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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
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FILE: WAC 08 145 51401 Office: CALIFORNIA SERVICE CENTER Date: **JAN 06 2010**

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:
[Redacted]

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 of the 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 independent distributor of television and home video distribution. It seeks to employ the beneficiary as a computer systems analyst 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, concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

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

The first issue that the AAO will therefore consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 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 (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.

In this matter, the petitioner seeks the beneficiary’s services as a computer systems analyst. Evidence of the beneficiary’s duties includes: the Form I-129; and the petitioner’s April 3, 2008 letter of support. The support letter indicates the scope of the proffered position would involve designing, constructing, launching and maintaining digital media applications on the Internet in an international business environment, which would entail the following duties:

- Setup and configure the entire Video on Demand website and network infrastructure including servers, workstations, master video library and encoders;
- Administration and support of applications and digital functionality around Video on Demand (VoD) services;
- Day to day administration of actively running website and the web server, including regular content updates;
- Restore new and delete old movie titles;
- Encode content to multiple formats and multiple languages, English and German;
- Operate and support the interactive Video on Demand service, enable video streaming and downloading;
- Administer digital right management, ensure copyright protection of provided content;
- Ensure proper scheduling, billing and performance of service;
- Maintain regular software, security and equipment upgrades;

- Set up optimum parameters and configurations under which the addressable systems and Video on Demand operates;
- Troubleshoot the VoD system using system tools and billing system functions;
- Identify situations in which the components are performing less than optimally;
- Recognize circumstances resulting in service failures and repairs or arrangements for repair or adjustment;
- Administrate system security, audit of services authorized to services in billing, backups, disaster recovery and database integrity; and
- Perform full time maintenance of web publishing system.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The *Handbook's* description of computer systems analysts includes the following:¹

[C]omputer systems analysts help organizations to use technology effectively and to incorporate rapidly changing technologies into their existing systems. The work of computer systems analysts evolves rapidly, reflecting new areas of specialization and changes in technology.

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems' resources to additional tasks. Most systems analysts work with specific types of computer systems – for example, business, accounting, or financial systems or scientific and engineering systems – that vary with the kind of organization....

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure that their plans are efficient and complete. . . .

¹ All of this decision's references are to the 2008-2009 edition of the *Handbook*.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it 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. . . .

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 programmers appears elsewhere in the *Handbook*). . . .

One challenge created by expanding computer use is the need for different computer systems to communicate with each other. Systems analysts work to make the computer systems within an organization, or across organizations, compatible so that information can be shared. . . .

Analyzing this description in the *Handbook*, the AAO finds that the proffered position as described in the initial support letter does not conform to that of a computer systems analyst, although this also can be determined from the *Handbook*’s description of computer systems analysts’ duties as well as the nature of the petitioner’s business. The petitioner was only established in 2006 and has an extremely small office – indeed, the petitioner only has one employee. No evidence was provided to establish that the petitioner needs to incorporate rapidly changing technologies into its existing systems or that the petitioner is large enough or has a sufficient client base to justify rapidly expanding computer use of the type that would warrant the employment of a computer systems analyst.

The AAO finds that the proffered position most closely falls under the job description of an Internet developer or Web developer/designer, which is found under the section for Computer Scientists and Database Administrators in the *Handbook* as follows:

The growth of the Internet and the expansion of the World Wide Web (the graphical portion of the Internet) have generated a variety of occupations related to the design, development, and maintenance of Web sites and their servers. For example, *webmasters* are responsible for all technical aspects of a Web site, including performance issues such as speed of access, and for approving the content of the site. *Internet developers* or *Web developers*, also called *Web designers*, are responsible for day-to-day site creation and design.

Of the education and training required for positions in the computer scientists and database administrators section, the *Handbook* states:

A bachelor’s degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. . . .

For more technically complex jobs, persons with graduate degrees are preferred. . . . Art or graphic design skills may be desirable for webmasters or Web developers.

Despite employers' preference for those with technical degrees, individuals with post-secondary degrees in a variety of other subjects may find employment in these occupations.

