

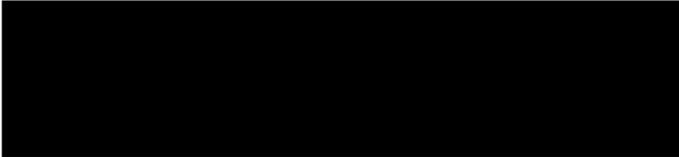
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



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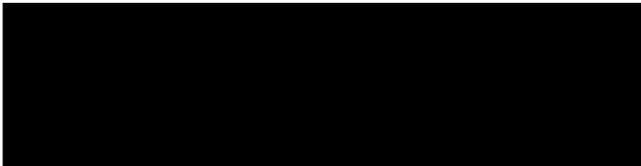
FILE: WAC 08 144 53454 OFFICE: CALIFORNIA SERVICE CENTER DATE: **JAN 14 2010**

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

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and affirmed her decision in a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner avers that it is in the business of software development and program management, was established in 1998, and currently has 89 employees. It seeks permission to employ the beneficiary as a programmer analyst and, 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: (1) it would act either as an employer or agent; (2) the labor condition application (LCA) was valid for all work locations; or (3) that the proffered position was a specialty occupation. On appeal, counsel submits a brief.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, the AAO affirms, but shall not discuss, the director's decision to deny the petition for reasons other than the petitioner's failure to establish the job as a specialty occupation. Because the foundation of the H-1B nonimmigrant visa category is whether a job qualifies as a specialty occupation, this decision shall focus solely on the evidence in the record that the petitioner has provided to support its assertions that it is offering a specialty occupation to the beneficiary.

When filing the H-1B petition, the petitioner submitted a letter that described, in very generic terms, the types of broad responsibilities that the beneficiary would have as a programmer analyst. The letter did not provide any information regarding the project(s) to which the beneficiary would be assigned, including whether such projects would be in-house or at a particular client's place of business. The petitioner also submitted an "Itinerary" for the beneficiary. According to this document, the beneficiary would be working in Indianapolis, Indiana on a project called "e-PracticeSalve." The itinerary listed several generic responsibilities for the beneficiary such as, "research, analysis, design, development, testing and implementation of the Electronic Health Records (EHR) of Electronic Medical Records (EMR), a Web based application." The petitioner also listed specific responsibilities for the beneficiary in the itinerary that were, nevertheless, stated in generic terms.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 4, 2008. In the request, the director asked the petitioner to submit, among other items: copies of signed contracts between it and the beneficiary; a complete itinerary of the beneficiary's services; and copies of signed contracts between the petitioner and its clients that list the duties that the beneficiary will perform and that list the beneficiary by name in the contract(s).

In its response, the petitioner reiterated that the beneficiary would be working on the e-PracticeSalve project and submitted its confidential business plan relating to the project. The petitioner stated that,

according to the U.S. Patent and Trademark Office (PTO), a trademark sign is a designation to alert the public to someone's claim regardless of whether an application was made to the PTO.

On September 26, 2008, the director denied the petition. The director declined to find that the proffered position was a specialty occupation. The director noted that the petitioner provides information technology consulting services and, therefore, the duties that the petitioner's client would require the beneficiary to perform, not the petitioner's own summation of the duties, controlled as to whether the job could be considered a specialty occupation. The director noted the lack of a contract between the petitioner and the end-client that would use the beneficiary's services and found that without such evidence, the position could not be classified as a specialty occupation.

In a motion that counsel filed after the director's decision, counsel claimed that the petitioner had misconstrued the evidence because the petitioner had submitted documentation of in-house work for the beneficiary. On motion, the petitioner submitted new evidence, such as an email message it had received from the PTO about registering its e-PracticeSalve software, a letter from the petitioner's president, and a brochure of an office condominium that the petitioner was purchasing. Counsel also noted that the position was a specialty occupation because of information that it had found in the Department of Labor's *Occupational Information Network (O*NET™ Online)* Summary Report and evidence that businesses similar to the petitioner hired only degreed individuals for programmer analyst positions. The petitioner submitted a copy of the *O*NET™ Online* Summary Report and two job advertisements. In her decision on the petitioner's motion, the director affirmed her original findings and noted that the petitioner failed to present any new evidence or arguments to establish that the prior decision should be overturned.

