



U.S. Citizenship  
and Immigration  
Services

(b)(6)

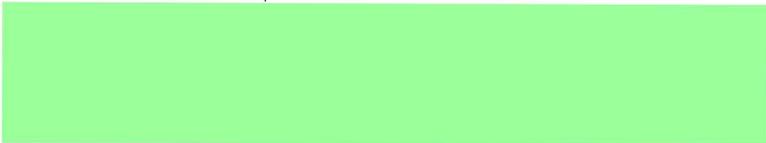


Date: **APR 02 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

The petitioner is a computer software consulting company that 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 revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after an administrative site visit to the petitioner's offices demonstrated that the beneficiary was not employed in the capacity specified in the petition.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on January 25, 2012.

The AAO turns first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO finds that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, the AAO further finds that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, the AAO shall not disturb the director's decision to revoke approval of the petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR, dated July 27, 2011; (3) the petitioner's response to the NOIR dated August 25, 2011; (4) the director's January 25, 2012 notice of revocation (NOR); and (5) the Form I-290B, appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

A brief summary of the factual and procedural history between the approval and the decision revoking it follows below.

The director revoked the petition's approval based on her determination that the petitioner had failed to establish that the beneficiary was employed in the capacity claimed in the initial petition. Specifically, the director found that the petitioner had failed to comply with the requirements governing Labor Condition Applications (LCAs) and that the proposed position did not qualify as a specialty occupation.

The AAO will first address the director's determination that the petitioner failed to comply with the requirements governing LCAs as set forth by U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of Labor (DOL).

In this case, the petitioner submitted documentation in support of the contention that the beneficiary will work as a programmer analyst for the petitioner's client, [REDACTED]. Specifically, the petitioner submitted a copy of a Systems Integrator and Consulting Partner Agreement with [REDACTED] effective July 1, 2009, along with a Purchase Order identifying the beneficiary as the contractor assigned to a project entitled [REDACTED]. The purchase order indicates that the beneficiary will work on this project at the petitioner's offices

(b)(6)

Page 4

located at [REDACTED], Ohio [REDACTED] beginning on July 19, 2010 and continuing through July 31, 2013. The record also contains two letters from [REDACTED] dated September 20, 2010 and August 22, 2011, which attest that the beneficiary will be working at this same [REDACTED], Ohio location.

On Tuesday, March 29, 2011 and on a second, unspecified date, a USCIS inspector conducted two administrative site visits to this location. On both occasions, no one from the petitioner's company was available nor was the beneficiary present at the worksite. In fact, despite the petitioner's claim that it has 16 employees, the USCIS inspector found the petitioner's office locked and the lights off on both visits. Subsequently, the director issued the NOIR requesting clarification regarding this issue.

In response, the petitioner claimed that due to delays in the [REDACTED] project, the beneficiary took vacation time from March 25, 2011 through April 1, 2011, and recommenced her duties at the [REDACTED] Ohio location on April 4, 2011. The petitioner concluded that this explained the beneficiary's lack of availability during the site visit.

The director found the petitioner's explanations insufficient and revoked the petition's approval.

The Department of Labor (DOL) regulations governing Labor Condition Applications states that "[e]ach LCA shall state . . . [t]he places of intended employment." 20 C.F.R. § 655.730(c)(4) (emphasis added). "Place of intended employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant." 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment "with as much geographic specificity as possible" and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that corresponds to the H-1B petition.

The Form I-129 and section G of the LCA state that the beneficiary's intended work site is the [REDACTED], Ohio address set forth above. However, as noted by the director in the NOR, the beneficiary's paychecks are issued to her at an address in Delaware, her home address on the Form I-129 is listed as being in Delaware, and her Form W-2, Wage and Tax Statement, for 2008, also lists a Delaware address and withholds Delaware state income tax. Moreover, it is further noted that the record contains a letter dated September 21, 2010 from [REDACTED] located in [REDACTED] Delaware, confirming that the beneficiary gave birth prematurely to a baby girl on October 1, 2009, further supporting the contention that the beneficiary maintains a residence in Delaware.

