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U.S. Citizenship
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FILE: WAC 08 150 53227 Office: CALIFORNIA SERVICE CENTER Date: **MAR 04 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: SELF-REPRESENTED

INSTRUCTIONS: This is the decision 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and management company. It seeks to employ the beneficiary as a senior programmer 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 on the following grounds: (1) the petitioner does not qualify as a United States employer or agent; and (2) the petitioner failed to establish that the proposed position qualifies for classification as 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 and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on April 30, 2008, the petitioner stated it has 45 employees and a gross annual income of \$6.8 million. The petitioner indicated that it wished to employ the beneficiary as a senior programmer analyst from August 19, 2008 through August 18, 2011 at an annual salary of \$75,000.

The support letter states that the person in the proffered position will be responsible for:

[c]ustom program development & implementation, system analysis & design. Analyzing users' data, general modes of operation, existing operation procedures, and problems and devising methods and approaches to meet the users' need based upon knowledge of data processing techniques, management information, and statistical, audit, and control systems. Additionally he will provide software support to our clients, which include testing, debugging and modifying software as per needs of the client.

The petitioner describes the minimum degree requirements for the proffered position as follows:

[T]his position requires an individual with a Bachelor's Degree in Engineering, Computer Science, or Math, and relevant experience.

The Form I-129 indicates that the beneficiary will work at the petitioner's offices in Irvine, CA. The submitted Labor Condition Application (LCA) was filed for a senior programmer analyst to work in Irvine, CA from August 19, 2008 to August 18, 2011. The LCA lists a prevailing wage of \$51,813 for Irvine, CA.

The petitioner submitted the beneficiary's education documents, resume, and reference letters, indicating that he has a foreign degree and experience. No credential evaluation was submitted with the petition.

On July 24, 2008, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, which could include an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The petitioner was also advised to submit documentation containing a more detailed description of the proffered position and additional evidence that the proffered position is a specialty occupation. The RFE specifically noted that "[t]he evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. . . ." The director also requested evidence regarding the petitioner's business.

The petitioner responded that the beneficiary will work at the petitioner's offices on a project for [REDACTED]. The petitioner included the following documents, in pertinent part:

- Offer letter from the petitioner to the beneficiary to work as a senior programmer analyst. The offer letter, signed by both parties, states, "[y]our services will be utilized in developing/maintaining application/system, which will change from time to time in our office in Irvine, CA. . . .";
- A letter dated August 11, 2008, from the petitioner's director responsible for directing the project for [REDACTED] which states that the project will last until August 18, 2011, and will take place at the petitioner's address in Irvine, CA;
- A copy of the Client Agreement between the petitioner and [REDACTED]; and
- A copy of a Statement of Work (SOW), signed by the petitioner and a representative of [REDACTED] on February 5, 2008, which states that the beneficiary will work in Irvine, CA on a project through August 18, 2011.

The letter from the petitioner's director states that the proffered job duties require the following:

- Proficient in analyzing and translating business requirements to technical requirements and architecture
- Theoretical knowledge of Software Development Life Cycle(SDLC)
- Practical application of Microsoft Tools such as Visual Basic 6.0,Active X, COM and SQL Server
- Highly specialized knowledge and experience with analysis, design, development, customization and implementation of software applications
- Additionally he will provide software support to our clients, which includes testing, debugging and modifying software as per needs of the client

The SOW describes the project with [REDACTED] as follows:

Development, analysis and design of Revenue Accounting System (RAS). Modify system procedure using Oracle database, Visual Basic, .Net & Reports. Gather users data, QA/testing, support and maintenance of RAS. Should have prior experience in Programmer Analyst under Windows platform.

It is not clear from the SOW what parts of the project would be performed by the beneficiary and what parts would be handled by the other workers assigned to the project. The generic and vague description of proposed duties provided by the petitioner does not indicate how these duties would be incorporated into the scope of the project or how they require specialized knowledge in their performance. Moreover, the SOW states that the beneficiary should have prior experience, but it does not state that a minimum of a bachelor's degree in a specific specialty is required for the proffered position.

