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



U.S. Citizenship
and Immigration
Services

D2

FILE:

Office: VERMONT SERVICE CENTER

Date: JUN 01 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: SELF-REPRESENTED

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 \$585. 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,

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 appeal will be dismissed. The petition will be denied.

The petitioner is an information technology services provider and seeks to employ the beneficiary as a programmer analyst. Thus, 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).

In denying the petition, the director determined that the beneficiary was not qualified to perform the duties of a specialty occupation. Specifically, the director found that the educational evaluation provided was insufficient to demonstrate that the beneficiary was qualified to perform the duties of the proffered position. On appeal, the petitioner contends that the director's conclusion was erroneous, and that the beneficiary, by virtue of his educational achievements, is in fact qualified to perform the duties of the proffered position. The petitioner submits additional evaluations of the beneficiary's credentials in support of this contention.

As a preliminary issue, the AAO will examine the record to determine whether the proffered position is that of a specialty occupation. Most directors should, and will, first determine whether a job is a specialty occupation before deciding whether the individual is qualified for the job. A beneficiary's credentials to perform a particular job, therefore, are relevant only when the job is found to be a specialty occupation. In this matter, however, it appears the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. As discussed below, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services 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.

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 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, the AAO does not simply rely on the position's title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the record's evidence about specific duties of the proffered position and 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 alien will likely perform for the entity or entities ultimately determining the work's content. In the present petition, the petitioner's business is providing IT services for clients contracting for those services. In this context, the clients are the entities generating the projects upon which the beneficiary will work and determining the actual content of the beneficiary's work.

In its February 27, 2008 letter submitted with the Form I-129, the petitioner describes itself as a "diversified integrated corporation." It further claims that it "has a substantial presence in the U.S. market and has successfully executed many large software development projects." It claimed that the beneficiary will work for its client, Credit Suisse, and claimed that his duties would be as follows:

The beneficiary will be responsible for 1. Business user interaction to gather requirements., 2. Development of packages to load data into central datab[ase]., 3. Development on periodical performance reports[.]

In general the duties of the beneficiary will include evaluating the design and development needs of the client, conducting logical analysis of technical problems and formulating mathematical models for solutions of the problems. In general, the beneficiary will be responsible for writing technical specifications, coding, debugging and testing, analyze the adequacy and applicability of the computer output. If necessary, provide modifications to ultimately ensure the functionality of the product.

The letter further indicates that the beneficiary will be subject to assignment at the client's location in New York City. The petitioner further indicates that the beneficiary will deal with a Risk Analytics platform for Hedge Funds.

As recognized by the court in *Defensor*, evidence of the client companies' job requirements is critical where, as here, the work is to be performed for entities other than the petitioner. 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. Such evidence must be sufficiently detailed and explained as 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 Credit Suisse, the end-user entity, whose IT needs directly determine what the beneficiary would actually do on a day-to-day basis. In the present petition, Credit Suisse, the entity who would determine the substantive nature of the beneficiary's work has not provided evidence delineating the specific components of the work that the beneficiary would perform for them. Therefore, the AAO is unable to determine whether the proffered position incorporates the theoretical and practical application of a body of

highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. Accordingly, the petitioner has not established that the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO recognizes the Department of Labor's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The Programmer Analyst occupational category is discussed in the *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 "Educational 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. 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.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank may need some expertise in finance, and systems analysts who wish to work for a hospital may need 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; and, more importantly, the evidence of record regarding the particular position proffered here does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but that he would do so at a level

that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

Not only does the *Handbook* not support the programmer analyst occupation as one that normally requires at least a bachelor's degree in a specific specialty, but the evidence about the duties that the beneficiary would perform is insufficient to satisfy any specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The record's descriptions of the duties comprising the proffered position generally comport with the Programmer Analyst occupational category as discussed in the 2010-2011 edition of the *Handbook*. However, neither those descriptions nor any other evidence of record distinguish the proffered position from those computer systems analyst positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties. Given the lack of detail about the Credit Suisse project designated for the beneficiary and the actual and specific performance requirements of that project, the petitioner has failed to establish both the substantive nature of the actual services that the beneficiary would perform and the nature and educational level of knowledge required to perform them.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, 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).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry 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 AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a U.S. bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a programmer analyst position as so generally described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence of record does not establish a bachelor's degree or higher in a specific specialty as an industry-wide requirement for positions substantially similar to the one proffered in this petition, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position. The information about the position and the duties comprising it is limited to generalized functional descriptions (such as "analysis of technical problems," "writing technical specifications," and "coding, debugging and testing"). This generalized information is not supplemented by documentation identifying specific projects in which the duties would be applied, describing the particular components of those projects that are so complex or unique as to satisfy this criterion, and explaining why those components are so complex or unique that their performance necessitates a person with at least a bachelor's degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. This petition's record of proceeding does not contain such evidence.