In this case, it is unclear where the beneficiary will work during the entire three-year employment period requested in the petition. While the petitioner continually claims that the

beneficiary is working onsite in [REDACTED] Ohio, the petition contains no evidence to refute the finding that the beneficiary actually resides and more likely than not works in Delaware. This inconsistency, coupled with the beneficiary's absence during the site visits and the failure of any of the petitioner's claimed 16 staff members to be present and demonstrate that the petitioner is doing business as claimed further supports the director's decision to revoke the petition's approval.

Therefore, even though the petitioner submitted a certified LCA for [REDACTED] Ohio, it appears that the beneficiary is living and working in [REDACTED], Delaware. This discrepancy has not been resolved by any evidence submitted by the petitioner.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. The petitioner has failed to provide a valid LCA that corresponds to all of the beneficiary's work locations, and the petition must be revoked for this reason.

The next issue before the AAO is whether the proposed position qualifies for classification as 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.

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

*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, 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 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. *See Royal Siam Corp.*

v. *Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service (INS) 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.* at 384. 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.

In addressing whether the proffered position is a specialty occupation, the AAO agrees with the director's determination that the record contains insufficient, credible documentary evidence demonstrating where and for whom the beneficiary would be performing her services, and therefore whether her services would actually be as described in the petition and in accordance with its testimonial evidence is insufficient.

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) 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 explained that it required the beneficiary's services as a programmer analyst for its contractual agreement with [REDACTED] indicated that the beneficiary would work on its [REDACTED] project, which it described as an integrated software solution for medium and large food processors. It further explained that the beneficiary would be responsible for the new system's integration with [REDACTED] existing system, as well as various development tasks. As previously discussed, this project was expected last from July 19, 2010 through July 31, 2013 and the duty station assigned to the beneficiary was [REDACTED] Ohio.

Although the petitioner submitted evidence regarding its agreement with [REDACTED] and the [REDACTED] project, as well as a purchase order for the beneficiary's services, the site visit conducted to the petitioner's offices and claimed duty station of the beneficiary revealed that she was not employed

in the capacity stated in the petition. Although the petitioner claims that delays in the project prompted the beneficiary to take vacation time at the time of the site visit, this contention is unconvincing based on the fact that the petitioner, which claims to be a software consulting company with sixteen employees, surely had other clients and other business to conduct during the delays in the [REDACTED] project on which only the beneficiary was assigned. Therefore, the petitioner's claim that the [REDACTED] project was delayed does not explain the absence of other personnel during the time of the site visit, nor does it clarify the inconsistencies regarding the beneficiary's residence and employment in the State of Delaware.

Accordingly, the AAO finds that the evidence submitted regarding the [REDACTED] project is questionable at best, and further finds that the record lacks substantive evidence about any particular project on which the beneficiary would work during the period of requested employment. Absent evidence to the contrary, it appears that the beneficiary has been and continues to reside in [REDACTED] Delaware, an issue not addressed or acknowledged by the petitioner. Therefore, it appears that the beneficiary is likely providing services of an undisclosed nature for a company other than the petitioner in another state, of which no evidence exists in the record. Therefore, the AAO is unable to determine the ultimate employment and ultimate employer of the beneficiary, thereby precluding a finding that the proffered position is a specialty occupation.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was 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." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proposed 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." *Id.* at 388. As explained above, 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. Again, the *Defensor* court held that the legacy INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or

higher degree in a specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act. As was noted previously, the record of proceeding lacks substantive, credible evidence about any particular project on which the beneficiary would work during the period of requested employment. Although the record contains evidence regarding the [REDACTED] project, the numerous unresolved discrepancies regarding the location and nature of the beneficiary's employment render this documentation unpersuasive and unreliable. Without such information, the AAO cannot analyze whether such duties would require the attainment of a baccalaureate degree, or its equivalent.

The record in this case makes it clear that the beneficiary would be performing work for the petitioner's clients, or for clients of its clients, but the record lacks substantive evidence about any particular project on which the beneficiary would work during the period of requested employment, what her specific duties would be on each project, and what the requirements are to perform such duties. Absent such information, the AAO cannot ascertain whether the performance of such duties for the petitioner's clients would require the attainment of a baccalaureate degree, or its equivalent.

The petitioner's failure to credibly establish the substantive nature of the work to be performed by the beneficiary precludes finding 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 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 such, the AAO agrees with the director's decision to revoke the approval of the petition on this ground.

The appeal will be dismissed and the approval of the petition revoked 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 appeal is dismissed. The approval of the petition remains revoked.