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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

D2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 0 3 2010

IN RE: Petitioner:
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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a computer software development and IT (Internet technology) consulting firm with 20 employees. To employ the beneficiary in a position designated as a programmer analyst, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding (1) that the petitioner failed to establish that the beneficiary would be employed in a specialty occupation, (2) that the petitioner failed to establish that it has standing to submit the visa petition as either a U.S. employer or a U.S. agent, (3) that the petitioner failed to demonstrate that the labor condition application (LCA) submitted to support the visa petition is valid for employment in the area(s) where the beneficiary would employ her, and (4) that the evidence in the record suggests that the petitioner does not intend to comply with the terms and conditions of the labor condition application (LCA) as certified.

On appeal, the petitioner asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, the petitioner submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly

specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, 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, 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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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.

An offer of employment, dated March 10, 2009 and addressed by the petitioner's CEO to the beneficiary, states that the beneficiary would be employed as a programmer analyst. A letter from the petitioner's CEO to USCIS, also dated March 10, 2009, states:

> [The petitioner] supplies a broad range of IT applications, Solutions and services including e-Business solutions, Enterprise Resource Planning (ERP) implementation & Post Implementation Support, Application Development, Application maintenance, Software Customizations, Database Administration and Data Warehousing applications.

[Errors in the original.]

As to the duties of the proffered position, that same letter states:

> [The beneficiary] would coordinate with the existing team to work on design and development activities. She will be responsible for the project's requirement gathering, design, development and implementation of new functionality.

The letter further describes the duties of the proffered position as follows:

- Designs, writes and documents computer programs/software packages, requiring knowledge of software packages and some programming languages.
- Tests adequacy of program and corrects program errors by altering program steps and sequence.
- Writes programs to verity accuracy of data collected and may enter into computerized files.
- Determines which record-keeping systems are most suitable for information storage and retrieval and report writing.
- Collects and organizes data to maintain and/or create computerized files, updating data on an on-going basis.
- Confers with supervisor to resolve questions of program intent and output requirements.
- May supervise data entry operations.
- Writes instructions and procedures for use of programs.

- Performs related duties as required.

[Errors in the original.]

As to the beneficiary's employment itinerary, the petitioner's CEO stated that the beneficiary will work at the petitioner's office in Sunnyvale, California. The CEO further stated that the "Start Date of Project" would be March 10, 2009 and the "End Date of Project would be April 10, 2011. Those dates are also the beginning and ending dates of the period of employment requested on the visa petition. The petitioner's CEO stated that it has clients in the "Information Technology, Financial Services, Manufacturing, Investment Banking, Insurance, Networking, Telecommunications, E-Business, Retail Enterprises, Healthcare and Marketing" industries, but did not identify any of its clients or demonstrate that it is currently under contract to provide any services to them. Despite referring to "the project" several times, the CEO did not identify the project upon which the beneficiary would work.

In a request for evidence dated April 3, 2009 the service center requested, *inter alia*, further evidence pertinent to the nature of the duties to which the beneficiary would be assigned. The service center also specifically stated:

> If the petitioner claims that the beneficiary will work on an "in-house" project[,] provide a detailed technical description of the alleged internal development project which includes the timeline, current status, number of employees assigned, worksite location, and a marketing analysis for the final product.

In response, the petitioner submitted a letter, dated May 11, 2009, from the petitioner's president. That letter includes a different description of the duties of the proffered position, specifically:

> [T]he beneficiary will be responsible for working on application development being done at our premises in Santa Clara. She would analyze user requirements and procedures as well as computer systems. She will be responsible for analyzing risks, and validate all the deliverables, identify and rectify complex issues and will also be involved in development, unit testing and implementation. She will also be required to coordinate other technical jobs at our office when there is a need. She will also be solving production problems, making enhancements to the existing functionality, fixing logical bugs existing in the application and carrying out research activities for betterment of various activities. Our company will also utilize her services and skill in all other functional areas wherein she has gained training and expertise.

The petitioner's president specifically mentioned the beneficiary's skills as a web developer.

The petitioner's president further stated:

> [The beneficiary] will be working on the development of the Universal Hardware Debug Card (UHDC) which constitutes PCI, PCI Express and USB interfaces on the

> PC side and 12C and JTAG interface on the DUT (Device under Test) side. This product can be used as a plug[-]in card to interface the PCI, PCI Express or USB port of PC's to the JTAG/12C of any board for testing the board. The software with GUI is developed using Microsoft .net framework with the registers of the FPGA being accessible from GUI.

