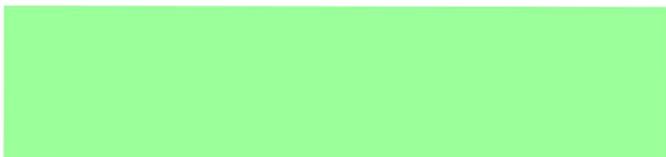
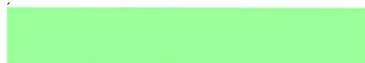


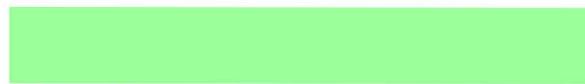
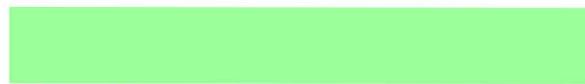


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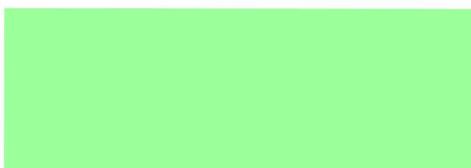


Date: **JUN 13 2013** Office: CALIFORNIA SERVICE CENTER 

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:



Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The director dismissed a subsequent motion to reopen and reconsider and affirmed the previous denial. The petitioner appealed the decision to dismiss the motion, and the director erroneously rejected the appeal as untimely filed. The matter is now before the Administrative Appeals Office (AAO) for review. The AAO hereby withdraws the director's September 18, 2009 decision to reject the appeal based on the director's lack of jurisdiction over the appeal. *See* 8 C.F.R. § 103.3(a)(2)(ii). The appeal will be dismissed. The motion will be dismissed, and the petition will remain denied.

On the Form I-129 petition, the petitioner claims that (1) it is engaged in software development and project management, (2) it was established in 1998, and (3) it currently has 89 employees. It seeks permission to employ the beneficiary as a programmer analyst and, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; (5) the petitioner's combined motion to reopen and motion to reconsider; (6) the director's decision dismissing the motion; (7) the petitioner's appeal Form I-290B and documentation submitted in support of the appeal; and (8) the director's decision to reject the appeal. The AAO reviewed the record in its entirety before issuing its decision.

While the director denied the petition because the petitioner failed to establish that: (1) it would act either as an employer or agent; (2) the Labor Condition Application (LCA) was valid for all work locations; or (3) that the proffered position qualified as a specialty occupation, those issues are not before us. If the petitioner had desired those issues to be reviewed on a *de novo* basis by the AAO, it should have timely filed an appeal with this office on the underlying decision. Having failed to do so, the matter being appealed here is the decision to dismiss the motion, not the underlying decision to deny the petition. Accordingly, the issue on appeal is whether the combined motion to reopen and motion to reconsider was properly dismissed by the director.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

In this matter, the motion consists of the Form I-290B, a brief entitled "Motion to Reopen and/or Reconsider H-1B Denial," and a number of exhibits in support of the combined motion.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ The new facts submitted on motion must be

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just

material and previously unavailable, and could not have been discovered earlier in the proceeding. Cf. 8 C.F.R. § 1003.23(b)(3).

Counsel asserts that exhibits five, six and eight contain new evidence in support of the motion. Exhibit five contains a printout from the [REDACTED]; exhibit six provides documents from the website of the city of Las Vegas that indicate that the address for [REDACTED] is zoned P-R or "Professional Offices and Parking," not residential; and exhibit eight contains the first page of the results from a Google search of the petitioner's name.

Upon review, there is no evidence that the documents above are "new." Absent evidence to the contrary, it appears these printouts from the websites described could easily have been provided earlier in this proceeding. While there is no guarantee that the contents of these printouts would have been identical if printed earlier in time, there is also no evidence that it would have been materially different and that such material differences would not have been reflected on these webpages prior to the director's adjudication of the petition. As the instant motion does not contain "new" evidence, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the motion filed with the California Service Center, the movant did not meet that burden. Therefore, the director properly dismissed the motion to reopen.

