U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 06 158 50237 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

James Blinzinger, for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director for entry of a decision consistent with this opinion.

The petitioner is an information systems development and consulting business. It seeks to employ the beneficiary as a computer systems analyst and to extend the beneficiary's classification 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 petitioner indicated on the petition that it seeks to extend the beneficiary's H-1B status from April 13, 2006 to April 1, 2007.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition because the petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101 (a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

The director denied the petition on May 3, 2006. The director noted that the beneficiary first entered the United States as a nonimmigrant in H-4 status on April 3, 2000. The director further noted that the beneficiary was approved for H-1B status from March 20, 2002 until February 24, 2005 (LIN 02 139 50827), and was approved for an extension of H-1B status from January 20, 2005 until June 24, 2007 (LIN 04 185 5718). Since there was no evidence in the record to suggest that the beneficiary had departed the United States since her first arrival in 2000, the director concluded that the beneficiary had reached the maximum six-year period of stay in the United States in H status.

The AAO disagrees with the director and withdraws his decision. Upon review of the record, the AAO notes that the petitioner submitted two receipt notices, Forms I-797, on behalf of the beneficiary. The first receipt notice indicated that the beneficiary was approved for H-4 classification from March 20, 2002 until February 14, 2005 (LIN 02 129 50827). The second Form I-797 indicated that the beneficiary was approved for a change of status to H-1B classification valid from January 20, 2005 until June 24, 2007 (LIN 04 185 51118). Thus, the evidence on record confirms that the beneficiary was granted H-1B status on January 20, 2005, and thus upon filing the instant petition on April 19, 2006, the beneficiary was present in the United States on H-1B classification for one year and three months. Therefore, the beneficiary had not reached her maximum allowable time on H-1B status of six years when the instant petition was filed.

Pursuant to a recent interoffice memorandum, which was issued after the director issued his decision, "any time spent in H-4 status will not count against the six-year maximum period of admission applicable to H-1B aliens." *See* Memorandum from Michael Aytes, Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.* AFM Update 06-29 (December 5, 2006). Thus, the time the beneficiary spent in H-4 status will not count against the beneficiary's six-year maximum period of admission applicable to H-1B status that began on January 20, 2005. She is therefore eligible for H-1B status for the period of time requested.

However, the petition may not be approved at this time as the record, as presently constituted, does not demonstrate that the proposed position qualifies for classification as a specialty occupation, or that the beneficiary qualifies to perform the duties of the specialty occupation.

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 one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> 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 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner states that it is seeking to employ the beneficiary to fill the position of computer systems analyst. In the support letter, the petitioner described the proposed duties as the following:

> The services desired of [the beneficiary] will be for the position of computer systems analyst. [The beneficiary] will provide high quality information technology solutions that involve the analysis, design, code and implementation of n-tier enterprise applications using Java, IBM WebSphere, Bea Weblogic, JSP, Servlet, Struts, Spring-JDBC, EJB, XML and Oracle in a UNIX environment. She will evaluate requirements and processes, translate business requirements into functional specifications, and program complex technical modules, applications, prototypes and computer programs.
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> In addition, [the beneficiary] will provide support of applications software through diagnosis of problems and implementation of changes to resolve problems and maintain software at the most current level. She will be expected to prioritize work by consulting with other staff members to schedule work and coordinate programming activities.
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> [The beneficiary] will be expected to develop and adhere to standards and procedures for programming, as well as to provide technical advice and assistance to management and technical staff in matters relating to programming activities. Sh4e will also assist with coordinating or performing generation or installation of systems software, and of course create and maintain technical application documentation and standards.
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> A day-to-day description of the proposed duties using layman's terms, as well as specific and non-generic terms, would be best described as follows. Computer programs are the internal mechanisms which enable a computer to process information, such as words and data. The program can be thought of as a series of coded instructions which the computer follows to accomplish a given task. Our primary mission is to meet with business entities to learn what they want their computer systems to do. In other words, we must learn what information (data) is to be stored and how that data is to be accessed and displayed and for what reasons. This would fall within the scope of duties of an analyst, as they "analyze" the business' technology needs and develop a plan to address such needs, then reduces the mission to the computer coded instructions to accomplish the program objectives....

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence,

whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. In reviewing the 2006-2007 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry for computer systems analyst as discussed below.

