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



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **SEP 02 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,

for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the service center director, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a convalescent hospital and seeks to employ the beneficiary as a computer programmer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on February 6, 2004, noting that the petitioner had failed to submit sufficient evidence demonstrating that it had a valid need for a degreed individual to perform the duties of a computer programmer. On appeal, counsel for the petitioner asserts that the director's basis for denial was erroneous, and contends that the petitioner satisfied all evidentiary requirements.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner claims to seek the beneficiary's services as a computer programmer. Evidence of the beneficiary's duties includes: the Form I-129, the petitioner's October 3, 2003 letter of support, and counsel's January 27, 2004 response to the request for evidence. In the October 3, 2003 letter, the petitioner indicates that to perform the duties of the proffered position, the individual candidate must possess a bachelor's degree

in computer programming and have at least two years of experience in the field. The petitioner claimed that the beneficiary's proposed job duties are as follows:

- Converts data from project specifications and statements of problems and procedures to create or modify computer programs: Prepares, or receives from SYSTEM ANALYST (profess. & kin.) 030.167-014, detailed workflow chart and diagram to illustrate sequence of steps that program must follow and to describe input, output, and logical operations involved.
- Analyzes workflow chart and diagram, applying knowledge of computer capabilities, subject matter, and symbolic logic.
- Confers with supervisor and representatives of departments concerned with program to resolve questions of program intent, date [sic] input, output requirements and inclusion of internal checks and controls.
- Converts detailed logical flow chart to language processable by computer [].
- Enters program codes into computer system.
- Inputs test data into computer.
- Observes computer monitor screen to interpret program operating codes.
- Corrects program errors, using methods such as modifying program or altering sequence of program steps.
- Writes instructions to guide operating personnel during production runs.
- Analyze[s], reviews, and rewrites program to increase operating efficiency or to adapt program to new requirements.
- Compiles and writes documentation of program development and subsequent revisions.
- May train workers to use program.
- May assist COMPUTER OPERATOR to resolve problems in running computer program.
- May work with SYSTEMS ANALYST to obtain and analyze project specifications and flow charts.
- May direct and coordinate work of other to write, test and modify computer programs.

However, no independent documentation to further explain the nature and scope of these duties was submitted. Consequently, the director requested additional evidence on November 10, 2003, including a more detailed description of the duties of the proffered position, the petitioner's past hiring practices for the position of computer programmer, and an overview of the petitioner's organizational structure.

In a response dated January 27, 2004, counsel for the petitioner addressed the director's queries. With regard to the proffered duties of the position, counsel discussed each of the duties originally identified in the October 3, 2003 letter of support, indicating whether each duty was "repeating," seasonal, or simply performed one time. Counsel further indicated that the petitioner had not previously employed an individual in the position of computer programmer, but claimed that it employed a computer technician, noting that the technician's position was inadequate for its computer operations. Finally, counsel submitted copies of the petitioner's

quarterly wage reports and an organizational chart demonstrating the organizational hierarchy of the company.

On February 6, 2004, the director denied the petition. The director found that the petitioner had not demonstrated that the level, scope, and complexity of the petitioner's business actually required an individual with a bachelor's degree to fill the proposed position. The director noted that the petitioner's hiring history did not include a computer programmer in the past, and the organizational chart provided did not depict the semblance of a computer personnel function. The director found that questions remained regarding the validity of the claim that a person possessing a bachelor's degree was mandated to fill the proffered position in the petitioner's convalescent home, particularly since no evidence pertaining to its computer hardware or software applications was provided. The director concluded that the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous. Specifically, counsel contends that the position is in fact a computer programmer position, and takes issue with the director's reliance on the nature and scope of the petitioning entity when rendering the decision. Counsel concludes that the petitioner has satisfied the requirements under 8 C.F.R. § 214.2(h)(4)(iii)(A). In support of the appeal, counsel submits a document showing that the petitioner is one of seven healthcare centers owned and operated by MRZ Management and Systems Corporation.

To make its determination as to whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the 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.

The petitioner has stated that the proffered position is that of a computer programmer. According to the *Handbook*, the educational requirements for computer programmer positions, in relevant part, are as follows:

A bachelor's degree also is required for many computer programming jobs, although a 2-year degree or certificate may be adequate in some cases. Employers favor applicants who already have relevant skills and experience. Workers who keep up to date with the latest technology usually have good opportunities for advancement.

* * *

Many 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.

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess strong programming skills. A graduate degree in a related field is required for some jobs.

As stated above, a 2-year degree or certificate may be adequate for some positions. In the event that a bachelor's degree is required, the *Handbook* indicates that a degree in computer science, mathematics, or information systems is often the standard, and further indicates that some computer programmers take special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. Based on this overview, a degree in a specific specialty is not normally a minimum requirement for a computer programmer. Therefore, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining this criterion include whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). In the instant matter, the petitioner has not submitted evidence that responds to either prong of the criterion.

The petitioner submitted no evidence, such as job postings, to establish its degree requirement as the norm within its industry under the first prong of the criterion. In response to the request for evidence, counsel merely stated that "all companies who have job vacancies for a Computer Programmer require a baccalaureate degree in Computer Programming." Without documentary evidence to support the claim, however, this assertion by 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 the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner's failure to submit information related to its programming needs, such as the creation and implementation of a proprietary software system, precludes it from establishing that the position's complexity or unique nature distinguish it from computer programming employment that is performed with less than a four-year degree. As previously stated, simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158. Therefore, the petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant matter, counsel, in response to the director's request for evidence, asserted that the petitioner had never employed a computer programmer. Therefore, since the petitioner has not established that it previously employed a degreed programmer in the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a programmer with a two-year degree or certificate. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a basic computer programmer.

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

In reaching its decision, the AAO has again considered the petitioner's letter dated October 3, 2003 and counsel's response to the request for evidence dated January 27, 2004. Both letters provide a vague and generalized overview of programming duties. However, absent additional evidence, such as information regarding the hardware and software needs of the petitioner's organization, there is an inadequate factual foundation to support a finding that the proposed duties are as specialized and complex as required by the regulation. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical programmer or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific specialty. The totality of the record does not establish the proffered position is a specialty occupation based on a claimed complex and unique nature as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

It should also be noted that, as touched upon by the director, the record contains numerous unresolved discrepancies pertaining the nature of the petitioner's organization. The record is unclear with regard to the entity for whom the beneficiary will perform his services. On appeal, counsel contends that the petitioner is a part of a group of healthcare companies owned and operated by [REDACTED], and that the beneficiary could possibly work for other companies within this group. Moreover, the organizational chart for the petitioner did not indicate that a computer-related position was incorporated into its structure. Finally, the quarterly wage reports submitted in response to the request for evidence show a discrepancy with regard to the actual employer, since the wage reports submitted identify the employer as "[REDACTED]" not the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice

unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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