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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 02 2011

IN RE: Petitioner: [redacted]
Beneficiary:

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, 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,

Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of a Programmer Analyst as an H-1B nonimmigrant in a specialty occupation pursuant to § 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 petitioner is an IT consultancy firm.

The petition was denied because the beneficiary does not qualify for an exemption from the general Fiscal Year 2008 (FY08) H-1B cap.

As of April 2, 2007, U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the general H-1B cap for FY08, which covers employment dates starting on October 1, 2007 through September 30, 2008. In general, H-1B visas are numerically capped by statute. Pursuant to § 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. On the Form I-129, the petitioner requested a starting employment date of March 10, 2008. Because counsel stated in its cover letter that the beneficiary is not subject to the H-1B cap and because the petitioner checked "yes" for box 5 in Part C in the I-129 H-1B supplement form, the petition was accepted for processing even though it was filed on March 25, 2008.

In the Form I-129, the petitioner requested a change of employer and to notify the consular office on behalf of the beneficiary. The beneficiary never held H-1B status previously and the petitioner did not request that the beneficiary's H-1B status be extended. However, counsel for the petitioner argued that the beneficiary had already been counted towards the H-1B cap based on a previous H-1B petition that had been filed on behalf of the beneficiary by another H-1B employer.

USCIS records show that this other H-1B petition filed on behalf of the beneficiary was denied on October 23, 2007, prior to the present H-1B petition being filed. The decision of the prior petition was then appealed to the AAO, which remanded the prior petition back to the Vermont Service Center. The Vermont Service Center then again denied the prior petition on August 5, 2009. The record does not demonstrate that there was ever any decision to approve the prior H-1B petition.

The present appeal was filed on July 10, 2008. Counsel's primary argument on appeal is that the beneficiary is H-1B cap-exempt under § 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), which states that:

> [a]ny alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted towards those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall

be counted only once.

Counsel argues that because the prior petition filed on behalf of the beneficiary was still pending pursuant to a Motion to Reconsider that was likely to result in the prior petition ultimately being approved, the beneficiary is therefore H-1B-cap exempt as he would have another H-1B petition counted towards the cap. As is evident from USCIS records, counsel was mistaken that the beneficiary's prior H-1B petition would ultimately be approved. The petitioner failed to submit evidence that the beneficiary ever had an approved H-1B petition and was counted towards the H-1B cap. Moreover, since the filing of the present appeal, the prior petition filed on behalf of the beneficiary was denied and this decision was final as the previous petitioner did not file another appeal or Motion to Reopen/Reconsider. Therefore, as the beneficiary has not been counted towards the H-1B cap, the beneficiary is not exempt from the H-1B cap under § 214(g)(7) of the Act.

The AAO further notes that even if the prior H-1B petition were to have ultimately been approved, counsel is incorrect that the beneficiary would have been H-1B cap-exempt at the time the present petition was filed. In order to qualify for H-1B cap-exemption under § 214(g)(7) of the Act, the beneficiary must have already been counted towards the H-1B cap, which means that the beneficiary would have had to have his prior H-1B petition granted, and not merely pending, by the time the present petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

Consequently, the AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner failed to demonstrate that the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which 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 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, a proposed 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 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 proposed position is a specialty occupation, the AAO finds that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a programmer analyst.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely 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 beneficiary will likely perform for the entity or entities ultimately determining the work's content.

According to the petitioner, the beneficiary will work at sixty different locations throughout the duration of the H-1B petition. However, insufficient evidence was provided with respect to the client(s) or the specific project(s) on which the beneficiary would allegedly work that would have been probative in determining whether actual performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, in accordance with the statutory and regulatory requirements for an H-1B specialty occupation. For example, such evidence might have included copies of the contracts with the clients and a detailed description of the projects to be performed as well as an explanation of how much work will be performed at the client sites and the addresses of the worksites. Going on record without supporting documentary evidence is not sufficient for purposes 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)).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387-388, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. *Id.* The record of proceeding lacks such substantive evidence from any end-user entity that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

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 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.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third-party client(s), the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis established by the Court in *Defensor* - which is appropriate in an H-1B context like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services – the AAO finds that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Also beyond the decision of the director, the AAO finds that the petitioner failed to submit an itinerary, as required under 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

> *Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is material and required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii).

As stated previously, the petitioner states that the beneficiary will work in sixty different locations, however the petitioner did not provide the names of the clients, the addresses of the worksites, or the dates the beneficiary would be employed at each worksite. The AAO therefore finds that the petitioner failed to provide an itinerary of the dates and locations of the services to be provided as required by 8 C.F.R. § 214.2(h)(2)(i)(B) and thereby denies the petition for this additional reason.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.