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

(b)(6)

U.S. Citizenship and Immigration Services

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: SELF-REPRESENTED

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,

for
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.

The petitioner describes itself as an information technology consulting company, and seeks to employ the beneficiary in what it designates as a computer systems analyst 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) the 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) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

> *Specialty occupation* means an occupation which [(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.

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. 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.

In addressing whether the proffered position is a specialty occupation, the record is devoid of any documentary 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 systems analyst.

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 April 27, 2012, the petitioner stated that it was a comprehensive professional services company focused on addressing the needs of customers in the areas of information systems and information technology.

Regarding the beneficiary, the petitioner stated that he would employed in the position of computer systems analyst and assigned to the [redacted] IT Project, and would work onsite at the client's location in Barrington, Illinois. Regarding his specific duties, the petitioner stated that the beneficiary would provide consulting services for the following activities:

- Initiate discussions with the business users to gather requirements, understand and streamline their business processes.

- Organize all the gathered requirements per the guidelines mentioned in the validation methodology so that they fall into distinct "buckets" with each bucket corresponding to a PeopleSoft module.
- Perform fit-gap analysis to determine which processes are supported by delivered functionalities in PeopleSoft and which would call for customizing the ERP package.
- Prepare User Requirements Specifications that depict business processes in the form of Use Cases and UML diagrams.
- Initiate the Traceability Matrix and keep it updated through the various phases of the project.
- Write Functional Specifications detailing the high-level architectural design of the system as also the design of any customizations to be done and any interfaces to be built between PeopleSoft and third-party systems.
- Assist the Technical Team in translating the Functional Specifications into detailed Technical Design Documents. Also guide on the approach to be taken in the actual coding.
- Conduct Conference Room Pilots to familiarize the users with the look and feel of the ERP system.
- Prepare a Test Strategy that defines the various rounds of testing and the corresponding documentation needed to support it. Write Installation Qualification (IQ), Operational Qualification (OQ) and Performance Qualification (PQ) scripts.
- Provide the Project Manager with regular updates on the overall progress and any risks associated with the project.

The petitioner further stated that the beneficiary will be required to "test, maintain and monitor computer programs and systems, including coordinating the installation of compute programs and systems," and that he will "develop, document, and revise system design procedures, test procedures, and quality standards." The petitioner concluded that it is imperative for the candidate for the position to be an expert in reviewing and analyzing computer performance indicators, and claimed that the individual must possess a bachelor's degree in computer science, engineering, management information systems, computer information systems, or a related field, or its equivalent. Regarding the beneficiary's qualifications, the petitioner stated that the beneficiary holds a bachelor's degree in engineering.

In further support of the petition, the petitioner submitted copies of its agreements with GE, as well as a copy of the petitioner's corporate fact sheet.

On September 20, 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. The director noted that, while the petitioner contended that the beneficiary would be employed onsite at offices in Barrington, Illinois from October 1, 2012 through September 30, 2014, the record contained insufficient evidence to establish such an

arrangement. The director requested additional documentation, including a complete itinerary of services and engagements for the beneficiary, copies of relevant portions of contract establishing the petitioner's right to control its employees while on location, copies of contractual agreements and work orders specifically pertaining to the beneficiary and his assignments for each client; additional information regarding the duties of the beneficiary, and a copy of the petitioner's organizational chart demonstrating the beneficiary's supervisory chain.

In a response dated November 26, 2012, the petitioner submitted the following documentation:

1. Educational evaluation from , with copies of the beneficiary's diploma and transcripts;[1]
2. Copy of the petitioner's Information Technology Services Agreement with dated January 1, 2010;
3. Copy of the petitioner's offer letter to the beneficiary;
4. Copy of its Conditions of Employment Agreement dated August 30, 2010;
5. Copy of the petitioner's Corporate Fact Sheet (previously submitted);
6. Copy of the petitioner's Performance Management Policy and Standard Operating Procedure; and
7. A copy of the organizational chart as it pertains to the project in question.

