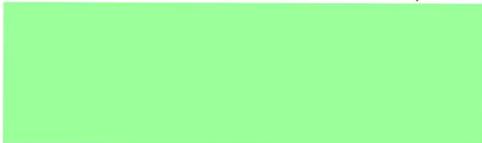




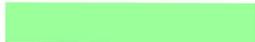
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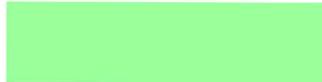


Date: **MAR 05 2013**

Office: VERMONT SERVICE CENTER

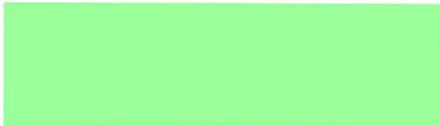
FILE: 

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:



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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a software consulting company established in 2004. In order to employ the beneficiary in what it designates as a programmer 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: (1) establish that the proposed position qualifies for classification as a specialty occupation; (2) submit an itinerary for all proposed employment locations of the beneficiary; and (3) submit a Labor Condition Application (LCA) that corresponded with the petition. On appeal, counsel for the petitioner contends that the director's findings were erroneous and submits a brief and additional evidence in support of this contention.

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. *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.

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.

In addressing whether the proffered position is a specialty occupation, the director found the record to be devoid of 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 programmer as claimed by the petitioner.

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 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 addition, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically 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.

On the Form I-129 petition, which was filed on August 9, 2011, the petitioner indicated that it was a software consulting company established in 2004, with 22 employees and a gross annual income of approximately \$6.5 million. The petitioner further indicated that it required the services of the beneficiary as a programmer for a three-year period, and indicated that the beneficiary would work onsite in its corporate offices in Princeton Junction, New Jersey.

The petitioner also submitted an undated letter addressed to the beneficiary, which indicated that the beneficiary would earn an annual salary of \$55,000 based on a 40 hour workweek. Regarding the duties of the proffered position, the letter stated that they would include the following:

- Analyze business procedures and problems to refine data and convert it to programmable form for electronic data processing.
- Confer with personnel of organization units involved to ascertain specific output requirements.
- Study existing data programming systems to improve work flow.
- Conduct special studies and investigations pertaining to development of new software systems to meet current and projected needs.
- Design, development, implementation and maintenance of application software.
- Prepare technical reports, memoranda, and instructional manuals related to the

establishment and functioning of complete operational systems.

The petitioner also submitted documentation pertaining to a software application entitled [REDACTED] without additional evidence explaining its relevance to the instant petition.

On December 27, 2011, the director issued an RFE requesting additional documentation outlining the nature and scope of the beneficiary's proposed in-house employment with the petitioner. In a response dated March 15, 2012, counsel for the petitioner addressed the director's queries, explaining that [REDACTED] is a social network product being developed by the petitioner which is using the [REDACTED]. Counsel continued to describe the three phases to the [REDACTED] development, explaining vaguely that this project is "the natural evolution for [the petitioner's] existing Internet presence." Counsel concluded by stating that "the non-technical aspect of this company is to remain competitive," and therefore the petitioner requires the services of the petitioner to "constantly interact with the client's management, explaining to it each phase of system development process, responding to its questions, comments and criticisms, and modifying the system so that concerns are adequately addressed.

Counsel also resubmitted the previously-submitted documentation pertaining to the [REDACTED] project, as well as photos of the petitioner's offices, a copy of the petitioner's website, several of the petitioner's quarterly tax returns, a copy of the petitioner's lease agreement, an employment agreement signed by the beneficiary on August 1, 2011. Counsel further claimed that an itinerary of services, including detailed job duties and the skill set required to perform the job, was submitted, yet the AAO is unable to locate such a document in the record.