In its discussion of the duties of computer systems analyst, the 2006-2007 edition of the *Handbook* states the following:

> All organizations rely on computer and information technology to conduct business and operate more efficiently. The rapid spread of technology across all industries has generated a need for highly trained workers to help organizations incorporate new technologies. The tasks performed by workers known as computer systems analysts evolve rapidly, reflecting new areas of specialization or changes in technology, as well as the preferences and practices of employers.
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> Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems—for example, business, accounting, or financial systems, or scientific and engineering systems—that vary with the kind of organization. Some systems analysts also are known as *systems developers* or *systems architects*.
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> Systems analysts begin an assignment by discussing the systems problem with managers and users to determine its exact nature. Defining the goals of the system and dividing the solutions into individual steps and separate procedures, systems analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan the system. They specify the inputs to be accessed by the system, design the processing steps, and format the output to meet users' needs. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology will be financially feasible.
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> When a system is accepted, systems analysts determine what computer hardware and software will be needed to set the system up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then, they work with programmers to "debug," or eliminate, errors from the system. Systems analysts who do more in-depth testing of products may be referred to as *software quality assurance*

> *analysts*. In addition to running tests, these individuals diagnose problems, recommend solutions, and determine whether program requirements have been met.

To make its determination as to whether the petitioner may qualify its proffered position as a specialty occupation under the first criterion at 8 C.F.R. 214.2(h)(4)(iii)(A), a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, the AAO turns to the *Handbook* for its discussion of the educational requirements imposed on those seeking employment as computer systems analyst:

> Rapidly changing technology requires an increasing level of skill and education on the part of employees. Companies increasingly look for professionals with a broad background and range of skills, including not only technical knowledge, but also communication and other interpersonal skills. This shift from requiring workers to possess solely sound technical knowledge emphasizes workers who can handle various responsibilities. While there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.
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> Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). MIS programs usually are part of the business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration (MBA), with a concentration in information systems, as more firms move their business to the Internet.
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> Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system analysts. The level of education and type of training that employers require depend on their needs. One factor affecting these needs is changes in technology. Employers often scramble to find workers capable of implementing "hot" new technologies such as the wireless Internet. Those workers with formal education or experience in information security, for example, are in demand because of the growing need for their skills and services. Another factor driving employers' needs is the timeframe during which a project must be completed.

The *Handbook* states "while there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education." That some employers place a "premium" on a college education is not synonymous with the "normally required" standard imposed by the regulation.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor's degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many

employers seek applicants who have a bachelor's degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

For all of these reasons, the AAO finds that the petitioner has not established that the position qualifies as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner did not submit sufficient documentation to evidence that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has failed to submit any evidence to the record that would serve as proof that the petitioner's degree requirement for the proffered position is common to its industry in parallel positions among similar organizations. Accordingly, the petitioner did not establish that the proposed position qualifies for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. There has been no demonstration that the proposed position is more complex or unique than the general range of computer systems analysts in other, similar organizations, which would not normally require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions. Accordingly, the petitioner has not established its position as a specialty occupation under the second prong of the second criterion.

Although the petitioner asserts that it requires an employee with a bachelor's degree to fill the position of computer systems analyst, the petitioner did not submit any documentation corroborating this statement. 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)). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner has not established that the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Upon review of the record, the petitioner did not present any documentation of its past employment practices. In the instant case, the petitioner has submitted no evidence regarding its past hiring practices with regard to the proffered position or other similarly situated employees. Accordingly, the evidence of record has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's degree requirement for the proffered position is not evidence of its normal hiring practices.

While the petitioner states that a degree is required, 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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 in any other way would lead to absurd results: if CIS 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.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In the instant case, the petitioner has not submitted evidence to establish the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A). Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that specific duties to be performed by the beneficiary in the context of the petitioner's business operations possess the requisite specialization and complexity. Therefore, the evidence

does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). However, the director did not address this issue. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision.

In addition, the petitioner did not submit sufficient evidence to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In the support letter, the petitioner stated that the beneficiary has been awarded a bachelor's degree in engineering in India and has completed coursework toward a master's degree in computer science from Franklin University in Columbus, Ohio. In reviewing the record, the petitioner did not submit a copy of the credential evaluation on behalf of the beneficiary evidencing that the beneficiary has the equivalent of a U.S. bachelor's degree.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Since the beneficiary failed to provide a copy of the credential evaluation, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the proposed position is a specialty occupation or that the beneficiary is qualified to perform the duties of the specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C). However, the director did not address this issue. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proposed position is a specialty occupation or that the beneficiary qualifies to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 3, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.