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U.S. Citizenship
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DJ



FILE: WAC 08 144 53524 Office: CALIFORNIA SERVICE CENTER Date: **FEB 03 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:



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, 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 describes itself as an IT consulting firm and indicates that it currently employs 18 persons. It seeks to employ the beneficiary as a business/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 director denied the petition because the petitioner failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, and that the proffered position qualifies as a specialty occupation.

On appeal, counsel states, in part, that the petitioner already submitted the following documentation to demonstrate that a bona fide job exists for the beneficiary: a signed contract between the petitioner and the beneficiary; a detailed description of the internal development project to which the beneficiary will be assigned; and a detailed, technical description of the beneficiary's project. As supporting documentation, the petitioner submits a description of its "Signature Service" product project and copies of previously submitted documentation.

When filing the I-129 petition, the petitioner described itself in its March 31, 2008 letter of support as an "IT Consulting firm that provides systems integration and support service to various projects, including government agencies and commercial enterprises."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 11, 2008. In the request, the director asked the petitioner to submit additional evidence, including a complete itinerary for the beneficiary. The director requested documentation such as contractual agreements with the actual end-client firm where the beneficiary would work and the petitioner's federal income tax returns for 2006 and 2007.

In a July 10, 2008 letter, addressed to the beneficiary from the petitioner's human resources manager, submitted in response to the director's RFE, the beneficiary's duties are described as working on the petitioner's in-house "Signature Service" product project. The petitioner's human resources manager described the beneficiary's job responsibilities in the context of the "Signature Service" product project as: interacting with clients to find out new requirements; product maintenance; and development of new features.

On August 11, 2008, the director denied the petition. The director found that the petitioner had failed to establish that it qualifies as a U.S. employer or agent, that it has complied with the conditions of the labor condition application, and that the proffered position qualifies as a specialty occupation.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 are 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 addressing whether the proffered position is a specialty occupation, the record is unclear as to whether the beneficiary’s services would be that of a business/systems analyst.

The petitioner’s letter of support dated March 31, 2008 listing the beneficiary’s proposed duties has been reviewed. The proposed duties are summarized as follows: provide staff and users with assistance in solving business/system-related problems; determine computer software or hardware needed to set up or alter system; develop process model and detailed business policies; modify the business requirement documents; prepare business work flow with input, output, and preconditions and postconditions; gather functional and technical requirements and liaison between business users and development team; train staff and users to work with business systems and programs; and interact with clients to understand business rules and develop functional specification of the requirements.

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 proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement 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. Factors often considered by USCIS when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook*, 2010-11 edition, reports:

Computer systems analysts use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

The *Handbook* mentions that most systems analysts work with specific types of computer systems - for example, business, accounting, and financial systems or scientific and engineering systems - that vary with the kind of organization.

The petitioner fails to establish the first criterion because the *Handbook* states that various degrees are acceptable for systems analysts jobs. Though the *Handbook* indicates that employers usually prefer applicants who have at least a bachelor's degree, some jobs may require only courses in computer science or related subjects combined with practical experience. In response to the RFE and on appeal, the petitioner states that the beneficiary will work on the petitioner's in-house "Signature Service" product project. The beneficiary's duties in the context of the petitioner's in-house "Signature Service" product project, however, are limited to generalized functions that the petitioner has ascribed to the position. For example, in its September 10, 2008 letter, the petitioner describes the beneficiary's proposed duties as interacting with clients to find out new requirements, performing product maintenance, and developing new features. In an undated document submitted on appeal, the petitioner divides the beneficiary's proposed duties into three phases: 1) money transfer, bill payment/rent collection, legal advice, and tax consultancy; 2) tours and travel, discounts and deals, and gifts and greetings; and 3) real estate, automotive and parents health. Again, the proposed duties described in the context of the three phases of the "Signature Service" product project are described generically, such as: provide staff and users with assistance solving business/system related problems; determine computer software and hardware needed to set up or alter system; develop process model and detailed business policies and modify the business requirement documents; and gather functional and technical requirements and perform liaison between business users and development team. The petitioner has not identified methodologies or applications of specialized knowledge that actual performance of the position's functions would involve or provided sufficient details of concrete matters upon which the beneficiary would work. Nor has the petitioner explained or provided documentary evidence to establish how the beneficiary's actual substantive work would require at least a bachelor's degree level of knowledge in a specific specialty.

There is also no evidence in the record to establish the second criterion: that a specific degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner fails to establish the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* indicates that that various degrees are acceptable for systems analysts jobs and although employers usually prefer applicants who have at least a bachelor's degree, some jobs may require only courses in computer science or related subjects combined with practical experience. The petitioner has not established that the proposed duties associated with its in-house "Signature Service" product project are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the duties of the proffered position would be performed by a computer systems analyst, an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on the ground that the proffered position does not qualify as a specialty occupation.

Although the director also denied the petition because the petitioner had not demonstrated that it qualifies as a U.S. employer or agent and that it has complied with the conditions of the labor condition application, the AAO affirms, but shall not discuss, these additional issues because the petition is not approvable on the basis of the lack of a specialty occupation for the beneficiary.

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 director's decision is affirmed. The petition is denied.