultimate location(s) of the beneficiary’s employment. Therefore, the petitioner’s failure to provide evidence of a credible offer of employment and/or work orders or employment contracts between the petitioner and clients renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, cannot analyze whether his 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)(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)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.