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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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FILE: Office: VERMONT SERVICE CENTER Date: **SEP 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:

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,

for 
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 services company. 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 failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

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

In the petition submitted on April 1, 2008, the petitioner stated it has three employees and a gross annual income of approximately \$600,000. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2008 to August 27, 2011 at an annual salary of \$60,000.

The support letter states that the petitioner has two offices, including its headquarters in Alpharetta, GA and a branch office in Carson City, Nevada. The letter also indicates that the person in the proffered position will be responsible for the following:

Analyze, design, develop, modify and implement software/systems applications in a client/server environment using Oracle, SQL, PL/SQL and Java on Windows operating system; specific projects may include development of interfaces with a Time Entry system, modification of COGS Account generation workflow, prepare design documents for integrating WMS with 3rd party for Inventory Transactions, PO Transactions and Sales Order Transactions, modification of Put away rules, implementation of Oracle Warehouse Management system, design and implementation of integrating PPMA with Microsoft Source Safe, Work Breakdown structure and Mailing services applications, provide functional and technical solutions for coming issues during and after implementation of Oracle WMS; Will work alongside other programmer analysts in a team environment developing user-friendly software/systems applications in accordance with project specifications; will also work under the supervision of the project manager.

The petitioner states that in addition to providing services at the petitioner's offices in Alpharetta, GA, "[the beneficiary] *may provide onsite professional services to [the petitioner's] clients*, always in accordance with a Department of Labor, certified Labor Condition Application. . . ." [Emphasis added.]

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

[W]e, therefore, require that our Programmer Analyst possess the minimum of a Bachelor Degree or Bachelor's Degree equivalent in one of a variety of industry-recognized areas including computer science, electronics and communication, engineering, technology, management information systems, mathematics, business, or a related field. . . .

The Form I-129 indicates that the beneficiary will work either in _____ or _____. The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in either _____ or _____ from August 28, 2008 to August 27, 2011. The LCA lists a prevailing wage of \$59,613 for _____ and \$51,210 for _____.

The petitioner submitted the beneficiary's education documents, resume, and reference letters, indicating that he has a foreign degree, along with a credential evaluation finding that this degree is equivalent to a U.S. Bachelor of Science Degree in Engineering from an accredited U.S. college or university.

On May 27, 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 regarding the petitioner's prior hiring practices with respect to other programmer analysts, copies of client contracts, or any other evidence demonstrating that the duties to be performed by the beneficiary require at least a bachelor's degree in a specific specialty. The RFE also requested additional documentation regarding the beneficiary's credentials, noting that it appeared that the beneficiary's coursework included only a few classes related to computers, as well as additional information regarding the petitioner's business.

Counsel for the petitioner responded, in pertinent part, as follows:

[K]indly note that [the petitioner], though it does business in the technical consulting market, **is the direct employer of the beneficiary**. If [the petitioner] chooses to provide the beneficiary's services in the consulting aspect of the company, employment would not shift from [the petitioner] to another employer. Assignments are issued in accordance with the [LCA] and at no time would the beneficiary be out of the employment of [the petitioner].

Technical Service Vendor Agreements held by [the petitioner] reflect the nature of the technical consulting market. [The petitioner] is a software consulting company that maintains Technical Service Vendor Agreements and Software Development Contracts with various direct clients that expand across the nation.

Regardless of contracted work, [the petitioner's] employees are employed by [the petitioner] at all times and, therefore, [the petitioner] is not considered an agent and is consequently not required to provide contracts or an itinerary. However, petitioner company has complied with USCIS [sic] request and attached the requested itinerary. Please note that since [the petitioner] is a software product developer and technical service contractor, the beneficiary's expertise may be required onsite in accordance with

one of the various on-going Technical Service Vendor Agreements. [The petitioner] has attested to this in the Letter in Support of [the beneficiary], submitted with the H-1B application. Any movement of employees to client sites will always remain in accordance with both LCA and Department of Labor procedures.

Despite counsel's statement that an itinerary was included with the RFE response, no itinerary was submitted in response to the RFE. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In a letter, dated June 25, 2008, which was also submitted in response to the RFE, the petitioner states:

[t]he position offered to [the beneficiary] is a technical professional position. As a Programmer Analyst, [the beneficiary's] job duties include to [sic] analyze science, engineering, business, and all other data processing problems for application to electronic data processing systems. Analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software. He may also supervise computer programmers. Prepare project status reports and formal presentations as required; Communicate project specifications effectively with project team.

The petitioner breaks down the proffered position as follows: research, analyze, and design and develop applications (75%); participate in project meetings (15%); and provide status updates and receive training as well as special projects at a client project site (10%).

