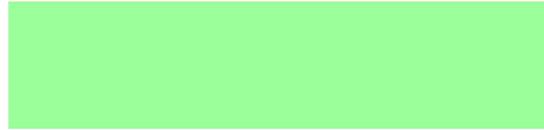


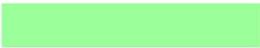


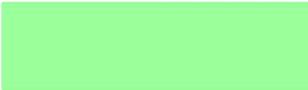
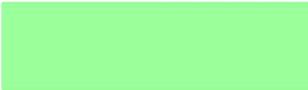
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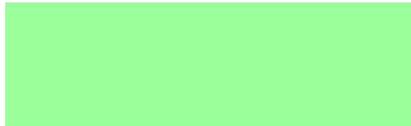
DATE: **AUG 30 2013**

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 Director, California 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.

On the Form I-129 visa petition, the petitioner describes itself as a computer consulting and technology integration company established in 1995. In order to employ the beneficiary in what it designates as a systems engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, counsel for the petitioner contends that the director's finding was erroneous and submits a brief and additional evidence in support of this contention.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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. 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 387-388. 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 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) 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.

In a letter of support dated May 22, 2012, the petitioner stated that it was a full service computer consulting and technology integration company. Specifically, it stated:

We install electronic medical/health records (EMR) programs, design and implement solutions, and provide support for medical billing management software, all with the goal of delivering quality products, service and training to meet our clients’ every need.

Regarding the beneficiary, the petitioner stated that he would be employed in the position of systems engineer. The petitioner stated that the proffered position “involves providing all services related to implementing electronic medical records (EMR) in a LAN and WAN network environment” and that it also requires “implementing, supporting, and maintaining EMR software, and related supportive web services.”

The petitioner concluded by stating that the proposed employee must possess a bachelor’s degree or equivalent in electrical or computer engineering. Regarding the beneficiary’s qualifications, the petitioner stated that the beneficiary holds a bachelor of science degree in electrical engineering from the [REDACTED], and submits a copy of his diploma in support of this contention.

On September 24, 2012, the director issued an RFE, which requested more specific information regarding the actual duties of the proffered position as well as clarification regarding the nature of the beneficiary’s employment (i.e., whether he would work on in-house projects or at client sites).

In response, the petitioner submitted the following documentation on December 12, 2012:

1. Overview of the duties of the proffered position;
2. Copy of the beneficiary’s employment agreement with the petitioner executed on March 30, 2012;
3. A list of the petitioner’s clients;

4. A copy of the petitioner's company brochure; and
5. Photographs of the petitioner's production space and equipment.

Regarding the proffered position, the petitioner stated that the responsibilities of the beneficiary would be as follows:

- Provide overall implementation of [REDACTED] EMR; develop and oversee implementation project milestones
- Evaluate clients' workflows, documents and procedures for implementation and customized training
- Management of clients' expectations and relationships
- Client training on [REDACTED] practice management/EMR application, including training providers, practice front office and billing staff

The director denied the petition, finding that the petitioner failed to establish the exact nature of the beneficiary's duties and who would ultimately control the beneficiary's work. Noting that the petitioner's business was the provision of computer consulting services, the director concluded that, absent specific documentary evidence regarding specific in-house projects or offsite assignments with clients, the evidence did not establish the actual nature of the beneficiary's duties, thus precluding a finding that the beneficiary would be employed in a specialty occupation position.

On appeal, counsel for the petitioner asserts that the director's conclusions were erroneous. Specifically, counsel contends that the petitioner is not a staffing company that outsources personnel. In support of this contention, counsel submits a letter from the petitioner and a letter from the petitioner's accountant further explaining the nature of the beneficiary's employment with the petitioner.

Upon review, the petitioner has failed to establish that the proffered position is a specialty occupation. The petitioner and counsel assert that the petitioner is not a staffing or placement company and that the beneficiary will be supervised solely by the petitioner. The petitioner also claims that the beneficiary will be working on various in-house projects, yet provides insufficient documentary evidence to support its claim. However, the petitioner claims that it is engaged in the provision of "total turnkey software, hardware and services solutions directly to [its] clients," which consequently requires the offsite assignment of its personnel to client sites as needed to respond to their specific needs and requirements. Although the petitioner claims that the beneficiary will work solely for the petitioner, the evidence submitted, while minimal at best, demonstrates that the beneficiary's duties will be dictated by various client needs at any given time.

For example, the petitioner submitted copies of its website, printed on May 15, 2012, in support of the petition. According to the website, the petitioner "tailors solutions that exactly meet [customer] expectations," noting that these solutions can include "building a network from the ground up" or "implementing and training a new practice management system." Moreover, the petitioner lists the "steps" that its employees will follow to help clients realize their goals:

1. Analyze your needs and evaluate your existing computer systems for network readiness.
2. Design a "turnkey" network system to meet your particular needs.
3. Assemble, configure, and start-up the solution so you'll be ready to begin realizing benefits as quickly as possible.
4. Troubleshoot the system to reduce the chance of any unwelcome surprises.
5. Install network applications and make sure that they're ready to go.
6. And, if you desire, we can provide access to the internet, either through a direct connection or through Internet Service Providers, and/or we can provide "dial-in" connections for telecommuters and other remote employees[.]

Since the petitioner is in the business of providing customized solutions to various clients, the exact nature of the beneficiary's assignments throughout the validity period will vary based on client needs. The uncertainty surrounding the future projects and the absence of documentary evidence demonstrating the existence of in-house projects for the entire duration of the requested validity period renders it impossible to find that the proffered position is a specialty occupation, since no specific and corroborated description of the duties the beneficiary will perform is included in the record.

The brief description of duties in the petitioner's support letter is generic and fails to specifically describe the nature of the services required by the beneficiary on the project in question. Moreover, the brief statement of responsibilities submitted in response to the RFE is likewise generic and does not specifically identify the actual duties to be performed by the beneficiary. It is noted that additional details of the proffered position, in the form of a letter from the petitioner and an updated job description, are submitted on appeal. However, this evidence will not be considered.

The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

Despite the claims of the petitioner and counsel on appeal that the beneficiary will work solely for the petitioner, the very nature of the petitioner's business, as evidenced by the statements of the petitioner and the company information provided in the record, confirms that the beneficiary's duties and responsibilities are subject to change in accordance with client requirements.

Based on the evidence submitted, it appears that the beneficiary and other employees will work in-house at the petitioner's offices; however, their presence will also be required at client sites to implement technical elements of a particular project. Moreover, even if the beneficiary can perform some of his duties from the petitioner's offices, it appears that the work of the beneficiary, and the work of the petitioner is general, is dependent on consulting agreements or contracts with clients who request specific services from the petitioner. Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom throughout the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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* held 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 *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 this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner and counsel both prior to adjudication and on appeal, indicate that the beneficiary will be working on different projects throughout the duration of the petition. Whether the beneficiary works in-house or at a client site is irrelevant, since it is apparent that the duties of the beneficiary will be dictated by the specific needs of a 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 denied.

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.