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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **JUL 03 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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,

Ron Rosenberg  
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.

The petitioner is a software solutions provider. The petitioner states that it seeks to employ the beneficiary as a software developer and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the petitioner failed to establish that there was a credible job offer to the beneficiary to perform specialty occupation work for the entire period of requested employment authorization.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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 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 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree

in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for an entity other than the petitioner, evidence of the client company's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The H-1B petition, filed on April 8, 2013, stated that the petitioner is seeking to employ the beneficiary as a software engineer for a three-year period from October 1, 2013 to September 12, 2016. The petition was accompanied by a letter from [REDACTED] the petitioner's senior immigration specialist, dated March 24, 2013, who stated that the beneficiary would be providing services to a client company headquartered in [REDACTED] Minnesota – [REDACTED] – and that these services would be performed at the client site in [REDACTED] Utah. Ms. [REDACTED] also stated that the beneficiary may be assigned to unanticipated worksite locations throughout the United States for client(s) that have service agreements with the petitioner. In her letter Ms. [REDACTED] provided a list of proposed duties to be performed by the beneficiary “[a]s a Software Developer with [REDACTED] as well as a list of duties previously performed by the beneficiary, and stated that he and his team would be supervised by the petitioner's senior program manager, [REDACTED]. The petitioner also submitted a letter from Mr. [REDACTED] dated March 19, 2013, who stated the beneficiary would be the assistant project manager in providing on-site deployment and services to [REDACTED] in [REDACTED] City, and that Mr. [REDACTED] would supervise the beneficiary. In addition to the foregoing letters, the petitioner submitted academic records showing that the beneficiary was awarded a Bachelor of Information Technology by the [REDACTED] in March 2005 following the completion of a four-year degree program in the years 1999-2003, as well as an appointment letter showing that the beneficiary was hired by the petitioner in December 2004. Tax records and pay statements from 2012 and 2013 show that the beneficiary continued to be an employee of the petitioner at the time the instant petition was filed. The petitioner also submitted a series

of services contracts with [REDACTED] (an original agreement and three amendments) covering the time period from July 1, 2007 to May 31, 2013, along with some statements of work (SOWs).

On August 27, 2013, the director sent a Request for Evidence (RFE) to the petitioner. Noting that the latest services agreement of record expired on May 31, 2013, and that the SOWs were not signed by either party and appeared to have expired in 2007, the director indicated that the evidence was insufficient to establish that a valid employer-employee relationship and a *bona fide* specialty occupation would exist for the duration of the requested validity period for H-1B classification. The director requested the petitioner to submit documentary evidence that it would have an employer-employee relationship with the beneficiary throughout the requested validity period and that there would be sufficient specialty occupation work for the beneficiary to perform at the client worksite for the duration of the requested validity period. In particular, the director requested:

- Copies of the relevant portions of the petitioner's contracts with the client(s) to whom its employees (including the beneficiary) would be assigned which establish that the petitioner will continue to control the employees while they work at the client work site.
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the client(s) which provide detailed information about the duties the beneficiary will perform, the qualifications required for the job, compensation, work hours, benefits, and a description of the supervisor and his or her duties.
- Copies of the position description or other documentation describing the skills required to perform the job offered, the source of the instrumentalities and tools needed for the job, the product to be developed or the service to be provided, the location where the beneficiary would work, the duration of the beneficiary's service and the petitioner's discretion in that regard, whether the petitioner has the right to assign additional duties to the beneficiary and hire assistants for utilization by the beneficiary, the method of payment to the beneficiary, the tax treatment of the beneficiary's wages, and company benefits offered to the beneficiary.
- A description of the performance review process.

The director also requested that the petitioner submit evidence that final decisions have been issued on all pending immigration cases for the beneficiary.

The petitioner responded to the RFE on October 9, 2013, with a letter from its senior immigration specialist [REDACTED] dated October 8, 2013, and additional documentation. Ms. [REDACTED] reiterated that the beneficiary would be employed by the petitioner and perform his duties at the client worksite in [REDACTED]. Ms. [REDACTED] resubmitted a copy of the appointment letter with appendices on salary structure and annual entitlements that commenced the beneficiary's employment with the petitioner in December 2004, as well as a fourth

amendment of the petitioner's services agreement with [REDACTED] signed by both parties, that extended the term of the agreement from June 1, 2013 to May 31, 2015. Ms. [REDACTED] indicated that the beneficiary and his work team would report to the petitioner's project manager, [REDACTED] who would determine the beneficiary's salary and conduct his appraisal. According to an organization chart provided by Ms. [REDACTED] Mr. [REDACTED] is the beneficiary's immediate supervisor, while [REDACTED] is the petitioner's senior program manager to whom Mr. [REDACTED] directly reports. The petitioner submitted a letter from the project manager, Mr. [REDACTED] dated September 23, 2013, which was virtually identical to the previously submitted letter from Mr. [REDACTED] dated March 19, 2013, describing the beneficiary's position as the assistant project manager in providing on-site deployment and services to [REDACTED] in [REDACTED] but identifying himself rather than Mr. [REDACTED] as the beneficiary's supervisor. Finally, the petitioner submitted documentation showing that the beneficiary was in L-1 visa status from July 13, 2010 to July 13, 2013, and that a petition was filed on July 9, 2013 to extend the beneficiary's L-1 status. USCIS records indicate that this latter petition was denied on November 13, 2013.

