

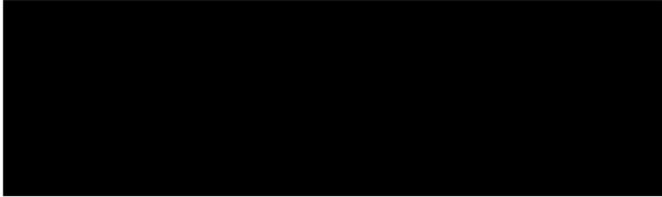
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: EAC 07 186 53149 Office: CALIFORNIA SERVICE CENTER Date: **JUL 17 2009**

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:

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).


John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. Upon review, the AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of systems administrator as an H-1B nonimmigrant 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 describes its business as systems and software development and IT (Information Technology) consulting.

The director denied the petition on two grounds, namely: (1) that the petitioner failed to establish that the proffered position is a specialty occupation, and (2) that the Labor Condition Application (LCA) submitted with the Form I-129 did not cover all the locations where the petitioner intended to employ the beneficiary. With regard to the first ground, the director determined that the record of proceeding lacked sufficient evidence to establish that, at the time that the petition was filed, the petitioner had sufficient H-1B caliber work for the beneficiary to perform in the period of employment specified in the Form I-129. With regard to the second ground for denying the petition, the director determined that the LCA was inadequate based on his finding that the consulting service agreements (with Hallmark Global Technologies, Inc. (HGT) of Delaware and Nu Info Systems, Inc. (NIS) of Florida) and the beneficiary's Offer Letter/Employment Contract, which were submitted in response to the request for additional evidence (RFE), indicate that the beneficiary would be employed in locations other than two that the LCA identified in Georgia.

On appeal, the petitioner argues that the director's decision misconstrued the evidence of record and incorrectly applied the relevant regulations to the facts established in the record. In addition to an annotated Form I-290B, the appeal consists of: (1) a brief; (2) an affidavit from the president of the petitioner; (3) a copy of a Statement of Work (SOW) outlining a project to be performed by the petitioner for Genpact Process Solutions LLC; (4) a Purchase Order to Supplier Agreement between the petitioner and HGT; (5) a Consulting Services Agreement between the petitioner and HGT; and (6) a Contractor Master Agreement between the petitioner and NIS.

The AAO first finds that the evidence submitted on appeal effectively rebuts and overcomes the director's determination that the LCA was inadequate. The Offer Letter/Employment Contract does not establish that the beneficiary would work in locations other than the two specified in the LCA. While the Offer Letter/Employment Contract includes terms that would govern reassignment and relocation from one project to another, the document does not designate any projects for relocation or otherwise indicate that relocation would necessarily occur. The Consulting Services Agreement between the petitioner and HGT does not address the petitioner's assignment of the beneficiary or any other of its own employees. Rather, it is an umbrella agreement that includes specific terms and conditions that would automatically govern any purchase order that the petitioner may issue to HGT for HGT's services as an independent contractor to perform work for the petitioner's clients.

The Contractor Master Agreement between the petitioner and NIS contains terms and conditions that would govern the performance of any purchase order that NIS may tender to the petitioner for its services as an independent contractor, and it does not specify a location for such performance. As such, the document does not indicate that the beneficiary would perform any work for NIS or that such work would be performed at a site other than the petitioner's principal place of business, which is included as a work location on the LCS.

Because the record of proceeding does not support it, the AAO withdraws the director's determination that the LCA fails to cover all of the locations of the beneficiary's work. Consequently, the only issue left for determination on appeal is whether the director's decision was correct in denying the petition on the basis that the petitioner failed to establish a specialty occupation.

As will be discussed below, the AAO finds that the director was correct to deny the petition on the basis of that the evidence of record is insufficient to establish a specialty occupation. Therefore, the appeal will be dismissed, and the petition will be denied.

In deciding whether a proffered position is a specialty occupation, the AAO applies the statutory and regulatory framework below.

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 field 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), United States 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.

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 (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.

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.”

The petitioner asserts that the nature and period of the work for which the petition was filed is indicated in the SOW executed by the petitioner and Genpact Process Solutions LLC on June 12, 2007. The petitioner submitted a copy of the SOW with the Form I-129 and on appeal. The SOW

bears the following title: "GENPACT PROCESS SOLUTIONS LLC AND GLOBAL IT SKILLS LLC, Statement of Work [Jaikanthan Sankaradass]."

The SOW's Section A (Nature/Scope of the Project) requires the petitioner, Global IT Skills LLC, to provide "an IBM-AIX Administrator resource on-site, providing support at NBC, Alpharetta, GA." Section A also states that the person serving in this capacity "is required to possess experience as an IBM-AIX Administrator." In its entirety, Section B of the SOW (Performance Standards) reads: "As per GENPACT PROCESS SOLUTIONS LLC standards." Section D (Genpact Process Solutions LLC Supplied Support) consists of the following three "bullets":

- Workstation
Access to MSNBC Facility
- Infrastructure for project work and all relevant technology/software requirements

According to the SOW's Section E (Other Terms & Conditions), the project is to extend from July 2, 2007 to at least July 1, 2010, a period which, the AAO notes, is coextensive with the employment period specified in the Form I-129.