Regarding the proffered position, the petitioner provided additional details regarding the nature of the project to which he will be assigned. Specifically, the petitioner stated that the project involved migrating the existing applications of PeopleSoft 8.4 to PeopleSoft 9.1, and that the beneficiary is a specialist in implementation. The petitioner further noted that PeopleSoft, which the AAO notes is a third-party Oracle application, is used by to manage their day-to-day activities including accounts payable, receivables, and fulfilling customer orders. According to the response to the RFE, the beneficiary generally would be required to attend meetings and analyze client requirements for the project and develop technical specifications in response to those needs.

Regarding the nature of its relationship with the beneficiary, the petitioner focused on the IT Services Agreement, which the petitioner refers to as the Master Services Agreement, or MSA, and claims that according to the agreement, the petitioner is "free to exercise its discretion as to methods and means of performance of its services, " "responsible for worker selection, " and "has discretion in the hiring, provision of salary, benefits, training and promotions of its employees." The petitioner further claimed that the beneficiary would report to , an employee of the petitioner.

The director denied the petition, finding that the petitioner failed to establish the exact nature of the beneficiary's duties and who would ultimate control the beneficiary's work. Noting that the petitioner's business was the provision of computer consulting services, the director concluded that,

[1] Although the director requested additional evidence regarding the beneficiary's qualifications in the RFE, the submitted evidence satisfied the regulatory requirements and thus need not be examined further.

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, the petitioner asserts that the director's conclusions were erroneous. Specifically, the petitioner contends that it has adequately documented the record with evidence of the beneficiary's assignment on the project, and submits a new agreement on appeal evidencing the renewal of its contractual agreement with through December 31, 2015.

Upon review, the petitioner has failed to establish that the proffered position is a specialty occupation. The petitioner asserts that it 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 solely on the project for the duration of the requested validity period, yet provides insufficient documentary evidence to support this inference. Regardless, the nature of the petitioner's business and the company profile submitted into the record indicate that the petitioner is engaged in the outsourcing of personnel to client sites as needed and thus contradict this contention. 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 corporate fact sheet both in support of the petition and again in response to the RFE. According to this document, the petitioner provides customized services based on customer needs and focuses "on providing innovative information technology solutions and process consulting that reengineer and transform business processes to help companies meet their organizational objectives."

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 time-specific assignments or 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 discussion of the project submitted in response to the RFE, although it provides more detailed descriptions regarding the phases of the project and beneficiary's role therein, is not supported by documentary evidence, such as work orders or contractual agreements, that demonstrate the beneficiary's actual assignment to this project.

Absent evidence to the contrary, it is evident that in order to provide its services to its clients, the petitioner's personnel must be assigned to work remotely at client sites in order to implement the

customized solutions described above. Although the petitioner submitted its MSA with , as well as an additional document entitled "Scope of Work," there is no work order, appendix, addendum, or other contractual agreement identifying the beneficiary as a contractor assigned to the project and/or verifying his claimed role in the project. Likewise, although the petitioner submits a copy of a renewed MSA with on appeal extending their agreement through 2015, there again is no mention of the beneficiary as being a contractor specifically assigned to the project. The petitioner provides no documentary evidence to either support its claim or refute this finding. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

It is evident based on the evidence submitted that the beneficiary and other employees will work 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 identifying the beneficiary as a contractor on a particular assignment and 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. Again, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Id.*

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 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 both prior to adjudication and on appeal, indicate that the beneficiary will potentially 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.

Finally, beyond the decision of the director, the petition must be denied due to the petitioner's failure to establish that it 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 the requisite 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). Again and as previously discussed, there is insufficient 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 appeal must be dismissed and the petition must be denied for this additional reason.

It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a

petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

In this matter, the Form I-129, LCA, and supporting statements of the petitioner claimed that the work location of the beneficiary would be Barrington, Illinois. However, for the first time on appeal, the petitioner claims that the beneficiary will work in Wauwatosa, Wisconsin. As stated above, this new work location constitutes a material change to the nature of the employment set forth in the initial petition, and thus cannot be considered on appeal as the proper remedy for such a change is to file a new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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.