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

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 02 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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is an IT consulting company. It seeks to employ the beneficiary as a systems analyst and to classify him 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, concluding that the petitioner failed to establish that the beneficiary is not qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The AAO first turns to the director's basis for denial, in which she determined that the record is insufficient for USCIS to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Again, the director denied the petition due to the petitioner's failure to establish that the beneficiary is not qualified to perform the services of a specialty occupation. On appeal, counsel submits a second credential evaluation written by a different evaluator together with a detailed experience letter from the beneficiary's prior employer. The AAO finds that this second evaluation submitted on appeal, which finds that the beneficiary has the equivalent of a bachelor's degree in computer information systems from a regionally accredited college or university in the United States, together with the supporting documentation, meets the requirements of 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(4) and (D)(1) and is therefore sufficient to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation requiring at least a bachelor's degree or equivalent in a computer-related field. As such, the director's sole basis for denying the petition is hereby withdrawn.

However, beyond the decision of the director, the AAO finds that the petition is not approvable in that evidence is insufficient to determine that the proffered position is more likely than not 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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, a proposed 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 addressing whether the proposed position is a specialty occupation, the record is devoid of documentary evidence with respect to the substantive performance requirements that would be determined by the particulars of the project defined by the end-client firm, and therefore whether the beneficiary would actually perform services in a specialty occupation.

The section on Computer Systems Analysts in the U.S. Department of Labor’s *Occupational Outlook Handbook* (*Handbook*), 2010-11 online edition, states “when hiring computer systems analysts, employers *usually prefer* applicants who have at least a bachelor’s degree.” (Emphasis added.) The use of the word “prefer” indicates that employers do not normally require systems analysts to have a bachelor’s degree in a specific specialty. The *Handbook* section on Computer Systems Analysts also states, “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.”

Therefore, based on the *Handbook’s* overview of educational requirements for systems analysts, it is apparent that a bachelor’s or higher degree in a specific specialty or its equivalent is not a normal minimum entry requirement.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

In the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary, the petitioner states the beneficiary would perform the following duties:

- Analyze business processes in Logistics and design, code, develop and implement applications according to analysis of business requirements (25% of time);
- Design, create and maintain Info Cubes, ODS Info sources, Extract Structures and queries using Bex reporting (15% of time);
- Design and implement automated testing tools and QA methodologies (15% of time);

- Create and modify existing test strings (15% of time);
- Write test cases for new and existing SAP transactions and functionality of business critical custom transactions (10% of time);
- Configure use of Restricted Key Figures, Variables, Exception and Calculated Key Figures in Queries as well as provide maintenance and troubleshooting (10% of time); and
- Use various computer technologies, languages and environments (10% of time).

Regarding the minimum requirements for the proffered position, the petitioner stated that: “[T]he usual minimum requirement for performance of this job is a Bachelor’s degree in Computer Applications, Electrical Engineering, Information Systems, Electronics, Engineering, Computer Science, Mathematics, Business Administration, Physics or the U.S. equivalent in any closely-related field. . . .” In other words, the petitioner requires at least a bachelor’s degree or equivalent in a wide variety of fields, not in a *specific specialty*.

In addition, the submitted Labor Condition Application (LCA) was filed for a systems analyst to work in Troy, MI from September 19, 2008 to September 19, 2011. The LCA lists a prevailing wage of \$51,251.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner’s support letter does not state where he will be employed, but the forms indicate that he will work at the petitioner’s offices in Troy, MI. However, in response to the RFE, the petitioner submitted copies of a Master Service Agreement (MSA) and Purchase Order, which contradict the information provided in the forms submitted with the petition.

The MSA, which is between the petitioner and a company based in Bingham Farms, MI called Pegasys Systems & Technologies Inc. (PEGASYS), states in pertinent part the following:

1. The terms of this Agreement apply in a situation where PEGASYS engages [the petitioner] to transition their Consultants to render programming, systems analysis, engineering, technical writing or other specialized services *as an employee to PEGASYS*.
2. [PEGASYS’s] Client has requested PEGASYS to locate temporary staffing for the client’s project according to the training, skills, abilities and experience required by the client. Consultant and [the petitioner] represent that he/she has the necessary qualifications. The representations of Consultant and PEGASYS as to his/her qualifications are a material part of this Agreement.
3. The term of this agreement shall begin on 07-06-2008. The duration of this contract is one year and automatically extends every year unless terminated by Pegasys. However, *ultimate duration is determined by PEGASYS’s Client. . . .*

[Emphasis added.] In other words, it is the unidentified client of PEGASYS, and not the petitioner, that will control the beneficiary’s work and terms of employment. Although another clause in the MSA indicates that, as far as PEGASYS is concerned, the consultant is an employee of the petitioner’s, as indicated above the MSA specifically states that the petitioner’s consultants are assigned as employees of PEGASYS, not the

petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Purchase Order and Scope of Work, which lists the beneficiary by name, is undated and states that the beneficiary will be assigned to a Campbell Development project from September 29, 2008 to an estimated date of September 1, 2010. The documentation does not state where the beneficiary will work, but it appears that the beneficiary will be assigned to work at a third-party client site pursuant to the MSA. The petitioner did not include a copy of the contract between the third-party client and PEGASYS.

As discussed above, the record contains conflicting statements with respect to whether the beneficiary will be working in-house at the petitioner's offices, or whether the beneficiary will be working at different third-party client sites. Additionally, the petitioner's employment contract with the beneficiary does not cover the full period of time requested in the petition.

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387-388, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Moreover, as discussed above, because the petitioner made contradictory statements regarding the location of the beneficiary's work, it is not clear that the petitioner's LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. Additionally, if the beneficiary will work at more than one location, the petitioner is required to submit an itinerary.

Therefore, the matter is remanded to the director in order to determine whether the proffered position is a specialty occupation, whether the LCA submitted corresponds to the petition, and whether the petitioner is required to submit an itinerary. The director may request such additional evidence as she deems necessary in rendering her decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361

ORDER: The director's November 5, 2008 decision is withdrawn and the matter remanded for entry of a new decision.