

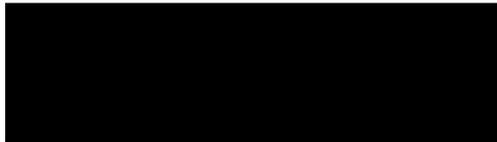
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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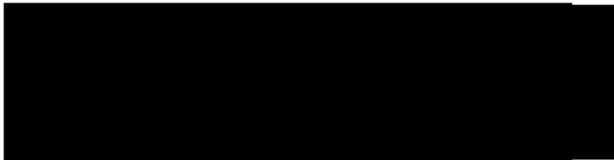
D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date **SEP 03 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 Michael F. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The Form I-290B appeal in this matter contains no indication that the petitioner was assisted by counsel or any representative in preparing it. A Form G-28 Notice of Entry of Appearance in the record, however, shows that the petitioner was represented by counsel when it submitted the Form I-129 petition in this matter, and the record contains no indication that counsel withdrew his appearance. A copy of this decision will, therefore, be furnished to counsel.

On the Form I-129 the petitioner characterized itself as a software development and consulting firm. To employ the beneficiary in a position designated as a Cognos consultant, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that the beneficiary is qualified for the proffered position. On appeal, the petitioner asserted that the beneficiary's bachelor's degree and Cognos certification qualify her for the position. In support of these contentions, the petitioner submitted additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and accompanying submissions.

As will be discussed below, the AAO will dismiss the appeal on each of two independent grounds. In addition to affirming the director's decision to deny the petition on the beneficiary qualification issue, the AAO will also dismiss the appeal on a basis not identified by the director, namely the petitioner's failure to establish that the proffered position is a specialty occupation.

The AAO will first address the petitioner's failure to establish that the proffered position is a specialty occupation, because, logically, the beneficiary's qualifications are rendered irrelevant if the particular position for which the H-1B petition is filed is not a specialty occupation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it is its independent, *de novo* review of the entire record of proceeding that leads it to conclude that the petitioner has failed to establish the proffered position as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) 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 (2) 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 position the AAO examines the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content. In a letter dated March 26, 2008, the petitioner’s Director of Recruiting and Workforce Planning described the beneficiary’s prospective duties as follows:

She will be responsible for installation and configuration of Cognos 8 and Reportnet 1.1, designing packages using Framework manager in Cognos ReportNet.Perform Analyzing and understanding the Requirement Specification. Carrying out new System Test cases. Review of System Test cases. Attending team meetings. Assigning the work to the team. Preparing status reports. Preparing Bug status reports.

[Quoted verbatim.]

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook*¹ (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations. The director stated that the proffered position “is similar to that of a software engineer,” and she referred to the *Handbook* as her basis for concluding that such positions

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online, accessed April 30, 2010.

constitute an occupational category that qualifies as a specialty occupation. At the outset, the AAO withdraws the director's determination that a software engineer position automatically qualifies as a specialty occupation.

As the *Handbook* indicates that the computer software engineer occupation is not limited to positions that require or are associated with at least a bachelor's degree, or the equivalent, in a specific specialty, the proffered position's inclusion within the Computer Software Engineers occupational category is not sufficient to establish that it is or will be a specialty occupation.

The aforementioned chapter of the *Handbook* reports that "most 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 *Handbook*, however, does not indicate that computer software engineers constitute an occupational class for which entry normally requires at least a bachelor's degree or its equivalent in a specific specialty. The following excerpts from the 2010-2011 *Handbook's* "Computer Software Engineers and Computer Programmers" chapter convey these points:

[From the three introductory "Significant Points":]

- Job prospects will be best for applicants with a bachelor's or higher degree and relevant experience.

[From the "Training, Other Qualifications, and Advancement" section:]

A bachelor's degree commonly is required for software engineering jobs, although a master's degree is preferred for some positions. 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.

Education and training. For software engineering positions, most 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 majors for applications software engineers are 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.

* * *

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.

In addition to educational attainment, employers highly value relevant programming skills and experience. Students seeking software engineering or programming jobs can enhance their employment opportunities by participating in internships. Some employers, such as large computer and consulting firms, train new employees in intensive, company-based programs.

As technology advances, employers will need workers with the latest skills. To help keep up with changing technology, workers may take continuing education and professional development seminars offered by employers, software vendors, colleges and universities, private training institutions, and professional computing societies. Computer software engineers also need skills related to the industry in which they work. Engineers working for a bank, for example, should have some expertise in finance so that they understand banks' computing needs.

Certification and other qualifications. Certification is a way to demonstrate a level of competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms, which may require professionals who work with their products to be certified. Voluntary certification also is available through various other organizations, such as professional computing societies.

Computer software engineers and programmers must have strong problem-solving and analytical skills. Ingenuity and creativity are particularly important in order to design new, functional software programs. The ability to work with abstract concepts and to do technical analysis is especially important for systems engineers because they work with the software that controls the computer's operation. Engineers and programmers also must be able to communicate effectively with team members, other staff, and end users. Because they often deal with a number of tasks simultaneously, they must be able to concentrate and pay close attention to detail. Business skills are also important, especially for those wishing to advance to managerial positions.

In light of the fact that the *Handbook's* "Computer Software Engineers and Computer Programmers" chapter indicates that software engineer positions do not categorically require at least a bachelor's degree or its equivalent in a specific specialty, the director erred in declaring the proffered position a specialty occupation by virtue of its being a software engineer position.

