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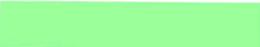
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



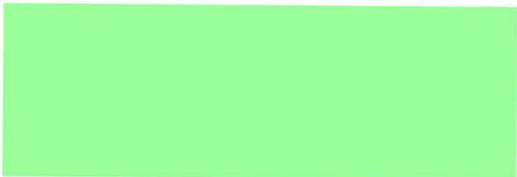
AUG 02 2013

DATE: 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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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 describes itself as a "Software product development & consultancy services provider." To employ the beneficiary in what it designates as a senior programmer analyst position, the petitioner endeavors to classify her 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.¹ On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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 petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue before the AAO is whether the petitioner has demonstrated that the proffered position qualifies as 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.

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

¹ Initially, in the decision of denial, the director stated that the issue to be discussed was whether a reasonable and credible offer of employment exists in this case. In the subsequent discussion, however, the director made clear that the issue is whether the work the petitioner has to offer the beneficiary, if any, is specialty occupation work.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but 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 the specific specialty as the minimum for entry into the occupation, as required by the Act.

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 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.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a senior programmer analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. That LCA is certified for employment in and near San Rafael, California, and in no other location.

With the visa petition, counsel submitted evidence that the beneficiary received a "Bachelor of Engineering (Computer) degree from the University of Pune in India. An evaluation in the record states that the beneficiary's degree is equivalent to a U.S. bachelor's degree in computer engineering. The visa petition states that the beneficiary's duties would be to "Design, develop, test

and implement software systems and applications from inception to implementation as per client requirements."

Counsel also submitted, *inter alia*: (1) a document headed, "Itinerary"; (2) an employment agreement, dated March 9, 2012, between the petitioner and the beneficiary; (3) a letter, dated April 2, 2012, from the vice president of human resources for [REDACTED] a company located at [REDACTED] California; (4) a letter, dated April 13, 2012, from the petitioner's senior vice president; and (5) counsel's own letter, dated April 13, 2012.

The itinerary states that the beneficiary would work throughout the period of requested employment at the location of [REDACTED] California, as does the employment agreement. However, the employment agreement adds:

Further, irrespective of the client location and project that you are assigned to, during the duration of your employment with [the petitioner] and your permitted stay in the US on our H-1B visa, you shall report to our Senior Delivery Manager, Mr. [REDACTED]

The April 2, 2012 letter from [REDACTED] vice president of human resources states that the petitioner and [REDACTED] executed an ongoing "Master Services Agreement" dated January 25, 2007, pursuant to which they enter into specific work orders. The petitioner did not then provide a copy of that agreement.

As to the beneficiary's duties, [REDACTED] vice president of Human Resources stated:

Some of the duties [the beneficiary] will perform include but are not limited to:

[1] Interact with customers for new requirements and customizations needed into various components and create designs from requirements that serve as input to development.

[2] Provide technical expertise in developing the [REDACTED] application specific to customers and software solution into banking and financial institution[.]

[3] Provide intermediate to expert technical production/applications support and assistance for Financial Institutions – Financial Institutions Enterprise class customers.

[4] Work closely with Development team, Production support team for end to end implementation support to our customers[.]

[5] Work with database and application teams to gather requirements for new projects and expansion to existing applications[.]

In his April 13, 2012 letter, the petitioner's vice president stated, "As part of her responsibilities, [the beneficiary] will design, write, develop and utilize custom software applications as per specific client requirements." He further stated:

[The beneficiary's] specific key duties will include:

- Interact with [redacted] Engineering team to finalize the features and other technical specifications of the iPad application to be developed.
- Provide technical expertise in developing the [redacted] iPad application.
- Provide expert technical production/applications support for customization of the iOS (iPhone/iPad) application specific to the customers.
- Work closely with Development team, Production support team for end to end implementation support to our customers[.]
- Post implementation support[.]

Further, [the beneficiary] will be involved in programming. She will be involved in systems integration, trouble-shooting, network installation and design, development and implementation of software applications. She will maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

[The beneficiary] will ensure that quality standards and procedures are maintained, while also obtaining a thorough understanding of the project's goals and business functionality. She will identify problems, study existing systems to evaluate effectiveness and develop new systems to improve production and or work flow. She will also provide training and support in the installation and utilization of operations control and also offer solutions for various software problems and compatibility of various systems.

