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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

[redacted]

B2

Date: JAN 30 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner is in the software development and consulting business and seeks to employ the beneficiary as a programmer analyst and to classify him 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 on three separate and independent grounds, namely, her findings that: (1) the petitioner did not qualify as an "employer" or "agent"; (2) that the petitioner had failed to submit an appropriate and valid Labor Condition Application (LCA) for all work locations; and (3) that the proffered position was not in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the AAO finds that each of the separate and independent grounds upon which the director denied the petition were correct. Accordingly, the appeal will be dismissed, and the petition will remain denied.

In the petition signed on August 21, 2009, the petitioner claimed to have 30 employees and a gross annual income of over $2.6 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from August 24, 2009 to June 29, 2012 at an annual salary of $64,000.

The petition was accompanied, in relevant part, by a letter from the petitioner, the beneficiary's educational evaluation and credentials, a copy of the LCA, and evidence relating to the beneficiary's immigration status. The petitioner's letter indicated that the duties of a programmer analyst within its organization include:

- Design, analyze, develop, test and deploy software;
- Consult with managerial, engineering, and technical personnel to clarify business needs, identify problems and suggest changes;
- Assist with suitable programming modifications;
- Document software instructions to enable efficient usage;
- Assist with development of software manuals and user guides.

The petitioner indicated that the position of programmer analyst requires at a minimum a bachelor's degree in business, accounting, economics, computer science, information systems, engineering, physics, mathematics or related field. The petitioner claims that the beneficiary has the equivalent of a U.S. bachelor's degree in computer science.

The Form I-129 and the LCA indicate that the beneficiary will work in San Jose, California.

On September 24, 2009, the director issued an RFE advising the petitioner, in part, to submit (1) evidence that a specialty occupation exists for the beneficiary; (2) copies of signed contracts between the petitioner and beneficiary; (3) itinerary of the beneficiary's proposed services; (4) signed contractual agreements, statements of work, work orders, etc. between the petitioner and end-clients requiring the services of the beneficiary; and (5) evidence of the beneficiary's non-immigrant status.

On November 2, 2009, the petitioner submitted a response to the director's RFE. The response includes, in relevant part: a copy of a service agreement and statement of work between the petitioner and [redacted] dated after the Form I-129 was filed; documents relating to the petitioner's products and services; evidence relating to the classification of the proffered position as a specialty occupation; the beneficiary's prior H-1 approval notice; and a letter providing explanations in response to the RFE.

The director denied the petition on November 24, 2009.

On appeal, the petitioner submits a brief with further descriptions of the petitioner's projects, maintaining that the petitioner qualifies as a U.S. employer. The petitioner further states that the beneficiary will work in its San Jose, California offices and that, at all times, the petitioner has the right to control all of the beneficiary's work. The petitioner then addresses the issue of whether the proffered position was in a specialty occupation.

The AAO will first address whether the petitioner could establish, at the time of filing of the Form I-129, that it would be the beneficiary's employer, that there was work for the beneficiary to perform, and that such work would be performed at its offices. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, and the proffered wage, among other items. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. [redacted] proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first

> examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the [Act]. The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

The information provided by the petitioner does not support the claim that, at the time of filing the petition, the petitioner intended for the beneficiary to be working in its San Jose, California. The AAO notes that the petitioner submitted a service agreement and statement of work between it and Cypress Semiconductor, but that this document was executed after the filing date of the Form I-129. At the time of filing the petition, there was no evidence that the petitioner had work for the beneficiary to perform. Alternatively, if such work was available at the time, there is no evidence in the record to support the claim that the petitioner would be in control of the beneficiary's duties or the location of the beneficiary's workplace. Accordingly, the petitioner has not established that it will be the beneficiary's employer or that the LCA is valid.

The AAO will next address whether the proffered position is in a specialty occupation.

The record does not establish that the proffered position of programmer analyst is in a specialty occupation or, beyond the director's decision, that the beneficiary has the equivalent of a U.S. bachelor's degree such that she would be qualified to perform the duties of a position in a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *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 [(2)] 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, a proposed 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 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) (hereinafter *Defensor*). 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), 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.

The AAO notes that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The petitioner states on the Form I-129 that the beneficiary will work as a programmer analyst. The record of proceedings includes a service agreement and statements of work, dated after the filing of the petition, between the petitioner and [redacted] purporting to contract the services of the petitioner as a consultant. The beneficiary's name is not listed in this agreement. The duties of the position are vaguely described by the petitioner and essentially only involve software development and support. The petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The *Handbook* describes computer programmers as follows:

> [C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.
>
> Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.
>
> As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers.

> As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .
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> * * *
>
> [M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

Id. Therefore, the *Handbook's* information on educational requirements for computer programmers indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials, including less than a bachelor's degree, or the equivalent, in a specific specialty. Moreover, the evidence of record on the particular position here proffered does not demonstrate a requirement, for the theoretical and practical application of such a level of a body of highly specialized computer-related knowledge.

As the petitioner has not demonstrated that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish 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 or its equivalent in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry to demonstrate that such a degree is the minimum entry-level requirement for the position.

As the evidence in the record of proceeding fails to establish that a requirement of a minimum of a bachelor's degree, in a specific specialty, is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Additionally, the petitioner has not satisfied 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 computer programmer positions, including degrees not in a specific specialty directly related to the performance requirements of the proffered position. Moreover, as mentioned previously, the record lacks sufficient information to distinguish the proffered position as unique from or more complex than computer programmer positions that can be performed by persons without a specialty degree or its equivalent.

Next, the AAO concludes that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence in the record of proceeding does not document a recruiting and hiring history of requiring for the proffered position at least a bachelor's degree, or the equivalent, in a specific specialty. [1]

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.

The petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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[1] In conformance with the definitions of specialty occupation at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), to satisfy this criterion the record of proceeding must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Beyond the decision of the director, it is noted that the evidence in the record does not establish that the beneficiary has the equivalent of a bachelor's degree. For this additional reason, the petition must be denied. The petitioner claims that the beneficiary has the equivalent of a U.S. bachelor's degree on the basis of an evaluation submitted by Universal Evaluations and Consulting, Inc. The evaluation specifically states that the beneficiary's academic credentials, training and progressively responsible experience were considered in determining that she has the equivalent of a U.S. bachelor's degree in computer information systems. The beneficiary, however, only completed three years of study at the university level.

To qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

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

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

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;[2]

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

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

[2] The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

> specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner has failed to establish that the beneficiary possesses the equivalent of a U.S. degree in a specialized field of study. The record establishes that the beneficiary does not hold a foreign bachelor's degree or its U.S. equivalent. The credential evaluation submitted does not meet the requirement set forth above. The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

The appeal will be dismissed and the petition will remain denied 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. The petition remains denied.