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, while the AAO recognizes that the director could have better articulated the reasons for denying the petition in her December 17, 2008 denial decision, the AAO does not find sufficient evidence on appeal that the director's decision to dismiss the motion to reconsider was incorrect based on the evidence of record at the time the underlying decision to deny the petition was issued. For instance, the director's decision to deny the petition was correct in that the petitioner failed to provide sufficient information in response to the director's RFE to establish the beneficiary's eligibility for the benefit sought.

Further, the AAO also finds no error in the paramount issue in the director's underlying decision, i.e., the director's ultimate determination that the petitioner failed to establish that it is offering a specialty occupation position to the beneficiary. The AAO will therefore discuss the deficiencies in the record that result in the failure to establish that the proffered position is a specialty occupation. Because the specialty occupation basis for denial is dispositive of the petitioner's eligibility for the benefit sought, however, the AAO will simply find no error, but shall not further discuss the director's underlying decision to deny the petition for reasons other than the petitioner's failure to establish the job as a specialty occupation.

When filing the H-1B petition, the petitioner provided documentation in support of the contention that it would employ the beneficiary as a programmer analyst. Specifically, the petitioner submitted a copy of a Technical Services Client Agreement with [REDACTED], along with a Statement of Work and a Work Order outlining the nature of the beneficiary's role for this client. According to these documents, the beneficiary would be working in Indianapolis, Indiana on a project called "Electronic Medical Records Online," and the statement of work listed several generic responsibilities for the beneficiary such as, "research, analysis, design, development, testing and implementation of the Online for worldwide use of customers."

To establish that the offered position qualifies as a specialty occupation, the petitioner submitted information that it had found in the Department of Labor's *Occupational Information Network (O*NET™ Online)* Summary Report and the *Occupational Outlook Handbook (Handbook)* regarding the programmer analyst occupation, as well as evidence that businesses similar to the petitioner hired only degreed individuals for programmer analyst positions. The petitioner submitted a copy of the *O*NET™ Online* Summary Report, excerpts from the *Handbook*, and two job advertisements.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 25, 2008. In the request, the director asked the petitioner to submit, among other items: copies of signed contracts between it and the beneficiary; a complete itinerary of the beneficiary's services; and copies of signed contracts between the petitioner and its clients that list the duties that the beneficiary will perform and that identify the beneficiary by name in the contract(s).

In its response, the petitioner reiterated that the beneficiary would be working in-house on the Electronic Medical Records Online (EMROnline) project for its client, [REDACTED], and resubmitted the previously-submitted agreement and appendices, along with a copy of the petitioner's offer of employment letter to the beneficiary and an itinerary prepared on petitioner letterhead, indicating that the beneficiary's work on the EMROnline project would continue until September 27, 2011.

On September 26, 2008, the director denied the petition, concluding that there was insufficient evidence to find that the proffered position was a specialty occupation. The director noted that the petitioner provides information technology consulting services and, therefore, the duties that the petitioner's client would require the beneficiary to perform, not the petitioner's own summation of

the duties, would determine whether the job could be considered a specialty occupation. The director noted the lack of a contract between the petitioner and the end-client(s) or user(s) of the EMROnline project that would ultimately use the beneficiary's services and found that without such evidence, the position could not be classified as a specialty occupation.

In a motion that counsel filed after the director's decision, counsel claimed that the petitioner had misconstrued the evidence because the petitioner had submitted documentation of in-house work for the beneficiary. On motion, the petitioner submitted additional evidence, such as a screen shot of [REDACTED] website, in support of the contention that this company is the ultimate end-user of the beneficiary's services on the EMROnline project, which is a subscription-based online product. Counsel also restated that the position was a specialty occupation because of information that it had found in the *O*NET™ Online* Summary Report and evidence that businesses similar to the petitioner hired only degreed individuals for programmer analyst positions, as demonstrated by the two job advertisements submitted in support of the petition. In her decision dismissing the petitioner's motion, the director affirmed her original findings and noted that the petitioner failed to present reasons for reconsideration in support of the contention that the prior decision should be overturned.

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.

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.

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. 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." In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation. Moreover, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director 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 period requested in the petition.