[The beneficiary] will research and evaluate user requests for new or modified programs in varied areas and will be responsible for satisfying the client/user in terms of the specific needs of the project and make recommendations for modifications as required and carry out such modifications. Furthermore, [the beneficiary] will keep herself updated with latest developments in the field by reading technical manuals,

periodicals and reports and utilize the knowledge thus gained to develop programs to meet customized requirements.

[The beneficiary] will provide technical evaluation of new products, assess time estimation and provide technical support within the organization. She will be responsible for updating existing software systems and updating management on new software that is developed to increase operating efficiency or adapt to new requirements.

Moreover, [the beneficiary] will participate in the testing process and ensure the successful implementation and use of the system.

She will formulate plans outlining steps required to develop programs, using structured analysis and design and submit plans to management for approval and implementation. She will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and to describe logical operations involved by making use of her[]knowledge of computer science. She will prepare manuals and undertake necessary write-ups to describe installation and operating procedures and also test software programs. And, finally, she will take on any additional responsibilities as decided.

As to the educational requirements of the proffered position, the petitioner's senior vice president stated: "The minimum requirements for this professional position are a Bachelor's degree in Computer Science, Engineering, or Science or its equivalent and relevant work experience."

In his April 13, 2012 letter, counsel cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for the proposition that the proffered position qualifies as a specialty occupation position. Counsel also stated:

Regardless of which location or client the beneficiary may be temporarily assigned to, the petitioner will act as her employer and will have sole responsibility towards her payroll, the authority to hire, fire and to control the performance of her services.

Thus, counsel appeared to contemplate that, during the period of requested H-1B employment, the beneficiary might be assigned to work for a client other than [REDACTED] and/or at a location other than San Rafael, California, as did the petitioner, in the employment agreement submitted with the visa petition.

On September 6, 2012, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel submitted (1) a document titled "Job Notice"; (2) two letters from [REDACTED], of the same address as [REDACTED] (3) a letter, dated November 21, 2012, from the petitioner's general manager; (4) a list of the petitioner's H-1B employees; and (5) counsel's own letter, dated November 21, 2012.

The job notice purports to be a notice the petitioner posted, in an undisclosed location during an undisclosed period of time, in an attempt to hire programmer analysts. As to the requirements of the proffered position, it states: "Bachelor's degree in Computer Science, Engineering, Information Technology or Science or its equivalent education, and relevant work experience."

One of the letters from [REDACTED] indicates that [REDACTED] acquired [REDACTED]. The other is substantially the same as the April 2, 2012 letter from [REDACTED] vice president of human resources, except that it is signed by [REDACTED] senior human resources manager and indicates that [REDACTED] expects to provide work to the beneficiary. That letter begins:

We write this letter to confirm an ongoing 'Master Services Agreement' (MSA) for provision of specific Information Technology & Computer Services dated January 25th, 2007, with [the petitioner]. Pursuant to this MSA we enter into specific work orders for provision of high end software/IT consultancy services on a need basis, from time to time.

The January 25, 2007 agreement was not then provided. Further, the AAO observes that, according to that letter, work contracted by [REDACTED] with the petitioner will be evidenced by work orders. No work orders were provided with that letter.

In his November 21, 2012 letter, the petitioner's general manager stated: ". . . [W]e ONLY hire software professionals with the minimum of a Bachelor's degree or its equivalent in science, computer science, engineering or a specific IT related field."

The petitioner's list of H-1B employees identifies 25 senior computer programmer analysts. That list asserts that, of those, five have master's degrees in computer applications, one has a master's degree in computer science, one has a bachelor of engineering (IT) degree, one has a bachelor of science in computer science, one has a bachelor's degree in computers, one has a bachelor's of technology degree, and one has an otherwise undifferentiated master of science degree. Finally, the list indicates that fourteen of the petitioner's senior computer programmer analysts have otherwise undifferentiated bachelor's degrees in engineering. No evidence was provided to corroborate that the petitioner's H-1B senior programmer analysts have the degrees asserted.

In his November 21, 2012 letter, counsel asserted that the evidence submitted is sufficient to show that the visa petition should be approved.

The director denied the petition on December 19, 2012, stating:

[Because] no contract or current statement of work was provided, we are unable to determine if specialty occupation work will be available for the requested validity period.

[Therefore] the petitioner has not established that the duties of the proffered position for the beneficiary require a specialty occupation and that it has sufficient work for the requested period of intended employment.

