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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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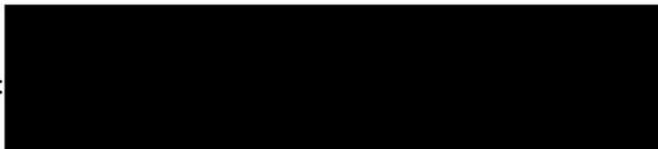


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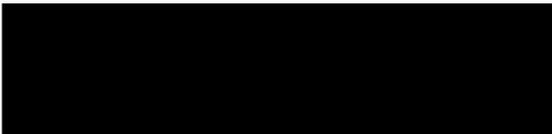
FILE: WAC 07 147 51063 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
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 petition will be denied.

The petitioner is an information technology consulting and solutions provider that seeks to employ the beneficiary as a SAP Business Systems Analyst. The petitioner, 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 director denied the petition on two separate and alternative grounds. Specifically, the director determined that the petitioner had not established: (1) that it qualifies as a U.S. employer or agent; or (2) that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

The first issue in the present matter is whether the petitioner has established that it meets the regulatory definition of a United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines H-1B nonimmigrants as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

- (3) Has an Internal Revenue Service Tax identification number.

The petitioner indicated on Form I-129 that the beneficiary would work as a SAP Business Systems Analyst in "Poway Metro, California." The record reflects that the petitioner's main offices, as of the date of filing, were located in Poway, California. The record also includes a certified labor condition application (LCA) submitted at the time of filing, listing the beneficiary's work location in Poway, California as a SAP Business Systems Analyst.

While counsel's letter accompanying the initial filing referred to a company support letter, the AAO can find no such letter upon careful review of the record of proceeding. Therefore, the petitioner's initial evidence did not include a description of the beneficiary's proposed duties.

In an RFE, the director requested additional information from the petitioner, including: information regarding the current employment status of previously approved H-1B employees; clarification regarding the employer-employee relationship between the petitioner and beneficiary; copies of signed contracts between the petitioner and beneficiary; a complete itinerary of the beneficiary's proposed services or engagements specifying the dates of each service or engagement; and copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the authorized officials of the ultimate end-user client companies. The director specified that such documentation must provide a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, and a description of who will supervise the beneficiary. The director also requested evidence of wages paid to the petitioner's employees since 2005, and copies of the petitioner's 2005 and 2006 tax returns.

In response to the RFE, counsel for the petitioner stated that the petitioner will be the beneficiary's direct employer and will control and supervise his work. Counsel indicated that the beneficiary will be working on the petitioner's in-house project known as "Integration of SAP FI/CO Module with Web Based Ordering System," with direct supervision from the petitioner's SAP Team Lead. Counsel stated that the petitioner maintains service agreements with clients where the beneficiary may be placed "as needed."

As supporting documentation, the petitioner submitted the following: a nonimmigrant employee list including each employee's current status with the petitioner; an employment agreement between the petitioner and beneficiary; an organizational chart; a tentative three-year work itinerary for the beneficiary; an employment agreement between the petitioner and the beneficiary dated February 7, 2007; a 10-page description of the "Integration of SAP FI/CO Module with Web Based Ordering System" project, which included a description of the beneficiary's proposed duties within the scope of the project; and the requested wage and tax documentation.

The project description included the following proposed position description for the beneficiary:

- Design, configure, develop SAP applications  
Provide functional and business support

- Develop systems, analyze and document user work progress and system functionality requirements
- Design and develop interfaces, develop standards, fixing bugs
- Implement and improve SAP applications
- Evaluate and implement new business intelligence
- Gather business and user requirements, implement queries
- Maintain SAP Products, maintain and support SAP BW Environment, maintain and extend SAP applications, monitor data loads, ITS & Visual Administration
- End user Documentation, test and validate system changes, test and convert data, report tuning, troubleshoot and resolve application problems

According to the itinerary submitted, the beneficiary would commence these duties in December 2007 after undergoing two months of induction training and advanced SAP FI/CO training, and continue with the SAP FI/CO Integration Project through June 2009. According to the project description, the project is in the “blueprint” phase, with only a proposed end-user client identified.

The director denied the petition on the basis of her determination that the petitioner does not qualify as either an employer or an agent and is therefore not qualified to file an H-1B petition. The director observed that it appears from the record that the petitioner subcontracts workers with a variety of computer skills to other companies that require computer programming services. The director noted that the petitioner failed to submit copies of the contract or consulting services agreement between the petitioner and the end-user client firm ultimately involved with the beneficiary’s computer-related duties. As such, the director determined that the petitioner did not identify who has actual control over the beneficiary’s work or duties.

On appeal, counsel for the petitioner states that the petitioner meets the definition of a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii), as it has an Internal Revenue Service Tax identification number and it maintains the responsibility of supervising, controlling, paying, and firing the beneficiary, pursuant to the terms of the employment agreement signed on February 7, 2007. Counsel asserts that the presumption that anyone other than the petitioner controls the hiring or payment of wages and benefits to the beneficiary is contrary to the evidence.

Furthermore, counsel asserts that there is no end-user client agreement required or executed for the project on which the beneficiary will work. Counsel states that the project described is “an internal project solely owned and independently developed by the Petitioner at its San Diego office location.” Counsel explains that the project is not for any specific client, that it is expected to be licensed to users by 2009, that it is directly related to a web based order entry system previously developed by the petitioner which is currently used by many companies. Specifically, the purpose of the project is to develop applications to integrate users’ back-end financial systems to the petitioner’s web order entry system. Counsel notes that there are no current end-user client agreements for the project since the application is still in progress and will be introduced to users in June 2009. Therefore, counsel asserts that the lack of an end-user client agreement is irrelevant for purposes of establishing who controls the beneficiary’s employment. Counsel emphasizes that the

project documentation and organizational chart show that the beneficiary will be supervised by the petitioner's own SAP Team Lead.

