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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2011

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:

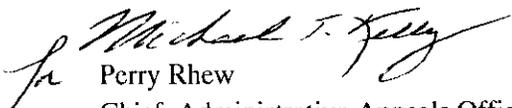


INSTRUCTIONS:

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 \$630. 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,


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 “product recommendation and personalization tools for enterprise-class [sic] eCommerce sites” firm. To employ the beneficiary from April 28, 2009 through January 25, 2012 in what it designates as a senior software engineer 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).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and failed to establish that it had sufficient work to employ the beneficiary throughout the entire three-year period of requested employment. On appeal, counsel asserted that the director’s bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, 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 in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

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.

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 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). 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 occupations.

These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the petition, counsel provided a copy of the 2007 Form 1120 U.S. Corporation Income Tax Return of [REDACTED]. That document indicates that [REDACTED] incorporated on April 26, 2007 and that its address when it filed that return was [REDACTED] in San Francisco, California. The instant petitioner, [REDACTED] gave its address as [REDACTED] in San Francisco on the visa petition. That return indicates that [REDACTED] Employer Identification Number is [REDACTED]. The visa petition in this case indicates that same number is the petitioner's Employer Identification Number, which strongly suggests that the two companies must be identical. The petitioner's Articles of Incorporation, indicate that it also incorporated on April 26, 2007. They further indicate, however, that the petitioner has been known as Richrelevance since its inception, and they make no mention of [REDACTED]. The relationship between the petitioner and [REDACTED] has not been made clear.

In any event, the 2007 return covers the period from [REDACTED] April 26, 2007 incorporation through the end of the 2007 calendar year. During that period, [REDACTED] had no Line 1 Gross receipts or sales, and incurred Line 2 Cost of goods sold of \$15,323. Various other expenses resulted in deductions of \$212,742. Although such performance is common during the first partial year of a company's existence, the AAO notes that the record contains no evidence pertinent to the more recent performance of either [REDACTED] or the petitioner.

Counsel also provided a letter, dated April 16, 2009, from the petitioner's Director of Administration. In it, she stated that the beneficiary would work on the petitioner's "intelligent personalization and targeting technology, incorporating machine learning, behavioral analysis, or data mining to develop contextual, behavioral and demographic targeting, personalization and text analytics software"

As to the market for the petitioner's products, the petitioner's Director of Administration stated, "Founded in 2007, [the petitioner] is the leading provider of next-generation personalization and product recommendation tools for enterprise-class eCommerce sites, including Sears.com."

The petitioner's Director of Administration did not, however, explain the relationship of [REDACTED] to the petitioner, or provide any information pertinent to the petitioner's past or present income, which could have served as an index of its provision of customized computer software to other companies, and, therefore, an indication of its need for a senior software engineer.

Because the evidence submitted was insufficient to show that the visa petition is approvable, the service center, on April 27, 2009, issued an RFE in this matter. Although the record contains no evidence that the petitioner would provide the beneficiary to other companies to work on their projects, that RFE focused on evidence pertinent to such end-users of the beneficiary's services.

In her April 28, 2009 response to that RFE, the petitioner's Director of Administration asserted that the beneficiary would work for the petitioner on the petitioner's premises and on the petitioner's products, and would be supervised by the petitioner's own employees. She did not, however, provide any evidence pertinent to the petitioner's performance or any other indication that demand exists for its products. She did not provide any other evidence to demonstrate that the petitioner has sufficient work to employ the beneficiary full-time throughout the period of requested employment.

The director denied the visa petition on May 8, 2009, finding that the duties to which the beneficiary would be assigned could not be shown to constitute a specialty occupation, as the end-user of the beneficiary's duties had not been identified and that end-user had not, therefore, provided any indication of the duties to which it would assign the beneficiary. The AAO finds no basis for the finding that the beneficiary would be employed at any location other than the petitioner's, or on the projects of any other company, or that he would be supervised by employees of any other company. Accordingly, the director's finding that the petitioner would be assigning the beneficiary to other firms is withdrawn.

However, the director also noted, almost parenthetically, that the petitioner did not submit any agreement with the company that will buy the petitioner's software after it is developed by the beneficiary and had not demonstrated that it would have work available to employ the beneficiary throughout the period of requested employment. The AAO notes that, although the petitioner's Director of Administration had asserted that the petitioner provides software to various on-line merchandisers, including Sears.com, it provided no evidence pertinent to its sales, past or prospective, and no other evidence of those sales or any evidence that its commerce with merchandisers is sufficient to provide the beneficiary with full-time work throughout the period of requested employment.

On appeal, counsel stated:

[The petitioner] has adequate capitalization/funding for its operations and its software products enhance online shopping recommendations for two of the top ten ecommerce sites in the world, along with dozens of other brand name retailers and customers. [The petitioner's] customers include such famous brands as Sears, Kmart, and Wal-Mart.

As a member of the engineering team responsible for continued innovations in the petitioner's proprietary software products, there is also no danger of running out of work for the beneficiary as long as the company exists and continues to sell, support, and develop upgrades of its software products

Counsel's basis for those assertions is unclear. The record contains no evidence that the petitioner has ever sold software to any company, let alone that it has sufficient business to employ the beneficiary as a full-time senior software engineer throughout the period of requested employment, which is almost three years.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The petitioner's failure to establish that it has sufficient work to employ the beneficiary during the period of requested employment precludes a finding that the proffered position is 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 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). For this reason also, the appeal will be dismissed and the petition denied.

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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.