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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 02 2011

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:



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 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of programmer analyst 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 itself as a gas station and grocery store and indicates that it currently employs 8 persons.

The director denied the petition because the petitioner failed to establish that the proffered position qualifies as a specialty occupation. On appeal, counsel for the petitioner submits Form I-290B and a brief statement.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. The main issue before the AAO, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a 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 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 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 at 387. 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

When filing the I-129 petition, the petitioner averred in its July 1, 2008 that, along with its affiliated companies, it operates gas stations and grocery stores. Regarding the position of programmer analyst, the petitioner stated that the duties consisted of the following:

1. Design and Develop software systems and applications for control and automation of all businesses and to facilitate the management process.
2. Develop and install new systems and will also demonstrate and train managers in the use of the new systems.
3. Plan, develop, test, Analyze, implement and document computer programs, applying knowledge of programming techniques and computer systems.
4. Will evaluate employer’s request for new or modified programs to determine feasibility, cost and time required, compatibility with existing systems and computer capabilities.

5. Will consult with management personnel to identify current operating procedures and clarify program objectives[.]

The petitioner concluded by claiming that the applicant for the position must possess a bachelor's degree in computer science or a related field, and must also have ample knowledge of computer programming and use of programming techniques and computer languages.

On October 6, 2008, the director issued a request for evidence (RFE). Specifically, the director noted that based on the modest size of the petitioner's operations, it was unclear how the beneficiary would be performing the duties of a specialty occupation. The director requested additional evidence demonstrating that the proffered position was in fact a specialty occupation, and noted that such evidence could include documentation that other companies in the petitioner's industry employed degreed individuals in parallel positions or that the petitioner itself routinely hired degreed individuals to perform the duties associated with the proffered position.

In a response dated December 18, 2008, the petitioner addressed the director's queries. In this letter, the petitioner provided the following updated list of the duties of the proffered position:

1. Design and develop a software system, which can facilitate the process of recording and tracking all inventories on a daily basis.
2. Develop and install new systems and demonstrate and train managers in the use of the new system.
3. Plan, develop, and analyze a system that can provide information on commodities location and quantities for improvement of accountability, productivity and accuracy of stores.
4. Prepare a meticulous sales [report] and keeping daily sales reports.
5. To maintain a comprehensive record of all payments including wages of labors, taxes and incidental expenditure on a daily basis.
6. Update software programs to [facilitate] smooth running of gas pumps.
7. Develop trends to indicate the need for new products and services.
8. Prepare monthly reports which will consult with management personnel to identify incoming profits or losses.

The petitioner also submitted a list of the main duties of a systems programmer as described by the beneficiary in resume form. No additional documentation pertaining to the hiring standards of programmer analysts in the industry was submitted.

On February 27, 2009, the director denied the petition. Specifically, the director found that the petitioner had not demonstrated that the level, scope, and complexity of the petitioner's business actually required an individual with a bachelor's degree to fill the proposed position. The director noted that, based on (1) the petitioner's failure to provide job postings from similar companies in the industry which required a bachelor's degree as a prerequisite for a programmer analyst position, and (2) the petitioner's lack of hiring degreed programmer analysts in the past, questions remained regarding the validity of the claim that a person possessing a bachelor's degree was mandated to fill the proffered position in the petitioner's gas

station/grocery store. The director concluded that the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous. Specifically, counsel contends that the position is in fact a specialty occupation, and takes issue with the director's reliance on the nature and scope of the petitioning entity when rendering the decision. No additional evidence is submitted.

Here, at the outset of its analysis of the evidence in the record of proceeding, the AAO finds that, to the extent that the proposed duties and the position which they comprise are described in the record of proceeding, it is not evident that the actual performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

In this regard, the AAO finds that, regardless of the job title applied to them, the proposed duties are described in terms of generic and generalized functions - for example, "design and develop a software system, which can facilitate the process of recording and tracking all inventories on a daily basis," "develop and install new systems," and "update software programs [to facilitate] smooth running of gas pumps" - that convey neither the substantive nature of the work that the beneficiary would actually perform nor a need for a particular level of education, or educational equivalency, in a specific specialty in order to perform that work. Consequently, regardless of the job title ascribed to the proffered position, the record of proceeding lacks an evidentiary foundation that would satisfy the relevant statutory and regulatory criteria for an H-1B specialty-occupation position. This decisive determination will now be discussed in terms of the separate components of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To make its determination as to whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) which requires that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion 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.