Additionally, although the SOW indicates that the beneficiary will be assigned to the project for [REDACTED] for the duration of the petition, the offer letter to the beneficiary indicates that his services will change from time to time. 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 director denied the petition on September 30, 2008. On appeal, the petitioner provides a letter from [REDACTED], dated October 29, 2008, which states as follows:

[The petitioner] is responsible for maintaining and supporting PeopleSoft HR, RAS, and PeopleSoft CRM projects. These projects were given to [the petitioner] after considering several other vendors. [The petitioner] has sole control over how the projects are conducted as long as the results meet our expectations. It is their responsibility to hire, supervise and fire resources as they are to perform the tasks needed to complete the projects. The resources they will need are Programmer Analysts, Database Administrators, Technical Architects, Business Analysts and Project Managers. [The petitioner] has control over the job duties and the right to control how the work is conducted. [REDACTED] will only monitor the results. Based on their past performance I am confident that they will meet all our current and future expectations.

[REDACTED] and [the petitioner] would like you to request that you grant the visa needed for [the beneficiary]. A statement of work has already been signed [sic].

It therefore appears that the petitioner is responsible for assigning a large number of staff to the project for [REDACTED], however details are not provided about the nature of the project or the beneficiary's specific role in that project. It is not clear why [REDACTED] has contracted with the petitioner to provide resources for the project. Although the letter from [REDACTED] states that the petitioner will assign programmer analysts to the project, which presumably means that the beneficiary would not be the only programmer analyst who will work on this project, no information was provided about other programmer analysts, their qualifications, and how their roles are similar or different from the beneficiary's. Going on 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 Dec. 190 (Reg. Comm. 1972)).

On appeal, the petitioner reiterates the job description and minimum requirements as provided in the support

letter and states that 25% of the beneficiary's time will be spent on functional analysis, 25% on application/report development, 20% on quality assurance, 15% on data flow analysis, and 15% on system support and maintenance. The petitioner also states that the beneficiary will report to the director and will not supervise any individuals.

The petitioner argues that the director did not acknowledge the SOW provided in response to the RFE and thereby mistakenly concluded that the petitioner would not be the beneficiary's employer. Upon review, the record establishes that the petitioner will be the employer of the beneficiary for the duration of the petition, and the director's decision to the contrary shall be withdrawn. The petitioner is a software development and management firm that, with regard to the beneficiary in this matter, will more likely than not provide direct computer programming services to its client as opposed to simply outsourcing the personnel in question. At all times, therefore, the services to be provided for this particular project are performed by the petitioner's employees, and the petitioner is responsible for, and controls all aspects of employment for the personnel it assigns to this client project. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise control the beneficiary's work, as evidenced by the fact that: (1) it will have and maintain direct control over the work; (2) the beneficiary will use the tools and facilities of the petitioner in performing his duties; (3) the location of the work is that of the petitioner; and (4) there exists written intent of both the petitioner and the beneficiary to enter into an employer-employee relationship. The petitioner therefore qualifies as a United States employer with regard to the beneficiary in this instance and the director's finding to the contrary is withdrawn.

The AAO will next consider whether the proffered position is 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.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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)).

Upon review, 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 AAO recognizes the *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 encompassed in two sections of the *Handbook* (2010-11 online edition) – “Computer Software Engineers and Computer Programmers” and “Computer Systems Analysts.”

The Computer Software Engineers and Computer Programmers section describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers’ productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

* * *

[W]hen 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 areas 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. . . .

Therefore, 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 evident above, the information in the *Handbook* does not indicate that programmer-analyst positions normally require at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the

evidence of record on the particular position here proffered does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge.

Despite the petitioner's titling this position as a "senior" programmer analyst, the record's descriptions of the petitioner's duties do not elevate the proffered position above that of a programmer analyst for which no particular educational requirements are demonstrated. The AAO rejects as unsubstantiated the petitioner's declaration that the proffered position requires an individual with a bachelor's degree in engineering, computer science, or math, and relevant experience. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 first 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). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

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.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. As mentioned above, the petitioner did not provide any information about its other programmer analysts.

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. The evidence of record would indicate no specialization and complexity beyond that of a programmer-analyst, and as reflected in this decision's discussion of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the *Handbook* does not indicate that the attainment of at least a bachelor's degree in a specific specialty is usually associated with programmer analysts in general.

For the reasons discussed above, the AAO finds that the petitioner has not established that the proffered position qualifies as specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation and denies the petition for this reason.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if both of the director's stated grounds for denial had been overcome on appeal.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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