On appeal, counsel discusses the error that the director made in dismissing the motion rather than issuing another decision based upon the new evidence that the petitioner submitted. Counsel continues to maintain that the petitioner's evidence meets its burden of proving that the beneficiary would be employed 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:

- (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.

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 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R.

§ 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

In this matter, the petitioner states that the position it is offering to the beneficiary is for a programmer analyst who would be assigned to develop its proprietary software, e-PracticeSalve. To support the existence and bona fides of this software, the petitioner submitted its confidential business plan for e-PracticeSalve's development. The AAO has read both the business plan and the beneficiary's itinerary to assess whether there is sufficient evidence to qualify the proffered position as a specialty occupation. As shall be discussed below, the evidence of record is deficient and contains inconsistencies that the petitioner has not resolved. Therefore, the position being offered to the beneficiary cannot be classified as a specialty occupation.

At page 18 of the business plan, it lists "Roles and Tasks of Resources (6.2.1)." The "roles" as listed relate to a "project manager" and a "technical team." Under the heading "Resources Needed (6.2.1)," it lists: "analysis"; "design/architecture"; "software development"; "SQA"; "customer implementation"; and "documentation and end user guides." The resources section of the business plan does not clearly identify the position of programmer analyst as being involved in the e-PracticeSalve project. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has not explained how it would employ the beneficiary on the e-PracticeSalve project when the business plan does not describe that such a position is a necessary resource.¹

¹ The petitioner's registration of the e-PracticeSalve trademark with the PTO is not relevant to a determination

Similarly, the itinerary for the beneficiary does not establish that the knowledge required to perform the listed responsibilities can be obtained only through the possession of a bachelor's degree in a specific specialty or its equivalent. For example, one of the beneficiary's duties is listed as "design the front end using java, HTML, CSS, JavaScript and AJAX." Another of the beneficiary's responsibilities is listed as "Writing code in JavaScript to enhance the user experience." Neither of these two tasks is necessarily equated to a bachelor's degree level of knowledge in computer science or a related field as either one could be accomplished by someone who possesses an associate's degree or certification in a particular programming language. The AAO notes that the programmer analyst occupation is not one that categorically requires an incumbent to possess a bachelor's degree in a specific discipline. The Programmer Analyst occupational category is discussed in the Department of Labor's *Occupational Outlook Handbook (Handbook)* chapters entitled "Computer Programmers" and "Computer Systems Analysts."

The *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, as indicated in the following excerpt from the education and training subsection of the *Handbook's* "Computer Systems Analysts" chapter:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

of whether the proffered position is a specialty occupation and, therefore, this evidence shall not be discussed.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

As evident above, the *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree in a specific specialty. The *Handbook* only indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for this type of position. Thus, the AAO would not find the programmer analyst occupation to normally require the attainment of a baccalaureate degree, or its equivalent, in a specific specialty. Without more specificity to the level of sophistication of each duty listed on the itinerary, there is insufficient evidence to find that a bachelor's degree level of knowledge in computer science or a related field is a necessary qualification to perform the duties.

Counsel stated in the motion and on appeal that the proffered position is a specialty occupation on the basis of the petitioner's description of the job because of information from *O*NET™ Online*, and because other companies like the petitioner advertise their programmer analyst job vacancies as requiring an incumbent to have a bachelor's degree.

Counsel's citation to the *O*NET™ Online* is not persuasive. *O*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O*NET™ Online's* JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS 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. With regard to the SVP (Specialized Vocational Preparation) rating, the AAO notes that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the *O*NET™ Online* excerpt submitted by counsel is of little evidentiary value here.

Regarding the two advertisements that the petitioner submitted, there is no evidence that the companies are similar to the petitioner or that the programmer analyst jobs advertised would be similar to the project on which the beneficiary would be working. More importantly, not all of the companies advertise for a bachelor's degree in a specific specialty, as one of the advertisements lists "bachelor's degree preferred" as the qualifying educational level.

As discussed above, the e-PracticeSalve business plan and the beneficiary's itinerary do not support the petitioner's claim that it has a specialty occupation position for the beneficiary. For this reason, the petition may not be approved.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not

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met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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