In response to the RFE, counsel also included the petitioner's offer letter to the beneficiary, which is undated. The offer letter includes the following language:

[The petitioner] is in the business of software development, software project development/implementation and IT consulting. As some of [the petitioner's] business involves providing consulting services to the client at the [sic] either [the petitioner's] location or at Client's location, *you would be required to travel / relocate the [sic] client site*. If the assignment is at a Client site it is very critical that you join the project at the designated client site and provide consulting services until the completion of the project and do your best to enable the client to successfully implement their system. If you are providing consulting services at the clients [sic] site, [the petitioner] will issue [a] separate Statement of Work (SOW) for each assignment at the client site and will have terms specific to that assignment.

[Emphasis added.]

Counsel also included a copy of the project to which the beneficiary would allegedly be assigned. This project is titled "Stores Warehouse and Inventory Management" (SWIM) and is dated November 8, 2007. The SWIM description, which entails enabling Wireless point of sales with major vendors so that clients can record and track customer orders, finalize sales, connect to other systems, and manage inventory, does not indicate how the beneficiary's vague and generically described duties fit into the overall project. Additionally, counsel submitted copies of paychecks issued by the petitioner to other workers.

Although the petitioner states that the beneficiary will work as part of a team, the petitioner only employs three workers. Moreover, the petitioner states that part of its business is to develop products in-house while part of its business is to provide computer consulting services and claims that although it assigns workers to client sites, it also employs workers at its two offices. The petitioner's assertions about the nature of its business seem contradictory given the small number of workers the petitioner claims to employ. 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).

Additionally, counsel submitted a copy of an advertisement the petitioner placed on its own website for a Senior Programmer Analyst. This advertisement is for multiple openings in _____ and "[v]arious client sites throughout the USA." The minimum requirements listed in the advertisement is a Master's or equivalent (defined as a Bachelor's with five years of prior progressive professional experience in the position offered or a related position) in Computer Science, Computer Information Systems, Engineering, Math, Electronics, Technology or a related field.

Counsel also submitted a second credential evaluation finding the beneficiary has the equivalent of a Bachelor of Science Degree, with a dual major in Management Information Systems and Engineering, based on a combination of his education and experience. This evaluation, written by _____ at _____ University, was submitted together with a letter from an Assistant Dean at _____ University.

The director denied the petition on October 29, 2008.

On appeal, counsel states that two denials were issued on October 29, 2008 and provides copies of both. The first denial letter states that the petition was denied due to abandonment as the petitioner did not respond timely to the RFE. The second denial letter is the one that is currently being reviewed by the AAO on appeal and denies the petitioner on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

Upon a review of the record, it appears that the denial due to abandonment was issued in error as the response to the RFE was timely submitted. As counsel addresses the issues raised in the second denial on appeal, even if the director had committed a procedural error by issuing the first denial due to abandonment, it is not clear what remedy would be appropriate beyond the appeal process itself. In response to counsel's concerns raised on appeal, the case was adjudicated on the merits and the petition was never considered by USCIS to be abandoned, despite the first denial letter to the contrary, which was issued in error.

Counsel does not submit any contracts on appeal, stating that “[T]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts.” Counsel further argues that the petitioner is not required to provide contractual evidence under *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), because the position at issue in *Defensor*, a nurse, is non-professional, whereas the present petition is for a programmer analyst position, which counsel claims is a professional occupation. However, the application of *Defensor* is not determined by whether the proffered position is professional. Instead, an analysis of whether the proffered position is a specialty occupation under *Defensor* is appropriate whenever the petitioner intends to have the beneficiary work on a project for another entity.

Further, for the proposition that requests for contracts exceed the scope authorized for RFEs, the petitioner mistakenly interprets the memorandum from

(November 13, 1995) (hereinafter referred to as the memo). While the memo states that requests for contracts between the employer and the alien worksite should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memo does not prohibit such RFE requests. Read as a whole, the memo counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for requesting the documents. The memo, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memo purport to bar agency officers from issuing RFEs as a matter of policy on any category of H-1B petitioners. Further, this internal memo must be read in the context of the current regulations that invest USCIS officers with broad authority to pursue such evidence as they determine necessary in the exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations.

Under 8 C.F.R. § 103.2(b)(8)(ii), “if all required initial evidence is not submitted with the application or petition *or does not demonstrate eligibility*, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS.” (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, “The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication.”

The record reflects that clients contracting for the services to be provided by the beneficiary generate the projects upon which the beneficiary would work. It is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition would be determined by the specific requirements generated by client entities contracting for the beneficiary's services. Those client entities ultimately determine what the beneficiary would do, and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. In these circumstances, documentary evidence from client entities generating the projects upon which the petitioner would work are relevant and material to establishing the specific work that the beneficiary would perform, and, consequently, whether the proffered position is a specialty occupation. However, when the RFE was issued for contract documents, the record was devoid of any substantive evidence from client entities, although their needs directly determine what the beneficiary would actually do on a day-to-day basis. In this context, the AAO finds that the RFE request for contract documents was a proper exercise of the director's discretionary authority reflected in the above referenced

regulations.