Quoted verbatim, the description of duties that the petitioner submitted with the Form I-129 states:

The System Administrator is responsible for the Internet network system should be available for all the computer systems/servers, troubleshoot if any problem occurs on the network and work on maintenance should of the systems/servers and provide the continuous service to the clients.

Additional duties include:

- * Identifying client requirements and work on day to day network and servers, Root causes analysis on any server problems.
- * Install and configure Switches and Routers for the servers and troubleshoot the problems.
- * Maintain Hardware and software to support the Local Area Network LAN & Wide Area Network (WAN) etc.
- * Estimate the outage time to install or upgrade Operatrng system or any other software on the servers.
- * Implement security measures and maintaining security to avoid unauthorized access and modification on system/servers on both window and UNIX servers.
- * Design & built servers and work independently to meet the client's requirements.

The record includes a more expansive and technically detailed description of the beneficiary's duties in the two-page document entitled "Work Order for [the Beneficiary] as an AIX ADMINISTRATOR." However, it is not apparent or self-evident that these duties require or are usually associated with a bachelor's degree level of knowledge in a computer-related specialty, and the record provides no documentary evidence of such an educational requirement.

The brief on appeal states, in part:

The O*Net online and Department of Labor designation for the "Aix Administrator" position is "Systems Administrator" with an OES code of 15-10701.00 and education requirement of "Bachelor's degree."

On July 6, 2009, the AAO accessed the pertinent section of the *O*Net Online* Internet site, which addresses Network and Systems Administrators under the Department of Labor's Standard Occupational Classification code of 15-10701.00.¹ Contrary to the petitioner's statement, *O*Net Online* does not state a requirement for a bachelor's degree. Rather, it assigns Network and Systems Administrators a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the *O*Net Online* does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position's being a specialty occupation.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of the wide array of occupations that it addresses. The petitioner's description of the beneficiary's duties substantially comport with the Systems Administrators occupational category as discussed in the chapter on computer Support Specialists and Systems Administrators in the *Handbook's* 2008-2009 edition. This is evident in the following excerpt from the *Handbook*:

Network and computer systems administrators design, install, and support an organization's computer systems. They are responsible for local-area networks (LAN), wide-area networks (WAN), network segments, and Internet and intranet systems. They work in a variety of environments, including professional offices, small businesses, government organizations, and large corporations. They maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to system users. These workers gather data to identify customer needs and then use the information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

¹ That site is <http://online.onetcenter.org/link/summary/15-1071.00>.

Systems administrators are responsible for maintaining network efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Furthermore, they monitor and adjust the performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades.

However, the *Handbook* indicates that employers of Systems Administrators do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. For instance, the relevant chapter opens with the following Significant Points, two of which indicate that employers are open to a wide array of qualifying credentials:

- Growth in computer support specialist jobs will be about as fast as the average, while growth in network and computer system administrator jobs will be much faster than average.
- *There are many paths of entry to these occupations.*
- *Job prospects should be best for college graduates with relevant skills and experience; certifications and practical experience are essential for people without degrees.*

(Emphasis added.)

While the Training, Qualifications, and Advancement section of the relevant chapter of the *Handbook* observes that "a bachelor's degree is required for many network and computer systems administrator positions," it does not specify particular majors or academic concentrations for those degrees. Further, the following paragraphs clearly indicate that a bachelor's or higher degree in a particular specialty is neither normally required nor usually associated with systems administrator positions:

Education and training. Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist or systems administrator. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. And for some jobs, relevant computer experience and certifications may substitute for formal education. For systems administrator jobs, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field.

A number of companies are becoming more flexible about requiring a college degree for support positions. In the absence of a degree, however, certification and practical experience are essential. Certification training programs, offered by a variety of

vendors and product makers, may help some people to qualify for entry-level positions.

The evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To the extent that they are described in the record of proceeding, neither this petition's particular position nor the duties comprising it indicate that the position is one that normally requires at least a bachelor's degree, or its equivalent, in a computer-related specialty. The AAO notes that the record includes no documentary support for the petitioner's assertion that such educational credentials are necessary for successful performance of the proffered position. 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)). The AAO acknowledges the variety of technical duties delineated in the petitioner's description of the proposed duties and in its Work Order for the beneficiary as an AIX Administrator. However, whatever technical training or formal education may be required to perform such duties is not self-evident.

As earlier discussed in this decision, the *Handbook* indicates that, while a particular Systems Administrator position may require a bachelor's degree, or the equivalent, in a specific specialty, such is not normally a minimum requirement for entry into the Systems Administrator occupation. Therefore, it is incumbent on the petitioner to provide sufficient evidence to distinguish the proffered position from the range of System Administrator positions that do not require a bachelor's degree or the equivalent in a specific specialty. This the petitioner has failed to do.

The AAO further notes that the record's copies of the petitioner's system administrator job advertisements do not include a requirement for any particular type or level of formal education.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position when the petitioner demonstrates that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information that entry into the system administrator occupation does not normally require at least a bachelor's degree in a specific specialty, and it does not develop complexity or uniqueness as aspects of the proffered position that distinguish it from the range of system administrator positions not requiring a bachelor's degree in a specific specialty.

As the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As noted earlier in this decision, the record provides lists of technical duties to be performed by the beneficiary. However, the record provides no explication or documentary evidence showing that they are so specialized and complex that their performance requires the knowledge specified in this criterion.

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.