The petitioner's president stated:

> Currently we have designated [the beneficiary] for this project and apart from her [another named worker] will be working on this effort. [The other named employee] has already come up with the functional specification and the technical design is underway.

The petitioner also provided two technical documents apparently produced for the petitioner's internal use. Those documents were last updated January 10, 2009 and February 12, 2009 and are concerned with the development of the UHDC through those dates. They provide general support for the petitioner's president's statements pertinent to the development of the petitioner's development of the UHDC.

On June 9, 2009 the director, as was noted above, denied the petition, on the basis that the petitioner had failed to demonstrate that the beneficiary would be employed in a specialty occupation and on other bases. On appeal, the petitioner did not directly address the finding that the petitioner had failed to demonstrate that the beneficiary would work in a specialty occupation.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The *Handbook* covers programmer analyst positions in the section entitled Computer Systems Analysts. In differentiating the duties of other systems analysts to those of programmer analysts, the *Handbook* states:

> In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client–server applications, and multimedia and Internet technology.

[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed November 8, 2010.

Thus, the duties of a programmer analyst includes those of a programmer and those of a systems analyst.

As to the educational requirements of systems analyst positions, including programmer analyst positions, the *Handbook* states:

> When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.
>
> Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.
>
> Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank may need some expertise in finance, and systems analysts who wish to work for a hospital may need some knowledge of health management. Furthermore, business enterprises generally prefer individuals with information technology, business, and accounting skills and frequently assist employees in obtaining these skills.

That "employers usually prefer applicants who have at least a bachelor's degree" does not indicate that a bachelor's degree is an industry-wide minimum requirement. Further, the balance of that passage makes clear that even those programmer analyst positions that may require a degree do not require a degree in a specific specialty. Degrees in computer science, information science, applied mathematics, engineering, physical sciences, management information systems are acceptable, as are degrees in other areas. That passage does not demonstrate that programmer analyst positions require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner is obliged, therefore, in order to demonstrate that the proffered position in this case qualifies as a specialty occupation, to show that the duties of this particular position proffered by the petitioner are sufficiently complex that they require a minimum of a bachelor's degree or the equivalent in a specific specialty, notwithstanding that some programmer analyst positions do not.

However, the evidence of record pertinent to the duties of the proffered position is very abstract. Designing, modifying, coding, and troubleshooting computer programs,[2] for instance, may be of such complexity that they require a minimum of a bachelor's degree or the equivalent in a specific specialty and therefore qualify as specialty occupation duties, or they may not. Without more specificity, the AAO cannot find that the duties described require a minimum of a bachelor's degree or the equivalent in a specific specialty and that, therefore, the beneficiary would be employed in a specialty occupation.

The *Handbook*, as was noted above, does not support the proposition that a minimum of a bachelor's degree or the equivalent in a specific specialty is an entry-level requirement for programmer analyst positions in general. The petitioner has not demonstrated, therefore, that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner stated, on the visa petition, that it is a computer software development and IT (Internet technology) consulting firm with 20 employees. However, it provided no evidence pertinent to the hiring practices of other computer software development and IT (Internet technology) consulting firms of similar size. The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to the educational qualifications of people it has previously hired to fill similar programmer analyst positions, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As was noted above, the descriptions provided of the duties of the proffered position are very abstract, and not amenable to analysis to determine whether they require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds

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[2] The AAO is paraphrasing here some of the duties described in the petitioner's CEO's March 10, 2009 letter.

that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmation of the director's denial of the petition based on her findings (1) that the petitioner failed to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) failed to establish that the approved LCA submitted to support the visa petition is valid for employment at the location or locations where the beneficiary would actually work; and (3) failed to establish that it would abide by the terms and conditions of the approved LCA.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The record suggests an additional issue that was not addressed in the decision of denial As was noted above, the petitioner failed to demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Had the petitioner demonstrated that the proffered position requires a degree in computer science, information science, or management information systems, just to list a few possible examples, the petition would still not be approvable. The petitioner is not only obliged to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, but that the beneficiary has that specific degree. *See generally Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968). Here, the petitioner has failed to provide evidence that the beneficiary's foreign degrees are equivalent to a U.S. bachelor's and/or master's degrees in a specific specialty. For this additional reason, the appeal must be dismissed and the petition denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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, and the petition is denied.