Although the project may be an in-house project from October 2007 until October 2009, it is not clear if the beneficiary will work at client sites once the application is introduced to end-user clients. As noted in the project outline, the last step is to "go live and support" where the project team will "assure that end-users needs are being met." The tasks in this phase will include: "production support, follow up training, define long term plans and perform project review." It is very likely that members of the project team will need to work on-site to perform the duties required at this phase. The petitioner failed to provide evidence of the beneficiary's duties after October 2009. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the Form I-129 stated that the beneficiary will work in the [REDACTED] area which includes the "metro" area rather than just the specific location of the petitioner. In addition, in a response letter to the director's RFE, dated August 10, 2007, counsel for the petitioner stated that "its employees/consultants are hired for a wide range of in-house opportunities existing within the organization and are also placed at client site as and when needed." Counsel further stated that "the petitioner also has many current service agreements with other clients where beneficiary may be placed if necessary." Since it is not clear where the beneficiary will be placed after October 2009 when the in-house project will be completed, it is not clear if the petitioner will qualify as an employer from October 2009 until the requested end date of employment on September 25, 2010.

Upon review, the AAO concurs with the director with respect to the issue of whether the petitioner qualifies as an employer. The AAO finds that the evidence of record is insufficient to establish that the petitioner will act as the beneficiary's employer.

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." Counsel for the petitioner asserted that the petitioner was not an agent. The director found again that, absent documentation such as work orders or contracts between the ultimate end-user clients and the beneficiary, the petitioner could neither be considered an agent in this matter. As stated above, 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. at 165.

The next issue is whether the petitioner established that the beneficiary would be working in a specialty occupation. The director observed that the petitioner submitted no evidence from its clients specifically identifying their job requirements, and therefore, the record "does not show any specific work to be done." Finally, the director concluded that the petitioner had not established that it has sufficient work for the requested period of intended employment.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which 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 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, the 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, 8 U.S.C. § 1184(i)(1), 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 (5<sup>th</sup> 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petition may not be approved as the evidence of record does not establish that the beneficiary will be employed in a specialty occupation. In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. *See* 8 C.F.R. § 214.2(h)(9)(i); 8 C.F.R. § 103.2(b)(8). Regardless, an itinerary is required as initial evidence whether the petitioner will be acting as either the beneficiary’s employer or as an agent for the beneficiary’s employees. *See* 8 C.F.R. §§ 214.2(h)(2)(i)(B) and (F). Upon review, the director properly exercised her discretion to request additional information regarding the beneficiary’s ultimate employment, as the nature of the petitioner’s business is software development and consulting. In response to the RFE, the petitioner submitted an employee itinerary and project description and a description of the project to which the beneficiary will be assigned, which included a description of his duties within the scope of the project.

On appeal, counsel for the petitioner asserts that the petitioner has in fact specified the beneficiary’s intended duties as a SAP Business Systems Analyst, as detailed in the project document “Integration of SAP FI/CO Module with Web Based Ordering System.” Counsel emphasizes that no one but the petitioner will be determining the beneficiary’s duties, and that the lack of an end-user client agreement cannot be a ground for finding that the proffered position is not a specialty occupation.

The AAO notes that petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In

circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. USCIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business, what the third party contractor expects from the beneficiary in relation to its business, and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specific specialty.

Upon review of the record as presently constituted, the petitioner has not provided substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the 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. Moreover, the petitioner has provided a position description for the proposed position that is associated with a project that is expected to require 18 months for completion. The beneficiary's proposed duties for the remaining 18 months of the requested three-year period of employment remain undefined.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education. The general overview of the proposed duties as described in association with the petitioner's in-house Integration of SAP FI/CO Module with Web Based Ordering System project is insufficient to determine whether the duties of the proffered position could be performed by an individual with a two-year degree or certificate or could only be performed by an individual with a four-year degree in a computer-related field. As the position's duties remain unclear, the record does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

In addition, according to the itinerary submitted, the beneficiary would commence his duties in the proffered position in December 2007 after undergoing two months of induction training and advanced SAP FI/CO training, and continue with the SAP FI/CO Integration Project through June 2009. It is not clear why the beneficiary will undergo two months of training if he should have the educational and professional background to immediately start the position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. 1978).

The record contains no evidence regarding parallel positions in the petitioner's industry or from firms, individuals, or professional associations regarding an industry standard. In the alternative,

the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted documentation to distinguish the proffered position from similar but non-degreed employment as a systems analyst. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. Counsel's assertion on appeal that "the duties are complexed [sic] and specialized enough to qualify as a specialty occupation" is insufficient. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel for the petitioner states that the petitioner requires a "minimum of a Bachelors degree in business, computer science, information systems, Engineering or a related field or an equivalent thereof." The record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.<sup>1</sup>

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. To the limited extent that they are depicted in the record, the duties of the SAP Business Systems Analyst do not appear so specialized and complex as to require the highly specialized knowledge associated

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<sup>1</sup> With respect to the petitioner's hiring practices, the AAO notes that the petitioner currently has a job opening for an SAP Systems Analyst posted on its public web site, which states the following requirements: "Position requires an Associate's degree and 2 years relevant experience in SAP, FICO & SAP modules." *See* "Current Job Openings," available at <<http://www.solec.net/career.htm>> (accessed on December 16, 2009.)

with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. The AAO acknowledges counsel's assertion that an accredited evaluation company has evaluated the beneficiary's foreign academic credentials. Although the credentials evaluation was listed among the documents included in the initial petition filing, the record as presently constituted does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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 director's decision is affirmed. The petition is denied.