

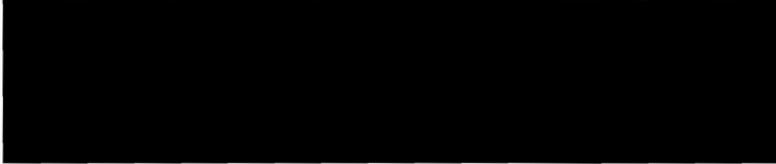
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 144 50954 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner: 
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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition remanded to the service center for entry of a new decision.

The petitioner is an information systems development and consulting company that seeks to employ the beneficiary as a computer systems analyst. The petitioner, therefore, endeavors to classify the beneficiary 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on three grounds: (1) that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary; (2) that the petitioner had failed to demonstrate that a reasonable and credible offer of employment exists; and, (3) that the petitioner had not established that it would comply with the terms and conditions of the labor condition application (LCA) certified for the location of intended employment.

On appeal, counsel contends that the director erred in denying the petition.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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.

Citizenship and Immigration Services (CIS) 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 proposed position.

The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(i):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The AAO disagrees with the director’s finding that the petitioner would not act as the beneficiary’s employer. The evidence of record establishes that the petitioner will act as the beneficiary’s employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). The petitioner submitted a support letter with the initial petition that stated it will be the “actual employer during the entire term of any authorized H-1B period.” The record contains corroborating evidence indicating that the petitioner is a U.S. employer. In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director’s decision to the contrary.

The director also noted that the petition does not establish that the beneficiary will be employed in a specialty occupation, and denied the petition on the basis that that the petitioner had failed to demonstrate that a reasonable and credible offer of employment exists. The director noted that the petitioner did not

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

submit contracts, statements of work, work orders or service agreements between the petitioner and the entity ultimately employing the alien or using the alien's services. The director stated that the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. In the letter of support, the petitioner stated that the beneficiary will be working on-site in Columbus, Ohio. The petitioner also stated that the "employment of [the beneficiary] is not dependent on any third party contracts, nor is his salary dependent on any third party contracts." In its response to the director's request for evidence, counsel for the petitioner reiterated the same and asserted that the "alien is not being assigned or contracted off-site or as a consultant." In addition, the petitioner submitted an executive summary of the E-Hire Project Business case that the beneficiary will work on in-house; a copy of the company's registration with the State of Ohio; a lease agreement signed by the petitioner for lease of a facility with 1,000 square feet; the petitioner's U.S. federal tax returns for 2004, 2005, and 2006; payroll records; and the petitioner's corporate brochure and company literature. The petitioner submitted corroborating evidence to establish that the petitioner is the U.S. employer and the beneficiary will perform duties at the petitioner's corporate offices. Thus, the AAO disagrees with the director and withdraws this part of the decision.

The petitioner is seeking the beneficiary's services as a computer system analyst. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. The petitioner described the proposed duties as follows:

He will implement his technical expertise in performing systems analysis and development, by analyzing user requirements and preparing detailed specification documentation, then designing the system based on his analysis and used input. He will be involved with the software development, software testing and implementation.

He will be responsible for Java programming, including coding JSP pages, struts framework, and writing action classes, as well as database connectivity through JDBC. He will also prepare test cases and unit testing, and develop Java files using core language functionalities, in addition to assembling and deploying server-side J2EE components.

A day-to-day description of the proposed duties using laymen's terms, as well as specific and non-generic terms, would be best described as follows. Computer programs are the internal mechanisms which enable a computer to process information, such as works and data. The program can be thought of as a series of coded instructions which the computer follows to accomplish a given task. The employee must learn what information (data) is to be stored and how that data is to be accessed and displayed and for what reasons. This would fall within the scope of duties of an analyst, as they "analyze" the technology needs and develop a plan to address such needs. The systems analyst reduces the mission to the computer coded instructions to accomplish the program objectives.

To describe what a systems analyst would do on a given specific day would depend on where he or she is during the detailed process described above. This is a sequential process, so the duties at any given time will depend on where he is during the process.

For example, one day the systems analyst would be analyzing procedures and issues, while on another day designing computer systems for the ascertained requirements, procedures, issues and programs, yet on another day inputting test data into computer systems, or testing and verifying the system and correcting any defects or program errors, commonly known as debugging the system, to eliminate systems errors or otherwise unsatisfactory results.

