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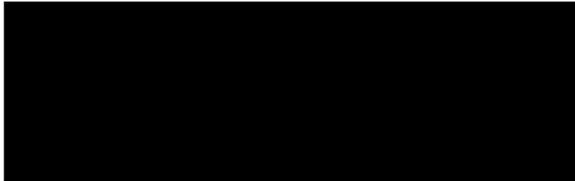
JAN 27 2010

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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.

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner states that it engages in telecommunications and switches partitioning, that it was established in 2005, and that it employs one person. The petitioner does not list its annual gross or net income as it indicates it is a start up company. The petitioner seeks to employ the beneficiary a telecommunication technician from June 18, 2007 to November 10, 2009.¹ Accordingly, the petitioner 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).

On July 25, 2008, the director denied the petition, determining that the petitioner failed to establish that the proffered position is a specialty occupation.

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, counsel's brief, and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner provided the non-technical job description of the proffered position as "[o]peration and maintenance of telecommunication equipment, Cisco Routers & Excel switches, fiber optic and digitalized services, partitioning." The petitioner also provided several Internet job postings for positions such as: a telecommunications technician that listed a bachelor's degree in "discipline"; a Nortel telecom technician that listed a bachelor's degree in computer science or equivalent; a telecommunication technician that listed a bachelor's degree in electrical engineering or computer science; a technician lead that listed a bachelor's degree in telecommunications or other related field as preferred but indicated that years of experience in lieu of a degree would be accepted; an electrical engineering technician II that indicated qualified candidates should have a bachelor's degree from a four-year college or six-years of related experience; and a helpdesk technician that listed college or technical degree or equivalent work experience as required.

In an April 21, 2008 response to the director's RFE, the petitioner provided a list of the duties of the proffered position including:

- Remote hands-on technical support within a 24x7 environment – 25%
- Installing, testing, operating and maintaining VoIP telecommunications equipment, systems, operation protocols and characteristics, switches and

¹ The AAO observes that the beneficiary has been in H-1B status since July 17, 2007. Thus, it appears that the beneficiary would reach her maximum period of stay in H-1B classification on July 16, 2009. The AAO notes that in general section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years."

partitioning including programming MTVS II, Voice Master, Excel Switches and Cisco Routers – 25%

- Network Operation Center – Provisioning, diagnose research, evaluate, troubleshoot and deploy new and existing telecom solutions – 20%
- Service and support for call centers client's equipments and applications, integrated voice and data communications – 15%
- Considerable knowledge of local and long distance services providers, rates and policies – 5%
- Connectivity solutions for local area networks (LANs) including hubs, routers, and remote access devices – 5%
- Telecommunications Management, CDRs reports exported requested from billing department for financial purposes – 5%

The petitioner also provided additional job advertisements for telecommunications technicians from diverse companies that listed a variety of degree disciplines or no specific discipline at all. Such educational listings included a general bachelor's of science degree, a general bachelor's of science degree required and a preference for the degree to be in engineering, and a bachelor's degree in security management, electronic maintenance systems or other related technical discipline.

Upon review of the record, the director denied the petition on July 25, 2008. The director acknowledged that some of the duties listed in the petitioner's description of the proffered position appeared to be of H-1B caliber; however, the director determined that the record did not establish that the beneficiary would be relieved from performing non-qualifying duties or that the petitioner had sufficient H-1B duties for the employment of the beneficiary or that the beneficiary would perform only duties so specialized and complex that the knowledge required to perform them is associated with a bachelor's or higher degree. Upon review of the job postings submitted, the director found that the petitioner had not established an industry standard as the petitioner had not established that the companies advertising were similar to the petitioner or that the duties were parallel to the proffered position. The director also noted that the petitioner had not previously employed a telecommunications technician so could not establish that it normally required a bachelor's degree in a specific field of study for the proffered position.

On appeal, counsel for the petitioner provides the petitioner's August 18, 2008 letter explaining some discrepancies noted by the director as well as stating its belief that the duties of the proffered position are complex and specialized and thus sufficient to warrant the employment of a four-year degree holder who has four years of experience in the telecommunications environment. Counsel also submits a position evaluation prepared by [REDACTED] of Computer Science and Director of the Program in Integrative Information, Computer and Application Sciences, Princeton University. [REDACTED] opines: "[c]ompanies seeking to employ a Telecommunication Technician require prospective candidates to possess at least [a] Bachelor's degree in the area of Electronics Engineering or a related field." [REDACTED] repeats the description of the proffered position's duties as set out above and concludes that the skills in these areas can only be acquired through bachelor's level classes which are part of a degree program in electronics engineering or through extensive work experience in the field of electronics engineering at an advanced level. [REDACTED] further noted that the skills required for the position are developed in the junior and senior

years of an undergraduate program, as well as in a graduate program in electronics engineering or a related field. Counsel further submits an additional three job postings for positions including: a network technician position that listed a bachelor's of science degree in related field as a qualification, a Cisco/Telecom NOC technician position that did not indicate any formal education was required, and a network operation center technician II position that listed knowledge and experience with particular elements as necessary and noted that degrees in telecommunications, computer sciences, electronics and other certifications are a plus.

