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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[Redacted]

FILE: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 29 2010

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:

[Redacted]

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,

for Michael T. Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and IT solutions business with 11 employees. It seeks to employ the beneficiary as a financial analyst 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and brief submitted by counsel, with supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue in this matter is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

In this matter, the petitioner seeks the beneficiary’s services as a financial analyst. The support letter indicates the proffered position would require the beneficiary to perform the following duties:

- Interface with program administrators and other business area personnel on a monthly basis [to] forecast sales, income, investment, cash flow, and shipments.
- Prepare operating and long-range plans.
- Prepare profit/loss position using accounting procedures.

- Maintain financial system used to track and forecast data on a monthly basis.
- Support functional organizations by supplying monthly financial data and expenses.
- Develop and prepare management reports and schedules to report actual vs. forecasted performance.
- Prepare and analyze monthly and quarterly program status reports.
- Prepare and analyze yearly schedules.
- Prepare quarterly workforce review.
- Prepare program cash flow analysis.
- Prepare analysis for new business pursuits.

The petitioner stated that it requires a bachelor's degree for the proffered position, but did not indicate that the degree needs to be in a specific specialty.

The petitioner submitted evidence that the beneficiary received a U.S. Master of Business Administration degree.

The Labor Condition Application (LCA) was submitted for a financial analyst to work at the petitioner's offices in San Jose, CA at an annual salary of \$61,000.

On January 23, 2009, the director requested additional information, including a more detailed job description and information about the nature of the position and the petitioner's past employment practices, demonstrating why the proffered position is a specialty occupation. The RFE also requested additional information regarding the petitioner and beneficiary.

Counsel for the petitioner broke down the position duties as follows:

- Prepare analysis for new business pursuits (20%);
- Enterprise software industry research, analysis of risk of initiatives, business scenario modeling and interdepartmental data gathering (15%);
- Prepare operating and long-range plans (15%);
- Develop and prepare management reports and schedules (15%);
- Prepare profit/loss position on a monthly basis using accounting procedures and the petitioner's financial system (15%);
- Support functional organizations by supplying monthly financial data and expense analysis (10%); and
- Prepare program cash flow analysis (10%).

The AAO finds that, to the extent that they are described in the record of proceeding, the duties comprising the proffered position are described exclusively in terms of generic and generalized functions. Those descriptions do not convey any specific methodologies to be used, particular analytical tools that would be applied, or any substantive aspects of performance of the proffered position for which there is a self-evident need for a particular educational level of a body of highly specialized knowledge in a specific specialty. The AAO also finds that the petitioner has failed to supplement the record with any documentary evidence that would establish a nexus between the

duties as described and a necessity for at least a bachelor's degree, or the equivalent, in a specific specialty. It follows that the petitioner has failed to provide an evidentiary foundation sufficient to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel stated that the beneficiary will provide analysis and reporting relating to cost, revenue, gross margin, and expenses on a billing system being developed by the petitioner.

Additionally, counsel stated that the petitioner requires at least a bachelor's degree in business or finance for the proffered position. However, this is in contrast to the petitioner's support letter stating that a bachelor's degree in any field is required. Although counsel submitted a copy of the petitioner's advertisement for a Business Analyst, which states that a bachelor of science degree in business management operations or information technology is required, this is a different occupation than the one proffered and counsel states that the petitioner has not previously employed anyone in the proffered position. Therefore, counsel has not submitted any evidence to support his assertion that the petitioner requires at least a bachelor's degree in business or finance. 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. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, counsel for the petitioner submitted an organization chart, which does not include the proffered position. From the chart, it appears that the petitioner has 11 workers, including a Director of Sales and a Director of HR & Accounting, and five consultants.

Counsel also submitted a copy of the petitioner's 2007 U.S. Corporation Income Tax Return, which states the petitioner earned a gross income of over \$1.6 million for that fiscal year. According to the 2008 quarterly returns that were submitted, the petitioner employs five workers, in contrast to the 11 claimed in the organizational chart and on the Form I-129.

Counsel also submitted copies of advertisements placed by other companies for financial analysts as well as a copy of the *O*NET Online* report for Financial Analysts.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director noted that the petitioner failed to establish that the petitioner engages in the type of business for which a financial analyst would typically be required and that the petitioner does not appear to have sufficient capital to invest that would require the services of a financial analyst.

On appeal, counsel explains that the petitioner is hiring the beneficiary to work on an in-house software product that the petitioner is creating. The product is a billing system suite. Counsel describes the technology that will be used to create this product and then states:

It follows that Petitioner will require the services of a Financial Analyst who can understand and use the above technology to work on the [REDACTED]

[REDACTED] suite product] so that the billing software can maximize return for its users. To do this, Beneficiary shall work directly with executive management, product managers, and the support team to provide financial and operating analysis and guidance to assist to [sic] the development of the [billing system suite product]. This role will provide analysis and reporting relating to cost, revenue, gross margin, and expenses on [REDACTED] once it is ready for deployment.