Upon review, the petitioner has failed to establish that the proffered position is a specialty occupation. The petitioner and counsel assert that the beneficiary will be working on an in-house project. However, the nature of the petitioner's business, as well as the employment agreement and the petitioner's website, indicate that it is engaged in the outsourcing of personnel to client sites as needed and thus contradicts this contention. Although the petitioner claims that the beneficiary will work in-house on the [REDACTED] project, the petitioner simultaneously indicates in the employment agreement that the beneficiary will perform consulting services for the petitioner's clients, and that the beneficiary must be open and flexible to relocate to any client location in the continental United States as needed. Therefore, even if the beneficiary were to work in-house for part of the requested three-year validity period, it appears that the nature of the petitioner's business is to outsource its personnel to client sites as needed, as evidenced by the employment agreement.¹

¹ It is noted for the record that the petitioner's claims that it is "developing a social network product called [REDACTED] is unsupported by the record. Further, the petitioner has not explained or provided any evidence to establish how its product differs from the social network product owned and developed by a Delaware company called [REDACTED] headquartered in the San Francisco Bay area. 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)).

Moreover, the response to the RFE refers to the ‘Client’s management’ and repeatedly claims that the beneficiary will consult with and address concerns of the client, yet the record is devoid of any evidence demonstrating for whom the beneficiary’s services are being performed. This omission, coupled with the vague and somewhat confusing overview of the duties of the proffered position and the client(s) for whom the beneficiary’s services will be provided, render it impossible to accurately conclude that the beneficiary will be employed in a specialty occupation. The exact nature of the beneficiary’s assignments throughout the validity period will vary based on client needs during the duration of the petition; thus, the uncertainty surrounding the current assignment of the beneficiary and the absence of documentary evidence demonstrating the existence of an in-house project for the entire duration of the requested validity period, coupled with uncertainty regarding future projects 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. Despite the claims of counsel on appeal that he will work solely on the non-client-specific [REDACTED] project, the very nature of the petitioner’s business, as evidenced by the statements of the petitioner and the employment agreement confirms that the beneficiary’s duties and responsibilities are subject to change in accordance with client requirements. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO finds that such objective evidence resolving the material inconsistencies is absent.

The AAO notes that, 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 in 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 would be 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. at 165.

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*, [REDACTED] 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.*

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 likely be working on different projects throughout the duration of the petition. Whether the beneficiary works in-house or at a client site is irrelevant to this specific question, 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.²

The AAO will next address whether the petitioner submitted an LCA that corresponds with the petition, and thus established filing eligibility at the time the Form I-129 was received by USCIS.

² It is noted that, even if the proffered position were established as being that of a software programmer, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position by virtue of its classification qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2012-13 Edition, "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited February 26, 2013). As such, absent evidence that the position of programmer qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The employment agreement between the petitioner and the beneficiary, as well as the printout from the petitioner's website, indicates that the petitioner offers various consulting services to clients in a broad range of industries. The employment agreement further requires the beneficiary to be "flexible and open" with regard to reassignment and relocation within the United States based on client needs.

Generally, to ascertain the intent of a petitioner, USCIS looks 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(s) of the proffered 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

(b)(6)

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 petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

In the instant case, the petitioner filed the Form I-129 with USCIS on August 10, 2011, and indicated on that form that the beneficiary would only work in Princeton Junction, New Jersey. The petitioner submitted a certified LCA for this location. In response to the director's RFE, however, the petitioner submitted a copy of its employment agreement with the beneficiary, which indicated that the core of the petitioner's business was consulting, and required the beneficiary to maintain flexibility regarding potential relocation throughout the United States based on client needs and requirements.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In this matter, the petitioner indicates in the employment agreement that it will reassign and relocate the beneficiary to various client sites as needed. This provision, when reviewed along with the vague overview of the [REDACTED] project and the lack of contracts or agreements outlining the nature and duration of the beneficiary's claimed role on this project, demonstrates that the beneficiary's services will ultimately be provided to third-party clients during the course of his three-year employment with the petitioner which have not yet been identified.

(b)(6)

Page 10

Therefore, it must be concluded that the physical location of the beneficiary will ultimately fluctuate based on the petitioner's solicitation of new contracts and work orders on the beneficiary's behalf in the future and that the submitted LCA does not correspond to the petition in that it has not been certified for all of the beneficiary's employment locations. Accordingly, the petition must be denied for this additional reason.

Finally, as noted by the director, the petition must also be denied due to the petitioner's failure to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, given the indications in the record that the beneficiary would work at multiple locations at some point during the requested period of employment and as the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter, the petition must also be denied on this additional basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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