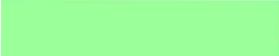


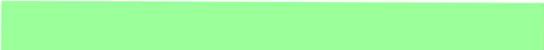


U.S. Citizenship
and Immigration
Services

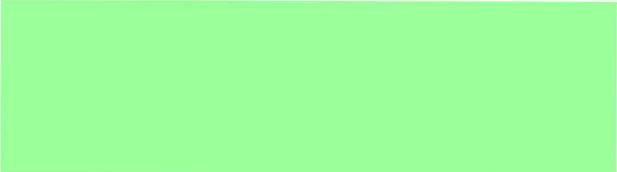
(b)(6)



DATE: **AUG 26 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

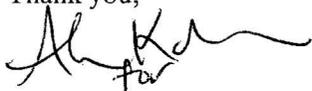
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The approval of the petition will remain revoked.

On the Form I-129 petition, the petitioner states that it is engaged in information technology services. It further claims to have been established in 2002, with 28 employees and a gross annual income of approximately \$3.4 million. It seeks to continue to employ the beneficiary as a computer programmer and 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 revoked the approval of the petition on the grounds that: (1) an employer-employee relationship between the petitioner and the beneficiary had not been established; and (2) the proffered position was not a specialty occupation.

On September 11, 2009, the petitioner filed an H-1B petition with the U.S. Citizenship and Immigration Services (USCIS), and it was approved on October 7, 2009.

On February 17, 2012, the director issued an NOIR informing the petitioner that, based on new information received during the beneficiary's visa interview at the U.S. Consulate General in New Delhi, the validity of the statements set forth in the petition were in question. Specifically, the director noted that based on the new information provided by the beneficiary and a review of the record as constituted, the petitioner was not maintaining the required employer-employee relationship with the beneficiary or employing the beneficiary in a specialty occupation position.

On March 6, 2012, in response to the director's NOIR, the petitioner submitted additional documentary evidence in support of its contention that it is maintaining the requisite employer-employee relationship with the beneficiary and is employing him in a specialty occupation position. The petitioner provided a copy of the beneficiary's employment contract with the petitioner, additional documentation regarding the petitioner's internal policies and procedures, a letter from the petitioner's new end client, [REDACTED] a certified LCA for the new work location of the beneficiary, and copies of the beneficiary's pay stubs.

The director revoked the approval of the petition on April 13, 2012.

On appeal, counsel for the petitioner claims that the revocation was erroneous, and submits a brief and additional evidence in support of this contention. The petitioner also resubmits the same documentation previously included in its response to the director's NOIR.

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 under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which an H-1B Form I-129 petition's validity will be rescinded.

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 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 February 17, 2012; (3) the petitioner's response to the NOIR; (4) the director's April 13, 2012 notice of revocation (NOR); and (5) the Form I-290B

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.

As stated earlier, on September 11, 2009, the petitioner filed the Form I-129 petition, claiming that it is engaged in information technology services. It further claims to have been established in 2002, with 28 employees and a gross annual income of approximately \$3.4 million. It seeks to continue to employ the beneficiary as a computer programmer.

The director initially approved the petition on October 7, 2009. Upon receipt of new information, the director issued an NOIR on February 17, 2012. The director cited discrepancies regarding the petitioner's work location, noting that although the petition was initially approved based on the petitioner's claim that it would control the beneficiary's work during his placement at [REDACTED] the beneficiary instead appeared to anticipate employment at a different client site. The director noted that according to the beneficiary's statements during his consular interview, the beneficiary would be working onsite at [REDACTED] through an agreement with a different mid-vendor, [REDACTED]. The director requested evidence supporting the contention that the petitioner was maintaining the requisite employer-employee relationship with the beneficiary, and also requested additional evidence demonstrating that the beneficiary would still be employed in a specialty occupation position.

In a response dated March 14, 2012, the petitioner, through counsel, addressed the director's concerns. Counsel for the petitioner submitted documentation establishing the petitioner's employment agreement with the beneficiary, as well as new documentary evidence establishing the petitioner's relationship with [REDACTED] the alleged new end client of the petitioner at which the beneficiary would be employed. Counsel also submitted a certified LCA corresponding with the site location of [REDACTED]. Counsel asserted that this documentation contained sufficient evidence to establish that immediate employment in a specialty occupation position was available for the beneficiary and that the petitioner would continue to be the beneficiary's employer, and contended that the petition's approval did not warrant revocation.

The first issue the AAO will address is whether the proffered position is 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 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 former 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.