The petitioner also submitted an executive summary of the E-Hire Project Business Case that the beneficiary will work on in-house as a computer systems analyst. The petitioner requires a minimum of a bachelor's degree in computer science, engineering or equivalent field for entry into the proffered position.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those of a computer systems analyst or database administrator. The *Handbook* notes that there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, but most employers place a premium on some formal college education. While a bachelor's degree is a prerequisite for many jobs, others may require only a two-year degree. Despite a preference towards technical degrees, individuals with a degree in a variety of majors find employment as systems analysts/database administrators, with the level of education and type of training required depending upon the employer's specific needs. Training is offered by universities, as well as community colleges and technical institutes. The petitioner has not, therefore, established that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has established, however, that the nature of the specific 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. The duties are specialized and complex in nature and are normally performed by individuals who have obtained a baccalaureate level education, or its equivalent, in such fields as computer science, information science, or management information systems. As noted in the *Handbook*, a bachelor's degree is a prerequisite for many systems analyst positions. The record establishes that the duties of the offered position require the theoretical and practical application of a body of highly specialized knowledge. The petitioner has, therefore, satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) (4). The proffered position is a specialty occupation.

The director also found that the record does not establish that the LCA is valid for all work locations. The director noted that as the record does not contain an itinerary of employment, it cannot be determined that the LCA is valid for the work locations. The AAO disagrees with the director. The record established that the beneficiary will work on-site in the petitioner's Columbus, Ohio location. In reviewing the LCA submitted by the petitioner, it is certified for the location of Columbus, Ohio. Thus, the AAO withdraws this part of the director's decision.

The petitioner has overcome the grounds for denial cited in the director's decision. The petition may not be approved, however, as the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1), as described above, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The petitioner submitted a certificate of graduation from the University of Madras in India. The certificate states that the beneficiary was awarded a bachelor's degree in computer science. Since the degree was not obtained from a United States institution of higher education, he does not qualify under the first criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record contains a July 23, 2007 evaluation from [REDACTED] a senior evaluator for Education Evaluators International, Inc. According to [REDACTED] the beneficiary completed a three-year full time program and earned the degree of Bachelor of Science in Computer Science which is the equivalent to a bachelor's degree in computer science in the United States. The three-year program completed by the beneficiary, alone, is not the equivalent of a four-year degree in the United States. In *Matter of Shah*, 17 I & N, Dec. 244 (Comm. 1977), the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. As the beneficiary only completed three years of academic study, the AAO will not accept [REDACTED] conclusion that the beneficiary's degree is equivalent to a bachelor's degree in Computer Science from an accredited university in the United States. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an

evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by 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;
- (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 specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as there has been no demonstration that [REDACTED] possesses the authority to grant college-level credit for training and/or experience in a related field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in the field. [REDACTED] stated that the

beneficiary completed a one-year program at Altos Data Systems and earned the Post Graduate Diploma in Computer application which is the equivalent of “advanced computer training offered at a private professional training center in the United States.” A credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Further, ██████████ does not conclude that the beneficiary’s one-year of training at Atlas Data Systems is the equivalent of a year of academic study in the United States.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit 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).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because ██████████ evaluation concludes that the beneficiary’s three year degree is equivalent to a bachelor’s degree in computer science in the U.S. As noted above, the AAO does not accept ██████████’s conclusion, which fails to address how the beneficiary’s three-year degree is the educational equivalent of a bachelor’s from an accredited university in the U.S. 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)). See *Matter of Shah*, 17 I & N, Dec. 244.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit 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.

The AAO next turns to the fifth criterion. When CIS determines an alien’s qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²;

² *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority’s opinion must state: (1) the writer’s qualifications as an expert; (2) the writer’s experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country;
or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

As provided by regulation, the formula utilized by CIS is three years of specialized training and/or work experience for each year of college-level training that the alien lacks. The beneficiary must therefore demonstrate at least three years³ of qualifying work experience in order to obtain the equivalent of a bachelor's degree.

The petitioner submitted a diploma awarded to the beneficiary from Altos Data Systems for the completion of a post graduate diploma in computer applications. The course was a one-year program. However, the petitioner did not submit any documentation describing the program and the type of training provided to the beneficiary. In addition, the record does not establish that the work experience completed by the beneficiary included the theoretical and practical application of specialized knowledge required by the field, that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field, and that the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation.

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 director did not address these issues in his denial. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of the proposed position. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

³ The AAO will recognize three years of university-level study taken while the beneficiary earned his degree in India.

ORDER: The director's August 18, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.