It is important to note that, to satisfy this criterion, the record must also establish that a petitioner's historical imposition of a degree requirement in its recruiting and hiring is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This requirement resides in section 214(i)(1) of the Act, 8 U.S.C. § 1184i(i)(1), which defines the term "specialty occupation" as requiring both "(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 petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor*, 201 F. 3d at 387-388. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to

perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. To satisfy this third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) in the context of the present petition, which involves the beneficiary's performing work on a client project, the petitioner must establish that performance of that project requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a particular specialty or its equivalent.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

As noted earlier in this decision, the petitioner has limited the record's duty descriptions to generalized and generic terms. They lack the specificity necessary to establish whatever level of specialization and complexity resides in the proposed duties. Consequently, the AAO can reasonably determine no more than that the duties of the proffered position generally comport with those of the programmer analyst occupation as described in the *Handbook's* chapter on computer systems analysts. The educational requirements for positions in this occupation are so varied, as noted in this decision's earlier discussion of the relevant *Handbook* observations, and the record's duty descriptions are so generalized and non-specific, that there is no basis for the AAO to find the degree association required by this criterion.

For the reasons discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

Returning to the director's decision in this matter, it is noted that the director denied the petition on the basis that the beneficiary was not qualified to perform the duties of a specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed above, the proffered position of programmer analyst has not been established as requiring at least a U.S. bachelor's degree or its equivalent in a specific specialty. The issue of the beneficiary's qualifications, therefore, is no longer relevant to these proceedings. However, upon review of the denial, the AAO notes some errors in the director's analysis which are addressed below.

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), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (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.

The record indicates that the beneficiary received a Bachelor of Technology in Electronics & Communication Engineering from Kurukshetra University in 2002. Therefore, since the beneficiary holds a foreign degree, he must demonstrate that the foreign degree is equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

Again, since the proffered position in this matter is not a specialty occupation, meeting this requirement is now a moot issue. However, the AAO notes that, in denying the petition based on the beneficiary's qualifications, the director incorrectly discounted the educational evaluation submitted by the petitioner.

The director found that the educational evaluation submitted by [REDACTED] of The Trustforte Corporation was not acceptable, since [REDACTED] did not have the authority to grant college credit. On appeal, the petitioner states that the beneficiary is qualified for the position based solely on his education, and submits new educational evaluations from persons authorized to grant college level credit.

Upon review of the record, the AAO finds that the beneficiary holds a foreign degree which is equivalent to a baccalaureate degree in electronic engineering from an accredited university in the United States.

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; or
- (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.

The Trustforte Corporation claims to be a credentials evaluation service and academic advisory firm specializing in the evaluation of foreign educational credentials. The evaluation by [REDACTED] dated June 23, 2008, evaluates only the beneficiary's academic credentials for equivalence to that of a United States baccalaureate degree. Contrary to the director's contention, the regulations do not require that an evaluator for a credentials evaluation service, described at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), have the authority to grant college level credit. An evaluation from an official who has authority to grant college level credit is only required when a beneficiary's training and/or experience is being equated to a United States baccalaureate or higher degree in the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Based on the evidence in the record, the evaluation prepared by Trustforte Corporation is acceptable as evidence that the beneficiary possesses the United States equivalent of a bachelor of science in electronics engineering. However, for the reasons discussed above, the petitioner has not demonstrated that the proffered position is a specialty occupation requiring a degree in a specific specialty. Therefore, while the beneficiary's foreign degree is equivalent to a United States bachelor's degree in electronic engineering, the proffered position is not a specialty occupation requiring, as a prerequisite, an individual with a bachelor's degree in electronic engineering. Accordingly, as it has not been demonstrated which specific specialty is required to perform the duties of the proffered position, it cannot be found that the director erred in ultimately determining that the beneficiary does not possess the degree or its equivalent "required by the specialty occupation." *See* 8 C.F.R. §214.2(h)(4)(iii)(C). For this additional reason, the petition will be denied.

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.