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

The AAO finds that the petitioner's descriptions of the beneficiary's duties are generic and generalized, and that the petitioner has not documented the correlation between the substantive nature of those duties and the educational requirements that characterize a specialty occupation. As the *Handbook* indicates no specific degree requirement for the employment as described in the record of proceedings, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 with a requirement for at least a bachelor's degree, in a specific specialty, that 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. To establish its degree requirement as an industry norm, in response to the RFE, the petitioner has submitted three advertisements from other companies for computer systems analyst positions as well as an article on becoming a computer systems analyst from About.com. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry because, as the AAO has determined, the proffered position is not that of a computer systems analyst. Despite the title assigned to the position by the petitioner, the record does not establish the proffered position as that of a computer systems analyst. Therefore, the announcements and article are not probative for the purposes of these proceedings. As a result, these documents do not establish the degree requirement in parallel positions that is necessary to satisfy the

first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Further, it is not evident that the positions advertised are parallel to the proffered position, or that they pertain to organizations substantially similar to the petitioner. Also, there is no documentary evidence of the extent that the advertisements are representative of the petitioner's industry's recruiting and hiring practices.

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 to the effect that there is a spectrum of degrees acceptable for web designer positions, including degrees not in a specific specialty related to web design. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other web design positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established 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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As noted earlier, the AAO finds that there is insufficient evidence that the proffered position is that of a computer systems analyst. However, even if the position were most closely aligned to that of a computer systems analyst, the AAO does not find that these duties, as described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of computer systems analysts whose responsibilities require them to solve computer problems and use computer technology to meet the needs of an organization.

Whether viewed as a web designer or computer systems analyst position, it is not evident that the proposed duties, even as expanded in response to the RFE, are so specialized and complex as to require the knowledge usually associated with at least a bachelor's degree in a specific specialty. The *Handbook* chapters related to web designers and to computer systems analysts indicate that neither occupational group categorically requires a degree in a specific specialty or the knowledge usually associated with such a degree. Thus, it is incumbent upon the petitioner to document how the duties and performance requirements of its particular proffered position elevates it above other positions in the same occupational group that neither require nor are usually associated with a degree in a specific specialty. This the petitioner failed to do. The AAO, therefore, concludes that the evidence of record has not established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel asserts that the director did not assess the additional job duties provided in the response to the RFE. The AAO will next examine whether the director erred in this regard. The director requested additional evidence regarding the proffered position in the RFE issued on May 1, 2008. In response, counsel for the petitioner expanded on the duties provided in the initial letter of support. Counsel did not provide a

breakdown of duties by percentage of time stating that such a breakdown has not yet been set by the petitioner. The expanded job duties provided in the RFE response include:

- Conceptual design of hard- and software environment;
- Conceptual design of services and service level management;
- Installation and configuration of computer systems;
- Documentation of the systems environment;
- Regular scheduled system administration activities including applications installation;
- Daily monitoring the health of the IT infrastructure;
- Daily scheduled systems reviews;
- Troubleshooting of issues as required;
- Weekly written systems status reports; and
- Monthly written quality assurance reports.

The AAO finds that the additional duties stated in the petitioner's response to the RFE constitute a material change to the petition. The petitioner expanded the beneficiary's duties in its response to the RFE, adding items such as "conceptual design of hard- and software environment" and "conceptual design of services and service level management." The initial description appeared to have the beneficiary focusing solely on web design and development while the second iteration of the job has the beneficiary working on computer systems design and installation. The AAO finds that the updated description of duties in response to the RFE is not consistent with the duties submitted by the petitioner in its initial support letter.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *See generally Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the AAO will not consider the additional job duties provided by the petitioner in response to the RFE or in support of the appeal.

Finally, counsel submits an April 23, 2001, USCIS guidance memorandum from the Nebraska Service Center director (NSC 70/44.4) that states that "if the duties described in the petition primarily constitute analysis/design/modification of software or hardware, that fact should be sufficient to establish eligibility."

Counsel's reliance on this memorandum is misplaced. For several reasons, this memorandum has no evidentiary impact. The memorandum is not relevant, as the petition was not adjudicated at the Nebraska Service Center. More importantly, the memorandum does not have the force of law. USCIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)

(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind USCIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004). In contrast to agency memoranda, a legacy INS or USCIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.