On appeal, counsel submitted a copy of the "Contractor Agreement," dated January 25, 2007, with [REDACTED] and subsequently adopted by [REDACTED]. Most of that agreement pertains to the terms pursuant to which [REDACTED] may opt to retain the services of the petitioner's Indian parent company's workers to perform IT work. It states, for instance:

[The petitioner's parent company] agrees to act as an independent contractor and [REDACTED] will make best effort to use the services of [the petitioner's parent company] for a period of one year from the Effective Date ("initial term"). This agreement shall automatically renew annually unless notice of termination is provided prior to the anniversary date of the effective date.

As to the petitioner, that agreement states: "Onsite Services shall be rendered by [the petitioner] and [REDACTED] will execute the Statement of Work with [the petitioner] for onsite Services." That agreement contains general terms pursuant to which [REDACTED] may retain the services of the petitioner's parent company's or the petitioner's workers. It makes clear that all work to be requested by [REDACTED] or, by extension, by [REDACTED] which confirmed it, will be evidenced by a work order. The record contains no work orders.

In his appeal brief, counsel stated that the evidence of record shows that, throughout the period of requested employment, the petitioner will have sufficient specialty occupation work to which to assign the beneficiary.

As a preliminary matter, the AAO observes that the petitioner has never alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. Rather, in his April 13, 2012 letter, the petitioner's senior vice president stated, "The minimum [educational] requirement[] for this professional position [is] a Bachelor's degree in Computer Science, Engineering, or Science or its equivalent." The vacancy announcement for a programmer analyst position and the petitioner's general manager's November 21, 2012 letter contain similar statements.

Neither "Science" nor "Engineering" is a specific specialty, within the meaning of 214(i)(1)(B) of the Act. The fields of science and engineering are very broad categories that cover numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering, or botany and meteorology. A petitioner must demonstrate that the proffered position requires a precise and specific course of

study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as science or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in science or engineering administration, may be a legitimate qualification for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Thus, the petitioner's recognition of a bachelor's degree in science or engineering, without additional specification, as a sufficient educational qualification for the proffered position, is tantamount to an admission that performance of the proffered position does not require at least a bachelor's degree in a specific specialty or the equivalent. This is sufficient reason, in itself, to find that the petitioner has not demonstrated that the proffered position is a specialty occupation position, and sufficient reason, in itself, to deny the visa petition. Thus, the director's decision must therefore be affirmed and the petition denied on this basis alone.

Further, however, the evidence provided is insufficient to establish for whom the beneficiary would work and, therefore, who would assign the beneficiary's duties. As was explained above, pursuant to *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical to a determination that the beneficiary would work in a specialty occupation. Here, the record contains a description of the duties of the proffered position provided by the petitioner. However, the petitioner's business is providing its workers to other companies to work for them. However, as the petitioner would not be assigning the beneficiary's duties, a description of the beneficiary's duties provided by the entity for whom she would work is critical. The record contains evidence from [REDACTED]. The evidence of record does not establish, however, that the beneficiary would work for [REDACTED] throughout the period of requested employment.

Thus, the record, as constituted, precludes a determination of the duties the beneficiary would actually perform if the instant petition were granted. 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 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 petitioner has failed to present sufficient, credible evidence of the actual job duties the beneficiary will perform, it has failed to demonstrate that the occupation more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. *See* INA § 214(i)(1). It has failed to demonstrate that the proffered position is a specialty occupation position pursuant to that section of the Act and has failed, as explained above, to demonstrate that the proffered position qualifies as a specialty occupation position pursuant to any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The appeal will be dismissed and the petition denied for these additional reasons.

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 throughout the requested period of employment. Counsel has demonstrated that an agreement was in place between the petitioner and [REDACTED] and subsequently between the petitioner and [REDACTED] successor, [REDACTED], pursuant to which they might utilize some of the petitioner's workers as needed. Further, letters dated April 2, 2012 and November 7, 2012, from [REDACTED] respectively, show that the beneficiary would be utilized on a [REDACTED] project, and that such projects "may last up to 24 to 36 months, though the exact duration of the project is frequently reviewed & updated." [Emphasis supplied.] That statement does not demonstrate that the petitioner has work to assign the beneficiary throughout the three year period of requested employment. The record contains insufficient evidence that, after the expiration of the particular project to which the beneficiary would be assigned, the petitioner would have additional work to assign the beneficiary. Even if the visa petition were otherwise approvable, it could not be approved for any period beyond that for which the petitioner has demonstrated that it has work for the beneficiary to perform.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.