Further, the AAO does not concur with the director's view that the proffered position is that of a software engineer. The *Handbook* succinctly states that software engineers design and develop software, rather than merely installing, configuring, and troubleshooting existing software programs, which are the activities that appear to define the proffered position as described in the record of

proceeding. In this regard, the AAO finds that the proffered position more closely comports with the Computer Support Specialist occupation as discussed in the *Handbook*.

The *Handbook* states the duties of a computer support specialist as follows:

Computer support specialists provide technical assistance, support, and advice to individuals and organizations that depend on information technology. They work within organizations that use computer systems, for computer hardware or software vendors, or for third-party organizations that provide support services on a contract basis, such as help-desk service firms. Support specialists are usually differentiated between *technical support specialists* and *help-desk technicians*.

Technical support specialists respond to inquiries from their organizations' computer users and may run automatic diagnostics programs to resolve problems. In addition, they may write training manuals and train computer users in the use of new computer hardware and software. These workers also oversee the daily performance of their company's computer systems, resolving technical problems with Local Area Networks (LAN), Wide Area Networks (WAN), and other systems.

The proffered position appears to be a computer support specialist position supporting Cognos 8. The *Handbook* describes the education required for such a position as follows:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science, computer engineering, or information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. Some employers will hire applicants with a college degree in any field, as long as the applicant has the necessary technical skills. For some jobs, relevant computer experience and certifications may substitute for formal education.

The above passage makes clear that a number of educational paths may lead to a computer support specialist job, and that such employment does not normally require a minimum of a bachelor's degree in a specific specialty, or the equivalent.

In any event, however the proffered position is catalogued in terms of occupation, the evidence in the record of proceeding regarding the duties comprising the position does not indicate that it qualifies as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). In the absence of evidence establishing that this proffered position belongs to an occupational group that categorically requires at least a bachelor's degree, or its equivalent, in a specific specialty, it is incumbent upon the petitioner to provide documentary evidence that establishes that its particular position is one that requires at least a baccalaureate level of highly specialized knowledge in a specific specialty closely related to the performance requirements of the position, as required by section 214(i)(1) of the Act, 8 U.S.C.

§ 1184(i)(1), and its implementing regulations at 8 C.F.R. §§ 214.2(h)(4)(ii)(defining the term specialty occupation) and 214.2(h)(4)(iii)(A)(detailing additional criteria that must be met to qualify as a specialty occupation). This the petitioner has failed to do.

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.

In addition to the educational requirements described in the *Handbook*, the proffered position requires competence in supporting Cognos 8. The evidence makes clear that the beneficiary is both certified and competent in that application. That certification and competence, however, does not elevate the proffered position to a specialty occupation, as the position still does not require a minimum of a bachelor's degree in a specific specialty or the equivalent.

As indicated in this decision's earlier discussion regarding the *Handbook*, that resource does not support a finding that the proffered position is a specialty occupation.

Further, the petitioner has not provided documentary evidence supporting its claim that a "Cognos consultant" position performed in the course of the petitioner's business operations is one that would normally require at least a bachelor's degree level of knowledge in a specific specialty. In this regard, the AAO notes that the minimum level of formal education, training, and/or on-the-job training required to perform the proffered position is not evident in the duties that the petitioner ascribes to the proffered position; and the petitioner has not supplemented the record of proceeding with documentary evidence that remedies this deficiency.

Accordingly, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner provided no evidence that a degree requirement is common to the industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not provided any evidence that it normally requires a minimum of a bachelor's degree or its equivalent in a specific specialty for the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

It is not evident on their face that the proffered position or its duties as described in the record are so complex, unique, or specialized as to require or be usually associated with the attainment of at least a bachelor's degree in a specific specialty.² Therefore the petitioner has not established that the

² In this regard, the AAO notes that the petitioner's use of undefined computer and IT related terminology is not probative of the relative specialization, complexity, or uniqueness of the proffered position, and that the

proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As the AAO finds that the evidence fails to establish that the beneficiary would be employed in a specialty occupation position, the AAO will dismiss the appeal and deny the visa petition on that basis.

The remaining issue is whether, if the proffered position were a specialty occupation, the beneficiary is qualified to perform in it.

The AAO also finds that the director's decision to deny the petition on the beneficiary qualification issue is not in error.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states, in pertinent part, that an alien applying for classification as an H-1B nonimmigrant worker must have completed a degree in the specialty that the occupation requires, and that, if he or she does not possess the required degree, the petitioner must demonstrate that the alien has [1] experience *in the specialty* equivalent to the completion of such degree, and [2] recognition of expertise *in the specialty* through progressively responsible positions relating to the specialty.

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

[Emphasis added.]

The fact that the record of proceeding does not establish the proffered position as a specialty occupation logically precludes the petitioner from establishing that the beneficiary is qualified within

petitioner has not provided independent evidence establishing these dimensions.

the meaning of section 214(i)(2) of the Act and its implementing regulations. The statute and regulations require the petitioner to establish the beneficiary's qualification to serve in the particular specialty occupation that the record of proceeding establishes the proffered position to be. As no specialty occupation is established by the present petition, the beneficiary's credentials are irrelevant. Regardless, even assuming *arguendo* that the proffered position is a specialty occupation requiring at least a bachelor's degree or its equivalent in a computer or IT discipline, the petitioner has failed to demonstrate that the beneficiary possesses such a degree or its equivalent. In terms of a degree, or degree equivalency, the record of proceeding (through the submitted educational evaluation) indicates that the beneficiary holds no more than a foreign degree equivalent to a U.S. degree in civil engineering. Accordingly, the AAO will not disturb the director's decision.

The petition will be denied and the appeal dismissed 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.