Counsel asserts that it is not the size of a company or the nature of its general business that determines the qualifications and experience required for a technical position, but rather it is dependent on the duties to be performed by the person occupying the position.

The AAO finds that the principle issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. The AAO also observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients, but whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as 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.

To determine whether a particular job qualifies as a specialty occupation, United States Citizenship and Immigration Services (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. *Defensor v. Meissner*, 201 F. 3d 384.

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. 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.

The AAO first turns to the Department of Labor’s *Occupational Outlook Handbook (Handbook)* for information regarding the proffered position of a telecommunications technician. The AAO observes that the petitioner’s overview of the duties of the proffered position do not coincide specifically with the *Handbook’s* discussion of the occupation of an engineering technician or of an engineer; however, the *Handbook* discusses telecommunications specialists under the heading “Computer Network, Systems, and Database Administrators.” The *Handbook* reports:

Telecommunications specialists focus on the interaction between computer and communications equipment. These workers design voice, video, and data-communication systems, supervise the installation of the systems, and provide maintenance and other services to clients after the systems are installed. They also test lines, oversee equipment repair, and may compile and maintain system records.

In regard to the education and training required for the position of a telecommunications specialist, the *Handbook* reports:

For telecommunications specialists, employers prefer applicants with an associate degree in electronics or a related field, but for some positions, experience may substitute for formal education.

The AAO observes that the generally stated duties of the position most closely resemble that of a telecommunications specialist. The *Handbook*, however, does not report that a bachelor’s or higher degree is normally the minimum requirement for entry into a telecommunications specialist position.

The AAO disagrees with the director’s assessment of the described duties as being of H-1B caliber. The duties as described do not include any substantive evidence that they require coursework at the university level for four years resulting in a bachelor’s degree in a specific discipline. Going on the 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 190 (Reg. Comm. 1972)). The AAO has reviewed the opinion of [REDACTED]. Dr. [REDACTED] although concluding that the skills described can only be acquired through bachelor-level classes and more particularly in the junior and senior year of a baccalaureate program in electrical engineering, does not substantiate his opinion with the results of formal surveys, research, statistics, or any other objective quantifying information. There is thus an inadequate factual foundation established to support his opinion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not

in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. [REDACTED] opinion, not only is insufficient to overcome the *Handbook's* report that an associate degree may be the only requirement for the position of a telecommunications specialist, but is also undermined by the variety of educational and training requirements for telecommunications technicians listed in the Internet job postings submitted by the petitioner.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. The record in this matter does not contain a description sufficient to determine that the beneficiary's daily tasks would require specialized knowledge obtained only through study that results in a bachelor's or higher degree in a specific discipline. Accordingly, the record does not establish that the occupation of an engineering technician satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or is distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. As observed above, the *Handbook* does not list a degree in a specific discipline as necessary to perform the duties of a telecommunications specialist. The AAO has reviewed the Internet job postings for telecommunication technicians and notes the diversity in the nature of the companies advertising, as well as the variety of educational requirements listed for the advertised positions. The AAO observes that some companies do not require any degree, some prefer a general degree, some require a general degree, and some identify disciplines such as computer science, electrical engineering, telecommunications, or security management, electronic maintenance systems or a generic technical discipline and/or certifications. Although some of the advertisements include similar duties as the duties in the proffered position, there is not an industry standard regarding the educational requirements for the positions. In addition, the advertisements do not provide sufficient information regarding the advertising firms' size, number of employees, or level of business. Contrary to counsel's assertion, the nature of a particular business including these factors demonstrates whether they are sufficiently similar to the petitioner to consider their employment practices. The petitioner has not provided evidence that the proffered position is comprised of duties that are significantly parallel to any degreed positions within similar organizations in its industry. The AAO has also reviewed the description of the duties of the proffered position to determine if there are duties described that demonstrate that the proffered position is more complex or unique than similar, but non-degreed, employment, as required by the alternate prong of the second criterion. However, there is nothing in the description that shows that it requires more complex or unique duties than that of a telecommunications specialist, a non-degreed and non-specialty

occupation. A review of the record finds it insufficient to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. As this is a start up company with only the founder as its employee, the petitioner has not provided evidence that it commonly hires only candidates with specific degrees for the proffered position. The AAO notes further that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. The petitioner has not provided sufficient evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Again, the AAO observes that the petitioner has not provided a description of the proposed duties that demonstrate that there are elements or tasks that require a bachelor's degree in a specific discipline. The AAO has again reviewed [REDACTED] opinion and finds that his opinion is not substantiated and conflicts with information in the *Handbook* and that his conclusions also conflict with a number of the job postings submitted regarding the educational requirements for a generic telecommunications technician. The AAO does not find sufficient evidence to conclude that the beneficiary's tasks include duties that are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. The petition will be denied and the appeal dismissed for the above stated reasons. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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