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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
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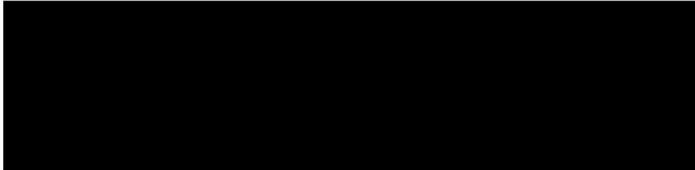


FILE: WAC 09 146 50621 Office: CALIFORNIA SERVICE CENTER Date: MAY 28 2010

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:** 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. 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 an information technology development firm. It seeks to employ the beneficiary as a 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; (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (3) the petitioner is not in compliance with the terms and conditions of employment.

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 counsel's brief with supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on April 24, 2009, the petitioner stated it has 42 employees and a gross annual income of \$4.6 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2009 through September 15, 2012 at an annual salary of \$60,000.

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

[a]nalysis, modification, design, and continued development and implementation of the software and system components from the inception of projects to completion for clients of [the petitioner]. He will work to meet clients' ongoing software needs through systems analysis, integration, upgrading, and ongoing support. He will utilize his skills and academic background to review, design, and create new software products to improve clients' existing system, and coordinate the implementation of new software to ensure compatibility and cohesive response in the overall network. [The beneficiary] will work to ensure that [the petitioner's] quality standards are maintained and evaluate existing systems to improve production and workflow.

The Programmer Analyst will prepare and review diagrams, spreadsheets, and flowcharts to illustrate sequences and steps in the system, and to identify problems and propose solutions. He will coordinate with clients and users to evaluate requests for modifications for feasibility, and make recommendations based on users' needs.

[The beneficiary] may work in a team. . . .

The petitioner breaks down the proffered daily responsibilities as follows:

- Software development cycle, including design, development, and unit testing (30%);

- Requirement gathering, development of new reports, writing functional specification and program specification, technical design, coding reviews and drafting detailed unit test plans (30%);
- Running various reports and monitoring process scheduler as well as implementing password controls (10%);
- Creating, planning, designing and execution of test scenarios, test cases, test script procedures and debugging (15%); and
- Working with the quality control team during integration testing and resolving any issues uncovered during the debugging process (15%).

The petitioner stated that the beneficiary will work at the petitioner's offices in Minneapolis/St. Louis Park, MN and stated that the petitioner requires at least a bachelor's degree or equivalent in computer science or a related field for the proffered position.

The Form I-129 indicates that the beneficiary will work at the petitioner's offices in Minneapolis, MN. The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Minneapolis, MN from September 16, 2009 to September 15, 2012. The LCA lists a prevailing wage of \$56,784.

The petitioner submitted the beneficiary's education documents and reference letters, together with an education evaluation indicating that his degree is equivalent to a U.S. bachelor of science degree in computer engineering.

On May 16, 2009, 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 additional evidence that the proffered position is a specialty occupation, including copies of contracts between the petitioner and any end clients for whom the beneficiary would perform work as well as any other documents the petitioner believed would substantiate qualifying employment. The RFE also requested copies of any contracts between the petitioner and the beneficiary, copies of any vacancy announcements the petitioner placed for the proffered position, documentation regarding past employment practices, a detailed description of the internal development project if the beneficiary will work in-house, and any other documentation the petitioner feels would substantiate sufficient qualifying employment. The director also requested evidence regarding the petitioner's business.

The petitioner responded that the beneficiary will work at the petitioner's offices in Minneapolis, MN on a project called REM-EDI 5010. The petitioner did not state for which client the REM-EDI 5010 project is being performed, nor did the petitioner provide any details about the project or the beneficiary's role in the project. The petitioner also stated as follows:

A Programmer Analyst duties at [the petitioner] entail the employee to analyze information to determine, recommend and plan installation of a new system or modification of an existing system; confer with data processing and project managers to obtain information on limitations and capabilities for data processing projects; consult with engineering staff to evaluate interface between hardware and software, develop specifications and performance requirements and resolve customer problems; co-ordinate

installation of software system; design and develop software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design; develop and direct software system testing and validation procedures; direct software programming and development of documentation; evaluate factors such as reporting formats required, cost constraints, and need for security restrictions to determine hardware configuration; modify existing software to correct errors, to adapt it to new hardware or to upgrade interfaces and improve performance; monitor functioning of equipment to ensure system operates in conformance with specifications.

The petitioner submitted copies of contracts it has with clients, but none of these contracts are relevant to the project on which the beneficiary would allegedly work, nor do they mention the beneficiary's name. The petitioner also provided a copy of its offer letter to the beneficiary, which is dated March 18, 2009.

The director denied the petition on July 21, 2009.

For the first time on appeal, counsel submits a summary of the REM-EDI 5010 project on which the beneficiary would allegedly work. The project is aimed at assisting the petitioner's clients in gaining Health Insurance Portability and Accountability Act (HIPPA) 5010 compliance. According to the summary, the project schedule begins April 1, 2010 and ends on January 1, 2012. The summary states that the petitioner's contractors assist clients "to begin exchanging [Electronic Data Interchange (EDI)] transactions by furnishing the enrollment and connectivity information, system access numbers and passwords, information on those transactions supported by Medicare Part A and Part B, and testing to assure correct transmission of the EDI formats. . . ." The project summary states that a Project Manager/ Business Analyst, QA Specialist/QA Lead, and various Programmer Analysts are required. The description of Programmer Analysts lists a Bachelor's degree or equivalent combination of education and experience as a minimum requirement, without requiring that the degree be in a specific specialty. Instead, the description states as follows: "Bachelors degree in computer science, mathematics, or related field preferred." In other words, the petitioner does not require a bachelor's degree in a specific specialty for the proffered position of programmer analyst.

First, the AAO will consider whether the petitioner is an employer or agent. 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 an information technology development 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 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.

Next, the AAO will examine whether the proffered position qualifies as 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 *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.

The record's descriptions of the beneficiary'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 computer science or a related field. 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). Moreover, the position description for a programmer analyst provided on appeal with the project summary indicates that a bachelor's degree in a specific specialty is merely preferred, contradicting the petitioner's assertion that the proffered position requires at least a bachelor's degree in computer science or a related field. 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).

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 and, moreover, the petitioner's position description for programmer analysts provided in its project summary indicate that a bachelor's degree in a specific specialty is merely preferred, not required.

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)(1), 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 a 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.

Third, the AAO will examine whether the petitioner complied with the terms and conditions of employment. The director focused on the petition of one of the petitioner's H-1B employees in 2007 and 2008, [REDACTED] finding that this employee had not received compensation as specified on his previous petition. Specifically, the proffered wage stated in the H-1B petition for [REDACTED] was \$70,000 per year, but based on the quarterly wage reports submitted by the petitioner, in 2007 he earned \$40,476,

while in 2008 he earned \$58,527. In conclusion, the director found that the petitioner did not present evidence that it will comply with the beneficiary's terms and conditions of employment.

On appeal, counsel does not address the director's finding that the petitioner is in violation of the terms and conditions of employment. Therefore, the petitioner has not demonstrated that the director erred in finding that this employee was not paid the proffered wage for those years. Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. The record does not establish that the petitioner has complied with the terms and conditions of a previously filed LCA and, therefore, absent any explanation and evidence to the contrary, the petitioner's claim that it will comply with the terms and conditions of the LCA with regard to this beneficiary is simply not credible. For this additional reason, the petition may not be approved.

Accordingly, the AAO shall not disturb the director's denial of the petition.

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.