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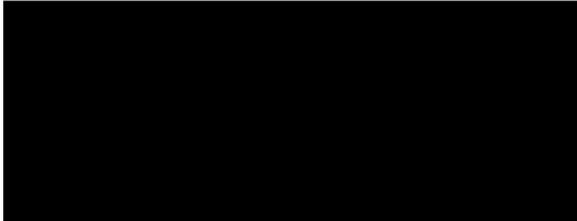
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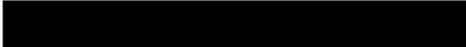
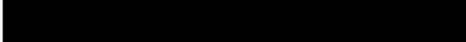


**U.S. Citizenship  
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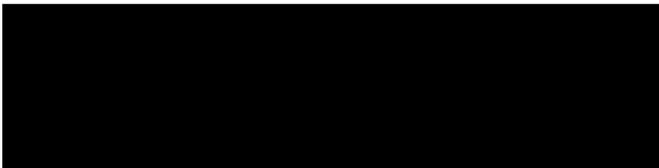


FILE: WAC 09 085 51471 Office: CALIFORNIA SERVICE CENTER Date: **APR 30 2010**

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).



Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the 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.

To continue to employ the beneficiary in what the petitioner designates on the Form I-129 as a Systems Developer, the petitioner seeks to continue the beneficiary's classification and extend his stay 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).<sup>1</sup>

The director denied the petition on the basis of her determination that the evidence of record does not establish a "reasonable and credible offer of [H-1B caliber] employment." The content of the decision conveys that the director found that the record of proceeding lacks substantive evidence that the beneficiary would actually be engaged in specialty occupation work for the extension period sought in the petition. The decision reflects that the director considered, but rejected, the petitioner's assertion that it had satisfied its burden of proof by virtue of the prior approvals issued by U.S. Citizenship and Immigration Services (USCIS) for H-1B petitions submitted for the same beneficiary and the same position.<sup>2</sup>

On appeal, counsel argues that the record of proceeding before the director was sufficient to establish that the beneficiary has been employed in a specialty occupation, and would continue to be so employed for the extension period sought in the present petition. Along with his "Appeal Brief in Support," counsel submits (1) copies of USCIS notices of receipt regarding H-1B petitions filed by the petitioner on behalf of the beneficiary, and (2) a copy of printouts from the petitioner's Internet site.

As will be discussed below, the AAO finds that the director did not err in denying the petition for its failure to establish that it was filed on the basis of specialty occupation employment that would exist for the beneficiary during the extension period sought in the petition.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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<sup>1</sup> On its Labor Condition Application, the petitioner specifies "Systems Developer/Computer Programmer" as the Job Title.

<sup>2</sup> The director correctly noted that the prior approvals are not probative of a specialty occupation in the present matter, as they were based upon separate records of proceeding that were not part of the record before the director in her adjudication of the present petition. Also, the director correctly stated that she was not bound to defer to prior petition approvals that may have been erroneous.

- (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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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 which [2] 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 (5<sup>th</sup> Cir. 2000) (hereinafter referred to as *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.

At the outset, the AAO will address counsel’s comment on appeal that the director had not issued a request for evidence (RFE) prior to her decision. If counsel is implying that the director was required by law to issue an RFE, he is incorrect. The regulations at 8 C.F.R. §§ 103.2(b)(8)(ii) and 103.2(b)(8)(iii) authorize USCIS officers to deny a petition outright, without issuing an RFE, if the petition either is filed without initial evidence required by regulation or is filed with all required initial evidence but fails to establish that the proffered position is a specialty occupation. Further, the AAO notes that the petitioner chose not to take the opportunity on appeal to submit documentation substantiating the projects in which the beneficiary would be engaged during this petition’s extension period, so as to address the lack of substantive evidence which is the core of the director’s denial of the petition.

Counsel contends that the petition should have been approved on the basis of the combined weight of the following factors: (1) the H-1B petition approvals that USCIS issued to the petitioner for the same beneficiary and job title as are the subjects of the present petition; (2) the petitioner’s status as “a \$46 million company [that] employs about 287 people”; (3) the nature of the petitioner’s business, as reflected in its statements in the record and the excerpts from its Internet site; and (4) the nature of the proffered position.

Specialty occupation classification is dependent upon the extent of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of whatever specialized knowledge in a specific specialty is shown to be necessary for or usually associated with such performance requirements. As the AAO will now discuss, the evidence of record in these areas is materially deficient and does not provide a sufficient foundation for the AAO to determine that the proffered position is a specialty occupation.

