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



U.S. Citizenship
and Immigration
Services

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MAY 28 2010

FILE: WAC 08 207 50891 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS: 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 computer software engineer 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 because the petitioner failed to establish that the beneficiary is qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study that is clearly related to the position being offered.

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 July 22, 2008, 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 computer software engineer from July 22, 2008 through July 15, 2011 at an annual salary of \$60,000.

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

[a]nalyze 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 computer problems; coordinate 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 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 it 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 an address in La Jolla, CA. The submitted Labor Condition Application (LCA) was filed for a software engineer to work in La Jolla, CA from July 16, 2008 to July 15, 2011. The LCA lists a prevailing wage of \$56,784.

The petitioner submitted the beneficiary's education documents, demonstrating the beneficiary has a U.S. Master of Science degree in Mechanical Engineering from the University of Cincinnati. The transcripts submitted from the University of Cincinnati indicate the beneficiary took the following coursework: viscous laminar flow; numbers methodology; conduct heat transfer; Partial Differential Equations Fourier anal.; convect heat transfer; heat exchange engineering; biofluid mechanics; thermal proc. engineering; and mechanical engineering. The transcripts from the beneficiary's degree in India indicate the beneficiary took various courses, including engineering, physics, mechanics, math, economics, and French. However, only one class appears to have been taken in computers, which is titled "Introduction to computing."

On September 19, 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 additional evidence that the proffered position is a specialty occupation, including a more detailed job description and an organizational chart. Additionally, the RFE requested evidence to demonstrate that the beneficiary has the equivalent of a U.S. bachelor's degree and recognition of expertise in the specialty occupation.

In response to the RFE, the petitioner essentially reiterated the job description provided with the petition and provided an organizational chart that shows the beneficiary is supervised by someone in computer application development. The petitioner did not explain why the beneficiary would be working in La Jolla, CA, even though the petitioner's offices are in St. Louis Park, MN, on which project the beneficiary would work, or the beneficiary's role in the project. As the petitioner did not provide evidence that it has offices in La Jolla, CA, it appears the beneficiary will be contracted out to work at another company for the duration of the petition. However, the petitioner did not provide any copies of contracts regarding the work to be performed in La Jolla, CA. The petitioner also submitted an education evaluation finding that the beneficiary's foreign education is equivalent to a U.S. bachelor of science degree in mechanical engineering.

The director denied the petition on December 1, 2008. On appeal, counsel argues that a bachelor's degree in mechanical engineering is relevant to the proffered position because it is closely related to the study of computer science and computer engineering. To support this argument, counsel submits an expert letter from [REDACTED], Princeton University. The letter from [REDACTED] is dated

January 7, 2004, and states that the academic study of mechanical engineering is closely related to the study of computer science and computer engineering because “[s]tudents are introduced to fundamental computational principles, as the methodologies and practices of these engineering disciplines have become almost entirely grounded in the utilization of software-based technologies for machine design, systems control, robot manipulation, and related functions. . . .” The letter from [REDACTED] was not written in support of the proffered petition and, moreover, is over six years old. Consequently, it fails to address the beneficiary’s educational background and explain how the courses taken by the beneficiary are the same or are closely related to those taken by computer science or computer engineering majors. Therefore, the AAO will not accept it as expert testimony in support of the present petition. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel also submits printouts from the website of the University of Cincinnati’s mechanical engineering degree program, which states:

[t]he core concepts of a mechanical engineering curriculum are then taught through courses in both the energy stem and the structures/motion stem. At the same time, students take laboratory courses, computer courses and other associated courses that broaden their education. . . .

* * *

Throughout the curriculum, students are exposed to modern technology and are required and encouraged to use the computer as a tool to solve problems and communicate effectively with others. . . .

Counsel also argues that a prior AAO decision notes that “[t]he use of computers is an integral part of the contemporary study of engineering. . . .” The AAO notes that counsel’s citation to an unpublished decision is not pertinent to the matter at hand. Counsel offers no evidence to establish that the facts of the instant petition are analogous to the facts in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO finds that USCIS is not required to approve applications or petitions where eligibility has not been demonstrated.

Prior to examining whether the beneficiary is qualified to perform in the duties of a specialty occupation requiring at least a bachelor’s degree in a specific specialty, the AAO will first determine whether the proffered position qualifies as a specialty occupation as the beneficiary’s credentials are relevant only when the proffered position has been determined to be 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 AAO finds that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a software engineer.

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 Department of Labor’s *Occupational Outlook Handbook (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.

As mentioned above, the evidence indicates that the beneficiary will not work at the petitioner’s offices, but instead would be contracted to another company located in La Jolla, CA. Therefore, it appears that the petitioner is a contractor that will assign the beneficiary to work for or on behalf of another entity. As mentioned previously, the petitioner did not provide any copies of contracts, or even a description of the project on which the beneficiary would allegedly work.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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.* at 387-388. 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. As discussed above, 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.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a software engineer. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Additionally, the AAO has reviewed the educational requirements for a software engineer, the title of the proffered position, and observes that the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2010-11 online edition, provides the following information regarding the education and training of software engineers:

[M]ost employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. . . .

The *Handbook*, therefore, does not indicate that mechanical engineering is a commonly accepted college major for an application software engineering position, contrary to counsel's assertions on appeal. The AAO also notes that the *Handbook* specifically excludes computer engineers from its section on engineers, even though this is the section that discusses mechanical engineers. The AAO concludes from this information that a position that could be performed by an individual with a degree unrelated to that of a software engineer is not a software engineering position. Our conclusion therefore further diminishes the claim that the beneficiary will be performing the specialty occupation duties of a software engineer.

The advertisements submitted by the petitioner to demonstrate that companies in the petitioner's industry commonly accept a bachelor's degree in engineering are not probative for these proceedings because, as discussed previously, the petitioner did not provide sufficient information regarding the proffered position to determine whether it is similar to the jobs listed in the advertisements. Moreover, the advertisements submitted indicate that a wide range of fields, including the engineering, computer science, math, and physics, are acceptable, which further indicates that a bachelor's degree in a *specific specialty* is not required.

Beyond the decision of the director, the AAO therefore 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).

Next, the AAO will examine the director's finding that the beneficiary is not qualified to perform the duties of a specialty occupation requiring a degree in computer science or a related field. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed previously, it cannot be determined what the actual proffered position is in this matter 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. However, the AAO notes that, in any event, the petitioner specifically stated that the proffered position requires a bachelor's degree or its equivalent in computer science or a related field, but the beneficiary's degree is in mechanical engineering. The AAO does not doubt that a mechanical engineering degree entails some computer coursework and that students are taught to use computers to solve mechanical engineering problems. However, the petitioner did not provide documentation that establishes that the beneficiary's particular mechanical engineering degrees and coursework qualify him to perform the duties of a software engineer. The beneficiary's transcripts do not indicate that the beneficiary took more than a basic computer course towards his degrees and, although the petitioner submitted documentation on appeal to indicate that a mechanical engineering degree generally entails computer usage, the petitioner did not submit any evidence specifically pertaining to the beneficiary's individual credentials that would indicate he is qualified to perform the duties of a specialty occupation requiring a baccalaureate or higher degree or its equivalent in computer science or a related field.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.