



U.S. Citizenship
and Immigration
Services

Δ,

FILE: EAC 07 140 50654 Office: VERMONT SERVICE CENTER Date: **DEC 03 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 Vermont 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 engaged in consulting services and seeks to employ the beneficiary as a consultant. The petitioner endeavors to employ the beneficiary in the nonimmigrant classification as a 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 March 25, 2008, concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position in fact qualifies for classification as a specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

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.

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 alien, 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 petitioner states that it is seeking the beneficiary's services as a consultant. In a letter of support, dated March 31, 2007, the petitioner described the beneficiary's proposed duties as follows:

- Apply statistical methods and perform mathematical calculations to determine manufacturing processes, staff requirements, and production standards.
- Coordinate quality control objectives and activities to resolve production problems, maximize product reliability, and minimize cost.
- Develop manufacturing methods, labor utilization standards, and cost analysis systems to promote efficient staff and facility utilization.
- Recommend methods for improving utilization of personnel, material, and utilities[.]
- Review and conduct analysis of client business processes and procedures at the organizational and operational levels by interviewing management and administrative personnel;
- Determine the optimal integration of business process reengineering and newly emerging information technologies and the modification of operational procedures to meet evolving business needs;
- Proposing strategic solutions and business process improvements including bench marking and design analysis;
- Participation in reengineering of client company business processes to accommodate the usage of new systems; and
- Propose new systems to address actual business needs and provide clients with consultation relating to the delivery of the system ensuring to meet client expectations.

In addition, the petitioner stated that the necessary educational background to perform these duties is through a bachelor's degree in Engineering, Business Administration, Computer Science, Math, Physics, or other related field. Under the section entitled responsibilities, the

letter states that “as a consultant, you will render reasonable duties including analysis, programming, design and development of software.”

In response to the director’s first RFE, dated August 4, 2007, the petitioner submitted a copy of the employment offer/agreement between the petitioner and the beneficiary. Upon review of the employment offer letter, dated June 28, 2007, the letter states that the offer of employment is for the position of Programmer Analyst.

In response to the director’s second RFE, dated February 1, 2008, the petitioner submitted a different offer of employment letter, dated June 20, 2007. This offer letter states the position as consultant and indicates the same responsibilities as listed in the offer letter. In addition, the petitioner stated that it “hires only candidates that possess at a minimum of bachelor’s degree, or its equivalent, in Engineering, or a related field.”

The petitioner also submitted a list of current employees, including their job titles, educational background, and the project and work location assigned to each employee. The list indicated that the petitioner employed two managers of operations, a senior developer, a vice president of operations, ten programmer analysts, five GIS analysts, three analysts, two consultants and one account administrator.

The petitioner also submitted information from its website which states that its corporate mission is to be the “premier Business Intelligence enabler of IT systems worldwide.” In addition, under the subcategory of “consulting,” it states that the petitioner “would like to find out how to dramatically improve your IT infrastructure” and “our top-notch ‘IT Gurus’ can help.” Furthermore, the petitioner’s U.S. Income Tax Return for an S Corporation, Form 1120S, states that its business activity is software development and Information Technology consulting.

On appeal, counsel for the petitioner asserts that the petitioner will be providing “services in industrial engineering.” Counsel further submits the excerpt for Engineers from the Department of Labor’s Occupational Outlook Handbook as evidence that the proffered position is similar to the position of industrial engineer.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO finds that the proffered position is not a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In reviewing the 2008-2009 edition of the *Handbook*, under the section of Management, Scientific and Technical Consulting Services, it

states that “for information on consulting firms that are engaged primarily in development of computer systems and computer software, see the statement on computer systems design and related services, and software publishing.” Under that section, the *Handbook* discusses the job duties of several computer development positions, including that of programmer analyst. Upon review of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are most closely aligned to the responsibilities of the occupational grouping of computer systems analysts as discussed in the *Handbook*.

In its discussion of the duties of computer systems analysts, the 2008-2009 edition of the *Handbook* states the following:

All organizations rely on computer and information technology to conduct business and operate efficiently. Computer 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. Analysts who specialize in helping an organization select the proper system software and infrastructure are often called system architects. Analysts who specialize in developing and fine-tuning systems often are known as systems designers.

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 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 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. 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.

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.) 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. Systems analysts work to make the computer systems within an organization, or across organizations, compatible so that information can be shared. Many systems analysts are involved with these "networking" tasks, connecting all the computers internally, in an individual office, department, or establishment, or externally, as when setting up e-commerce networks to facilitate business among companies.

The *Handbook* states the following regarding the educational requirements for computer systems analysts:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

This finding does not support a finding that a bachelor's degree is normally required for entry into this occupation. The *Handbook* finds that many employers "prefer" applicants who have a bachelor's degree. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into this occupation. Moreover, the fact that obtaining a 4-year degree is preferred is not synonymous with the standard imposed by the regulation of normally requiring a bachelor's degree, or its equivalent. It is clear that a bachelor's degree, or its equivalent, in a specific specialty is not the normal minimum requirement.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by programmer analysts, i.e., the review and analysis of a business's computer systems, operations, and policies. However, the petitioner's listing of these duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary would "propose new systems to address actual business needs," it offers no indication of what type of systems would be implemented and what the petitioner would require of the beneficiary in completing these tasks. In addition, the job duties indicate that the beneficiary will "coordinate quality control objectives and activities to

resolve production programs, maximize product reliability, and minimize cost;” however, the petitioner did not provide a detailed description of what these requirements are and how the beneficiary will implement them. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Accordingly, it finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

For all of these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner’s industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. The petitioner did not submit any evidence to establish this criterion. Simply 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. at 165. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor’s degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the description of the position proposed in the petition is very general and vague. The petitioner only offered a generic description of the beneficiary’s duties in the proffered position. The petitioner indicated that the duties will include analysis, programming, design and development of software. However, the petitioner does not explain the type of programming and development the beneficiary will perform or how it fits into the overall project. Without a detailed description of the work to be performed by a beneficiary, a petitioner

cannot establish that the tasks he or she would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent. Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally 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. The petitioner did not submit any supporting evidence to establish the third criteria. Again, 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. at 165.

Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As previously noted, USCIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. However, the petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The proposed position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

Based on the foregoing analysis, the AAO has determined that the record, as presently constituted, fails to establish that the beneficiary qualifies to perform the duties of the proffered position. The petition will be denied and the appeal dismissed for the above stated reasons. In

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

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