On October 15, 2013, the Director issued a Notice of Decision denying the petition. "It is not clear in this case . . . that there is a bona fide position," the Director stated, since "the record fails to demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients." The materials submitted in response to the RFE, the Director noted, did not include any new SOWs to supplement the expired SOWs cited in the RFE. The Director found that the services agreement between the petitioner and [REDACTED] (amendment number 4, valid from June 1, 2013 to May 31, 2015) did not sufficiently describe the beneficiary's duties, the product to be developed, or the specific services to be provided. The Director stated that the petitioner did not sufficiently demonstrate that it had work available for the beneficiary throughout the requested validity period for H-1B classification, without which it could not be determined that a valid employer-employee relationship currently exists and would continue to exist for the entire validity period. The Director concluded that "without further information to substantiate the nature of the petitioner's agreement with the end-client, the end-client's need for the beneficiary's services, the work location, and the specific duties to be performed, a credible proffer for the indicated specialty occupation cannot be established for the requested period of employment."

The petitioner appealed the Director's decision on November 12, 2013, supplemented by a brief from its senior immigration specialist and copies of previously submitted documentation which included the beneficiary's appointment letter of December 14, 2004, the original services agreement with amendments, and associated SOWs (all expired). In her letter Ms. [REDACTED] asserts that the documentation submitted with the petition and in response to the RFE is sufficient to establish that a credible offer of employment from the petitioner to the beneficiary exists. Ms. [REDACTED] cites the appointment letter as proof that the beneficiary is employed by the petitioner and the letters from the petitioner's senior program manager and project manager in March and September 2013 as confirming that the beneficiary will be working in [REDACTED] on behalf of the client [REDACTED]. Ms. [REDACTED] also cites the petitioner's services agreement with [REDACTED] and the series of amendments extending its term to May 31, 2015, as evidence that a *bona fide* position exists at the client work site and, considering the longstanding

relationship between the contracting partners, will continue to exist through the end of the requested employment period on May 12, 2016.

We agree with the Director that the evidence submitted by the petitioner is insufficient to establish that a *bona fide* job offer exists for the beneficiary to perform specialty occupation work at the client work site in [REDACTED]. In the RFE the Director requested that documentation be submitted – such as contractual agreements, statements of work (SOWs), work orders, service agreements, and letters between the petitioner and the client(s) – that provides detailed information about the duties the beneficiary will perform. No such information was provided in the initial services agreement or any of its amendments. The SOWs in the record are expired. They were appended to the initial services agreement and, for the most part, the work stated therein appears to have been scheduled for completion in 2007. No new SOWs have been submitted with the latest amendment to the services agreement, or with any earlier amendments. Moreover, none of the foregoing documents identifies the beneficiary as an employee of the petitioner who will perform services for [REDACTED] pursuant to the services agreement, its amendments, and its SOWs. The petitioner has provided no letters or other documentation between itself and [REDACTED] that confirms the beneficiary will be utilized at the client's [REDACTED] work site and the duties he will perform there during the requested period of employment from June 2013 to May 2016.

While the letters from the petitioner's senior immigration specialist ([REDACTED]), senior program manager ([REDACTED]), and project manager ([REDACTED]) list the beneficiary's job duties as assistant project manager and assert that the beneficiary will be deployed to [REDACTED] to work on the client contract with [REDACTED] we note some inconsistencies in the letters. Mr. [REDACTED] in his letter dated March 19, 2013, identified himself as the petitioner's senior program manager and the beneficiary's principal supervisor with complete authority to hire and fire him. This information was affirmed by Ms. [REDACTED] in her letter dated March 24, 2013. Six months later, in his letter dated September 24, 2013, Mr. [REDACTED] identified himself as the petitioner's project manager and the beneficiary's principal supervisor with complete authority to hire and fire him. This information was affirmed by Ms. [REDACTED] in her letter dated October 8, 2013. Thus, both the senior program manager and the project manager claimed to be the beneficiary's principal supervisor in 2013, and Ms. [REDACTED] affirmed each of these inconsistent claims. The petitioner has provided no explanation as to how two different managers could both be the beneficiary's principal supervisor.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

Moreover, while the letters from the petitioner in 2013 [REDACTED] provide a detailed list of the job duties to be performed by the beneficiary at the client work site in [REDACTED] no such detailed information has been provided by [REDACTED] to corroborate the petitioner's letters. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its

location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. Because they come exclusively from the petitioner, therefore, the letters from [REDACTED] do not establish the job duties to be performed by the beneficiary. *See id.* In this case, the description of the job duties to be performed in [REDACTED] must come from [REDACTED] the end-client. There is no such evidence from [REDACTED] in the record. Accordingly, we cannot determine from the evidence of record whether or not the petitioner will employ the beneficiary in 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 satisfies any criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of the work that determines

- (1) the normal minimum educational requirement for the particular position, which is the focus of criterion one;
- (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, and the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two;
- (3) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and
- (4) the degree of specialization and complexity of the specific duties, which is the focus of criterion four.

Accordingly, the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In summation, while the evidence of record documents a contractual relationship between the petitioner and [REDACTED] and that the beneficiary is an employee of the petitioner, it does not establish that the beneficiary will be employed by the petitioner at a work site in [REDACTED] to perform specialty occupation work for [REDACTED] pursuant to an ongoing services agreement during the entire three-year period of requested employment. There is no documentation from [REDACTED] confirming that there is specialty occupation work to be performed at its [REDACTED] location for the entire period of requested employment from June 2013 to May 2016, that the beneficiary will be deployed by the petitioner to work on that project for the entire period of requested H-1B classification, and the specific duties the beneficiary will perform. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248.

In accordance with the foregoing analysis, and consistent with the director's decision, we conclude that the petitioner has failed to establish that it has a *bona fide* job opportunity for the beneficiary at a client work site performing the duties of a specialty occupation for the entire period of requested employment.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, we will not disturb the director's decision denying the petition.

**ORDER:** The appeal is dismissed.