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. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis.

Counsel further asserts that the standard of proof to be met by the petitioner is a preponderance of the evidence, which means that it only has to demonstrate that the matter asserted is more likely than not true. The AAO agrees that the petitioner's standard of proof is based on a preponderance of the evidence standard, however the petitioner did not meet its burden with regard to this standard. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The burden of proof is on the petitioner to either prove that the petitioner does not intend to contract the beneficiary to another entity or to demonstrate that the petitioner will directly control the beneficiary's work and conditions of employment. By not submitting copies of contracts, with corresponding work orders or statements of work, with the petitioner's client(s) for the project(s) on which the beneficiary would allegedly work, the petitioner has precluded USCIS from following a line of material inquiry to determine where and for which entity the beneficiary would actually work. Under a preponderance of the evidence standard, given the inconsistencies in the petitioner's statements and the lack of any contractual documentation to support the petitioner's assertions regarding where the beneficiary would work and on which project the beneficiary would be assigned, the petitioner has not demonstrated that the beneficiary would primarily work at the petitioner's offices performing the job duties as outlined in the support letter submitted with the petition.

Having discussed the primary evidentiary deficiencies in the record, the AAO will first 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 at 387. 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), 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)).

As discussed above, the petitioner states that the beneficiary will primarily work at the petitioner's offices in _____ but also may be assigned to various client sites in the _____ area. The evidence submitted by the petitioner regarding the nature of its business indicates, however, that it is likely that the beneficiary will be contracted to another entity to work at unspecified worksites in other locations and that any work performed at the petitioner's offices will be supplemental to work performed at client sites. Therefore, under *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts establishing 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.

However, even if the petitioner had credibly demonstrated that the beneficiary would work at the petitioner's offices in _____ for the duration of the petition, 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* – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The *Handbook* (2010-11 online edition) 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. . . .

As evident in the excerpts above, 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 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 computer science or equivalent combination of education and experience in a closely 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).

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 (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). Although the petitioner submitted a prior advertisement published on its own website, the proffered position is for a programmer analyst while the job title listed in the advertisement is for a senior programmer analyst. Moreover, the wide range of specialties accepted by the petitioner in conjunction with the degree requirement does not contradict the *Handbook's* description that a wide variety of fields is acceptable for programmer analyst positions, thereby demonstrating that the petitioner does not require at least a bachelor's degree or its equivalent in a *specific specialty* for the proffered position. Further, the advertisement is not sufficient evidence of an established recruiting and hiring history, and neither it nor any other evidence in the record of proceeding establishes that the petitioner's specification of a degree requirement is necessitated by the actual performance requirements of the proffered position.

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 indicates 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.

Second, the AAO will examine the director's finding that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring at least a Bachelor's Degree or the equivalent in Management Information Systems or a related field under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which

specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The director determined that the initial evaluation submitted with the petition, which found that the beneficiary's education is equivalent to a U.S. Bachelor of Science Degree in Engineering, did not appear to qualify the beneficiary to work in a specialty occupation requiring at least a bachelor's degree or equivalent in a computer-related field. Consequently, the director requested additional documentation regarding the beneficiary's qualifications.

The petitioner submitted a second credential evaluation in response to the RFE finding that the beneficiary has the equivalent of a U.S. Bachelor's Degree with a dual major in Management Information Systems and Engineering. This evaluation was based on a combination of the beneficiary's four-year engineering degree and employment letters documenting three years and six months of progressively responsible experience in management information systems and related fields.

Noting that the beneficiary only took two computer science classes towards his foreign degree, the director reviewed the beneficiary's credentials under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) and found that the beneficiary does not have the U.S. equivalent of a Bachelor's Degree in Management Information Systems because "[i]n cases where the beneficiary has two or more years of academic studies in an unrelated field, the beneficiary may be considered as having two years of study toward a degree required by the specialty occupation. . . ." The director then stated that the beneficiary would have had to document six years of relevant experience in order to make up for two years of study in a computer-related field that the director found the beneficiary lacks.

Although counsel submitted the second credential evaluation in order to demonstrate that the beneficiary has a U.S. equivalent of a dual Bachelor's Degree in Engineering and Management Information Systems under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the director rejected this evaluation, finding that it is not in accord with previous equivalencies or is questionable. The AAO disagrees. The second credential evaluation and supporting documentation submitted by counsel in response to the RFE appear to meet the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and, therefore, the director's finding that the beneficiary is not qualified to perform in the duties of a specialty occupation requiring at least a bachelor's degree or the equivalent in Management Information Systems or a related field will be withdrawn.

The appeal will be dismissed and the petition denied. 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.