The petitioner has stated that the proffered position is that of a programmer analyst. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2010-2011 edition of the *Handbook* for its discussion of computer systems analysts, the category most closely aligned to the vague and general duties described by the petitioner. As stated by the *Handbook*:

Nearly all organizations rely on computer and information technology (IT) to conduct business and operate efficiently. *Computer systems analysts* use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

Most systems analysts work with specific types of computer systems—for example, business, accounting, and financial systems or scientific and engineering systems—that vary with the kind of organization. Analysts who specialize in helping an organization select the proper system hardware and software are often called [REDACTED] [REDACTED] who specialize in developing and fine-tuning systems often have the more general title of *systems analysts*.

To begin an assignment, systems analysts consult with an organization's managers and users to define the goals of the system and 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 a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts oversee the implementation of the required hardware and software components. 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 may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

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.

One challenge created by expanding computer use is the need for different computer systems to communicate with each other. Many systems analysts are involved with "networking," connecting all the computers within an organization or across organizations, as when setting up e-commerce networks to facilitate business between companies.

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would more likely than not require the beneficiary to have an understanding of computer programming principles. According to the *Handbook*, a bachelor's degree is generally the minimum requirement for entry into this position. Specifically, the *Handbook* states as follows:

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.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

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.

While the *Handbook* indicates that various degrees are accepted for entry into the position of programmer analyst, the *Handbook* does not indicate that a bachelor's degree in a *specific specialty* is normally required. Therefore, based on the description of duties provided in the record, it cannot be concluded that the proffered position is a specialty occupation. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining this criterion include 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)). In the instant matter, the petitioner has not submitted evidence that responds to either prong of the criterion. Despite the director's specific request, the petitioner submitted no evidence to establish its degree requirement as the norm within its industry under the first alternate prong of the criterion.

To satisfy the alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The record, however, contains insufficient evidence regarding the nature of the petitioner's business operations which therefore prohibits a thorough review of whether the proposed work is complex or unique. While the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker. In matters where a petitioner's business is relatively small, the AAO must review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring a level of

programming knowledge that may be obtained only through a baccalaureate degree in computer science or its equivalent.

At the time of filing, the petitioner stated that it commenced business operations as a gas station/grocery store in 2004, and claimed to employ eight persons. It further claimed to have a gross annual income of \$500,000, and indicated that it was affiliated with several other companies. However, the petitioner has submitted no documentary evidence, such as its most recent income tax return or payroll records, to corroborate its claimed affiliations, gross income or staffing levels. Moreover, in the response to the RFE dated December 18, 2008, the petitioner indicates that it is a sole proprietorship, thereby raising further questions regarding the legitimacy of the petitioner's need for a programmer analyst. Although the petitioner submitted copies of the filings of articles of incorporation for several other Florida companies, the petitioner submits no evidence to demonstrate that it is related to or affiliated with these companies. 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 record offers no meaningful evidence to establish that the programming duties to be performed by the beneficiary in relation to the petitioner's claimed operations are sufficiently complex to require the services of a degreed individual. Moreover, as reflected in earlier comments in this decision regarding the evidence submitted with regard to the proffered position – evidence which is generic and generalized - is not indicative of the complexity or uniqueness required to satisfy this criterion.

The petitioner's failure to submit information related to its financial operations, affiliations, or business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from programming employment that is performed with less than a four-year degree. As previously stated, simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158.

For the reasons noted above, the petitioner has failed to establish the second alternate prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually 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. In the instant matter, the petitioner, in response to the director's request for evidence, asserted that the petitioner had never employed a programmer analyst a full-time basis. Therefore, since the petitioner has not established that it previously employed a degreed programmer in the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform them duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, however, finds no evidence to indicate that the beneficiary's duties are so specialized or complex. As already reflected in this decision's comments about the petitioner's dependence upon generalized and

generic descriptions of the duties of the proffered position, the record of proceeding does not present the duties with sufficient specificity to establish either their substantive nature or whatever degree of specialization and complexity may reside in them. Therefore, the petitioner has also failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as it has not developed the proposed duties to an extent establishing their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

The appeal will be dismissed, and the petition will be denied, for all of the reasons discussed above.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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