Counsel's descriptions of the duties that she associates with the [REDACTED] suite product suffer from the lack of substantive information that this decision earlier discussed as the hallmark of the duties as described in this record of proceeding. Further, however, the addition of these [REDACTED]-related duties undermines the credibility of the petition. First, they were not identified in either the petitioner's letter of support submitted with the Form I-129 or in the additional duties identified in response to the director's RFE. Second, while counsel asserts that the beneficiary would participate in the development of the [REDACTED] suite product, the content of the Fact Sheets submitted on appeal as Exhibit A contains conflicting information that undermines the credibility of this assertion. In this regard, the AAO notes that, while page 1 of the first and second copies of the Fact Sheet states that Release 1.0 "is scheduled to be released in [D]ec 2009," page 11 of the second copy, at the [REDACTED] section, specifies "a release date of April 2004." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel then reiterates the duties provided in response to the RFE. Counsel has also provided a copy of the petitioner's product overview of the billing system suite product along with a copy of a contract between the petitioner and its client to exchange proprietary information.

As already noted, the proffered duties as described are vague and generic. According to counsel, the beneficiary will assist the petitioner in developing and testing the product being created. It is not clear whether the beneficiary would actually assist in developing and testing the software product and/or whether the beneficiary would gather the financial data necessary to market the product. Regardless, the petitioner has failed to demonstrate that the proffered position is that of a financial analyst.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's Occupational Outlook Handbook, 2010-11 online edition (*Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a

degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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 discussed above, on appeal, counsel for the petitioner argues that the proffered position most closely resembles the position of financial analyst. However, upon review, the AAO affirms the director's finding that the petitioner's business does not justify the hiring of a financial analyst. The petitioner's position descriptions, which are vague and generic, fail to demonstrate that the nature of the petitioner's business supports the hiring of a financial analyst.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is that of a financial analyst, for which most companies require at least a bachelor's degree in finance, business administration, accounting, statistics, or economics. See the *Handbook's* Chapter (2010-11 online edition) on Financial Analysts. As discussed by the *Handbook*, financial analysts are individuals who:

Assess the economic performance of companies and industries for firms and institutions with money to invest. Also assess the performance of stocks, bonds, commodities, and other types of investments. Also called securities analysts and investment analysts, they work for banks, insurance companies, mutual and pension funds, securities firms, the business media, and other businesses, making investment decisions or recommendations. Financial analysts study company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates to determine a company's value by projecting its future earnings. They often meet with company officials to gain a better insight into the firms' prospects and management.

Financial analysts can be divided into two categories: buy side analysts and sell side analysts. Analysts on the buy side work for companies that have a great deal of money to invest. These companies, called institutional investors, include mutual funds, hedge funds, insurance companies, independent money managers, and nonprofit organizations with large endowments. Buy side financial analysts devise investment strategies. Conversely, sell side analysts help securities dealers, such as banks and other firms, sell stocks, bonds, and other investments. The business media hire financial advisors that are supposed to be impartial, and occupy a role somewhere in the middle.

In this matter, the petitioner is not an investment bank, insurance company, mutual and pension fund, securities firm, business media, or institutional investor, as described above by the DOL. Rather, the petitioner is a software development and IT solutions firm with five employees. The petitioner has not demonstrated that it will employ the services of a financial analyst, whose primary

role is to assess the economic performance of companies and industries for firms and institutions with money to invest. Furthermore, there is no evidence that the position offered includes complex or advanced financial planning duties involving mergers and consolidations, global expansion and financing, or that the position requires an individual with a knowledge of sophisticated financial planning techniques normally associated with the duties of a financial analyst.

The record in this matter is insufficient to establish the proffered position as a specialty occupation. As reflected in the above discussion and this decision's earlier comments about the generalized and generic level of the duty descriptions, the substantive nature of actual work to be performed in the proffered position remains unclear. The petitioner must provide independent objective evidence of the daily tasks the petitioner requires as it relates to its specific business. The petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise essentially permits acceptance of any petitioner's broadly stated description, rather than a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary and what the proffered position actually requires.

The duties of the proffered position are only generally and generically described. They do not convey the substantive work that would be required of the beneficiary, which counsel has intimated on appeal could entail software development and testing and/or marketing analysis. Therefore, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the position.

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.

As discussed previously, the position is not described with sufficient detail for the AAO to determine that the actual duties to be performed by the beneficiary comprise a position for which the normal minimum requirement for entry is at least a baccalaureate or higher degree, or the equivalent, in a specific specialty. Accordingly, 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). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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)).

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 in a specific specialty. As discussed above, the AAO finds that the proffered position is not that of a financial analyst. Therefore, the advertisements submitted by the petitioner are not probative for these proceedings. As a result, the petitioner has not established a degree requirement in parallel positions.

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." As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar positions that can be performed by persons without a bachelor's degree in a specific specialty or its equivalent. Additionally, the petitioner's own description of the minimum requirements is for a person with a bachelor's degree without requiring that the degree be in a specific specialty. Therefore, the petitioner's own stated requirement for the position is a bachelor's degree in a wide range of disciplines, which means the petitioner does not require a bachelor's degree in a specific specialty, or its equivalent, as is required for an H-1B petition.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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. As reflected in this decision's comments regarding the generalized and generic level on which the duties are described, the petitioner has failed to establish whatever degree of specialization and complexity may reside in the duties. Simply put, as it is not clear from the vague and generically described duties what the beneficiary would actually be doing, the AAO lacks an evidentiary basis for finding the degree-association required to satisfy this criterion.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The appeal will be dismissed and the petition denied. 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.