In this matter, the petitioner states that the position it is offering to the beneficiary is for a programmer analyst who would be assigned to research, analyze, design, develop, test and implement the EMROnline product for "worldwide use of the customers." To support the existence and bona fides of this product and the beneficiary's role in its development, the petitioner submitted the aforementioned agreement and itinerary, as well as a screen shot of Across Global Soft's website, which briefly described this product as being an online, subscription-based product developed in conjunction with the petitioner. The AAO has reviewed all of these documents to assess whether there is sufficient evidence to qualify the proffered position as a specialty occupation. As shall be discussed below, the evidence of record is deficient and contains inconsistencies that the petitioner has not resolved. Therefore, the position being offered to the beneficiary cannot be classified as a specialty occupation.

According to the document entitled "Itinerary of Definite Employment for [The Beneficiary], the main responsibilities of the beneficiary on the EMROnline project include "work with end users to develop customization requirements." The itinerary, as well as the screen shot submitted of Across Global Soft's web page, indicate that this product is designed to integrate with existing J2EE/.Net/Mainframe COBOL based applications used by healthcare providers and insurance companies, and requires the beneficiary's services to develop code to integrate these systems. The documentation submitted, and the list of the main duties of the beneficiary, confirm that she will be required to customize requirements for end users of the EMROnline product, thereby demonstrating that the specific duties of the beneficiary will vary based on the needs of each particular healthcare provider and/or insurance company subscribing to the service. Therefore, despite the petitioner's contention to the contrary, the ultimate end-user of the beneficiary's services is the subscriber to EMROnline.

Furthermore, the itinerary for the beneficiary does not establish that the knowledge required to perform the listed responsibilities can be obtained only through the possession of a bachelor's degree in a specific specialty or its equivalent. For example, the beneficiary's main duties appear to be wiring and developing code, duties not necessarily equated to a bachelor's degree level of knowledge in computer science or a related field as either one could be accomplished by someone who possesses an associate's degree or certification in a particular programming language. According to information provided by U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, the AAO notes that the programmer analyst occupation is not one that requires an individual to possess a bachelor's degree in a specific discipline as a standard entry requirement for the occupational category. The Programmer Analyst occupational category is discussed in the *Handbook* chapter entitled "Computer Systems Analysts."

The *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a standard minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, as indicated in the following excerpt from the education and training subsection of the *Handbook's* "Computer Systems Analysts" chapter:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

* * *

Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Some analysts have an associate's degree and experience in a related occupation.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Computer Systems Analysts," <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-4> (last visited June 12, 2013). As evident above, the *Handbook* does not indicate that programmer analyst positions require as a standard minimum entry requirement at least a bachelor's degree in a specific specialty or its equivalent. The *Handbook* only indicates at most that a bachelor's degree in a computer related field is common for this type of position. Thus, the AAO would not find the programmer analyst occupation to normally require the attainment of a baccalaureate degree in a specific specialty or its equivalent for entry. Without more specificity to the level of sophistication of each duty listed on the itinerary, there is insufficient evidence to find that a bachelor's degree level of knowledge in computer science or a related field is a necessary qualification to perform the duties of the particular position here proffered.

Counsel stated in the motion and on appeal that the proffered position is a specialty occupation on the basis of the petitioner's description of the job because of information from *O*NET™ Online*, and

because other companies like the petitioner advertise their programmer analyst job vacancies as requiring an incumbent to have a bachelor's degree.

Counsel's citation to the *O*NET™ Online* is not persuasive. *O*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O*NET™ Online's* JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS 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. With regard to the SVP (Specialized Vocational Preparation) rating, the AAO notes that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the *O*NET™ Online* excerpt submitted by counsel is of little evidentiary value here.

Regarding the two advertisements that the petitioner submitted, there is no evidence that the companies are similar to the petitioner or that the programmer analyst jobs advertised would be similar to the project on which the beneficiary would be working. More importantly, not all of the companies advertise for a bachelor's degree in a specific specialty, as one of the advertisements lists "bachelor's degree preferred" as the qualifying educational level.

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." As discussed above, the technical services client agreement, along with the itinerary prepared by the petitioner, do not support the petitioner's claim that it has a specialty occupation position for the beneficiary. The petition may not be approved for this reason as well as for the other reasons articulated herein. As such, the director did not err in denying the petition or in subsequently dismissing the motion to reconsider for failing to establish error in the underlying decision.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed, and the previous decisions of the director will not be disturbed.

ORDER: The appeal is dismissed. The petition remains denied.