The petitioner’s January 22, 2009 letter in support of the petition describes the proffered position as follows:

As a Systems Developer, [the beneficiary] will be responsible for the implementation of the detailed design and coding of software. He will develop and enhance high quality software in accordance to the detail specification and project goals. He will provide maintenance to released software. He will be involved with project plans detailing the expected level of effort and time required. He will assist the QAM in the support of the alpha and beta sites and Support Services concerning support calls. He will provide technical reviews for documentation and education services as requested. He will provide assistance to Project Leaders with planning and execution of projects, including the writing of detail specifications and the coordination of the plan.

Counsel states on appeal that “[i]t is plainly reasonable that a technology company which builds end-to-end, fully-integrated software systems for the educational community needs a Systems Developer,” but neither he nor the petitioner have submitted contracts or any other documentary evidence of any actual software-system building project to be performed during the extension period sought in the petition. Therefore, counsel fails to establish a factual basis for his claim that the petitioner’s need for a software developer is self-evident. Likewise, neither counsel nor the petitioner provides any documentation establishing the existence and particular nature of any definite work for the beneficiary that would require his performance of duties asserted for the proffered position, such as “implementation of the detailed design and coding of software”; “develop[ment] and enhance[ment] [of] high quality software”; “involve[ment] with project plans”; and assistance to the “QAM in the support of the alpha and beta sites” and “Project Leaders with planning and execution of projects.” Further, the petition does not document any specific projects or project plans that would require the beneficiary’s software developer services during the extension period sought in the petition. Absent documentary evidence substantiating their claims, attestations from the petitioner and its counsel are insufficient to establish the likelihood of H-1B caliber work for the beneficiary for the period sought in the petition. 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 (Comm. 1998). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506. Accordingly, the record of proceeding fails to establish the nature and extent of any actual work that would involve the beneficiary’s services during the period specified in the petition.

Next, the AAO withdraws the director’s comment that a “bona fide position of Systems Developer position requires a beneficiary to have a bachelor’s degree.” Neither the position title, the record’s duty descriptions, nor any information provided in the record about the proffered position indicates that its performance would require the theoretical and practical application of at least a bachelor’s degree level of knowledge in any specific specialty. Further, the AAO finds that the totality of the evidence in the record of proceeding about the proffered position does not establish it as belonging to any occupational category regarding which the Department of Labor’s *Occupational Outlook*

*Handbook (Handbook)* reports a normal entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty.

As reflected in this decision's comments about the insufficiency of evidence regarding the actual work that the beneficiary would perform if this extension petition were granted, the petitioner has failed to establish which, if any, of the multiple duties claimed for the proffered position would be performed by the beneficiary and, regarding those actually to be performed, the minimum level of education and/or training that would be required to perform them. Consequently, the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry 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)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a U.S. bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As indicated earlier in this decision, the proffered position as described in this petition does not align with an occupation for which the *Handbook* reports a categorical requirement for at least a bachelor's degree in a specific specialty. Therefore, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence of record does not establish a bachelor's degree or higher in a specific specialty as an industry-wide requirement for positions substantially similar to the one proffered in this petition, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The evidence of record does not develop relative complexity or uniqueness as an aspect of the position. The information about the position and the duties comprising it is limited to generalized functional descriptions. This generalized information is not supplemented by documentation identifying specific projects in which the duties would be applied, describing the particular components of those projects that are so complex or unique as to satisfy this criterion, and explaining why those components are so complex or unique that their performance necessitates a person with at least a bachelor’s degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. This petition’s record of proceeding does not contain such evidence.<sup>3</sup>

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.

As noted earlier in this decision, the petitioner has limited the record’s duty descriptions to generalized and generic terms and has not related them to the actual performance requirements of any definite project upon which the beneficiary would work. Thus, the proposed duties lack the specificity necessary to establish whatever level of specialization and complexity may reside in

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<sup>3</sup> It is important to note that, to satisfy this criterion, the record must also establish that a petitioner’s historical imposition of a degree requirement in its recruiting and hiring is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This requirement resides in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), which defines the term “specialty occupation” as requiring both “(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 petitioner’s creation of a position with a perfunctory bachelor’s degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor*, 201 F.3d at 387-388. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner’s self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

them. Thus, there is no basis for the AAO to find the degree association required by this criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported assertions and evidentiary deficiencies that are contained in the current record, those approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed 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 is denied.