In addressing whether the proffered position is a specialty occupation, the record is devoid of sufficient evidence as to where and for whom the beneficiary would be performing his services during the requested employment period, and whether his services would in fact be that of a computer programmer.

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)(I) 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. Furthermore, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide USCIS broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire employment period requested in the petition.

In the petitioner’s support letter dated September 9, 2009, the petitioner states that the beneficiary will continue to work as a computer programmer, and would be assigned to work onsite for [REDACTED] through the petitioner’s agreement with [REDACTED]. As stated by the petitioner, the proffered position’s duties would be as follows:

- Design and develop the OBIEE / Metadata Repository (.rpd) using OBIEE Admin tool by importing the required objects (Dimensions and Facts) with integrity constraints into Physical Layer[.]
- To maintain the Performance Measurement Dashboards/Reports that are Dynamic & Interactive with intuitive drilldowns, drill-across, and flash-based drillable charts (bar-charts, pie-charts, radars, and bubble-charts), Capabilities split reports for summary & details information, and local & global filters and cache monitor using Oracle BI Presentation Services. Using Oracle BI Delivers and iBots.
- Customize the requests and modify the OBIEE Dashboard using cascading style sheets[.]
- Perform Unit, Integration, and Regression Testing to validate report and mapping functionality[.]

The petitioner also stated that to effectively perform the work of the proffered position, the incumbent must have at least a bachelor’s degree in computer science, engineering, information services, or its equivalent.

The petitioner also submitted a letter from [REDACTED] dated September 4, 2009, stating that the beneficiary had been working under contract since August 12, 2009. Accompanying documentation confirmed that the beneficiary was currently working onsite for its client, [REDACTED]. The letter also stated that this project was schedule to continue for 24 months with a provision for extension. The record also included a certified Labor Condition Application (LCA) for the work location of [REDACTED], valid from September 30, 2009 through September 29, 2012.

In response to the NOIR, which requested clarification with regard to the beneficiary’s claim that he

would instead be working in North Carolina for a different end client, the petitioner submitted letters and agreements from [REDACTED] both of which confirmed the petitioner's claims that the beneficiary would be employed onsite at [REDACTED] through the petitioner's agreement with [REDACTED]. A new LCA was submitted, certified for the period from March 22, 2010 through March 21, 2013.

Upon review, the petitioner has failed to establish that the proffered position is a specialty occupation. The petitioner asserted at the time of filing the petition that the beneficiary would be working onsite for [REDACTED] for the duration of the requested validity period. However, after the director requested clarification regarding the actual work location of the beneficiary, including the actual end client to which his services would be rendered as well as the duration of the project, the petitioner submitted an entirely new itinerary for the beneficiary not disclosed or discussed in the original petition.

The nature of the petitioner's business and the documentation contained in the record indicate that the petitioner is engaged in the outsourcing of personnel to client sites as needed. Based on this, it is apparent that the exact nature of the beneficiary's assignments throughout the validity period may vary based on client needs during the duration of the petition. Therefore, the very nature of the petitioner's business, as evidenced by the statements of the petitioner, confirms that the beneficiary's duties and responsibilities are subject to change in accordance with client requirements.

Although the petitioner submits a letter from [REDACTED] dated December 14, 2010, in which a brief description of the beneficiary's duties are outlined, the fact that the petitioner now submits evidence demonstrating that the beneficiary's assignment differs from the original assignment for the which the petition was approved confirms that the beneficiary's ultimate employment during the duration of the validity period is subject to change based on client needs. Based on this uncertainty, the AAO cannot properly analyze whether the beneficiary will be performing the duties of a specialty occupation.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, 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." *Id.* at 387.

The court in *Defensor* also found 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." *Id.* at 388. 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. *Id.* The *Defensor* 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.*

In this matter, the job description provided by the petitioner, as well as various statements from the petitioner both prior to revocation and on appeal, indicate that, contrary to its original claim, the beneficiary will be working on different projects throughout the duration of the petition. It is apparent, therefore, that the duties of the beneficiary are dictated by the specific needs of an end-client on a given project. Therefore, absent clear evidence of the beneficiary's particular duties on a particular project for the entire requested validity period, the AAO cannot analyze whether his duties would require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

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. For this reason, the petition must be revoked.

The next issue before the AAO is whether or not the petitioner qualifies as a United States employer. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As previously discussed, there is insufficient and contradictory evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director's decision is affirmed, and the approval of the petition must be revoked for this additional reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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. The approval of the petition is revoked.