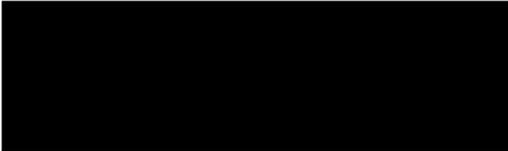




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: WAC 09 142 51714 Office: CALIFORNIA SERVICE CENTER Date: APR 29 2011

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 \$630. 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,

bar
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.

On the Form I-129 visa petition the petitioner stated that it is an export firm with one employee. To employ the beneficiary in what it designates as a systems analyst position, the petitioner endeavors 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, 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 counsel's brief in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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 a particular position 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its

equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted a letter, dated March 23, 2009, from the petitioner's CEO. That letter provides the following description of the duties of the proffered position:

- Conduct research, design, develop, and maintain computer systems and programs for monitoring industrial equipment inventory and network while supporting multiple work stations and terminals (overall responsibility).
- Develop and maintain computer systems that ensure data flow and database security, through JavaScript Programming and UNIX Programming (30%).
- Design, develop and maintain computer network and environment including computer hardware and systems software also including our inventory and database updates (20%).
- Design and maintain the network of software and databases for the storage and retrieval of specific client information and order details (20%).
- Monitor system performance, before and after program implementation, in order to prevent reoccurrence of program operating errors. (10%).
- Install system updates and conduct tests to verify that the system can achieve maximum performance. Conduct compatibility tests with existing software (10%).
- Prepare instructional manual and provide ongoing technical support for employees as necessary (10%).

The petitioner's CEO further stated: "The [proffered position] requires at least a Bachelor's degree in Computer Science, Computer Information Systems, Computer Engineering or a related field," and "The skills required can be obtained only as part of at least a Bachelor's degree in Computer Science, Computer Information Systems, Computer Engineering or a related field"

Because the evidence submitted was insufficient to demonstrate that the visa petition is approvable, the service center, on May 7, 2009, issued an RFE in this matter requesting, *inter alia*, additional evidence that the petitioner would employ the beneficiary in a specialty occupation position.

In response, counsel submitted a letter, dated June 1, 2009, from the petitioner's CEO. In that letter, the petitioner's CEO reiterated the description of the duties of the proffered position that was previously provided, and also reiterated his contention that the position requires a minimum of a bachelor's degree computer science, information systems, computer engineering, electrical engineering, or a related field. As will be discussed below, the AAO finds that the evidence in the record of proceeding does not substantiate the claim of petitioner and its counsel that the proffered position in fact requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes, that, because they are not supported by documentary evidence in the record of proceeding, the specialty-occupation claims of the petitioner and its counsel have no weight. Going on 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

The director denied the visa petition on July 14, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation position. In that decision the director found that the description of the duties of the proffered position more closely resembles the duties of a computer technical support specialist than those of a computer systems analyst.

On appeal, counsel asserted that the proffered position is a position for a systems analyst, rather than for a technical support specialist. In support of that position, counsel stated, "A Systems Analyst develops networks to facilitate data sharing within companies . . ." The AAO notes that, as the petitioner has only one employee, the need to facilitate data sharing within the company has not been demonstrated.

Counsel also emphasized the need to develop a database in asserting that the duties of the proffered position exceed those of a technical support specialist. Counsel asserted:

In order to manage the costumer [sic] information, inventory, supply orders, and shipping information, the petitioner needs a database designed to store, manage, and safe keep its business transactions. The beneficiary will be responsible for developing and designing the database and creating a network that can support multiple workstations and terminals in order to streamline the petitioner's business transactions and protect the company's client and inventory data.

At the outset, the AAO concurs with counsel's assessment that the director erred in categorizing the proffered position as a technical support specialist. The AAO also finds that the information that the petitioner presented about the proffered position indicates that, as described by the petitioner, it generally comports with the Computer Systems Analyst occupational classification as discussed in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*.¹

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. In its chapter "Computer Systems Analysts," the *Handbook* describes the educational requirements of such positions as follows:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with

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.

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.

With regard to the information in the above paragraph, the AAO observes that the usual preference for applicants with a bachelor's degree indicate, first, that, while usually preferred, a bachelor's degree is not normally required – as a preference indicates neither a recruiting nor hiring requirement, and, two, that the even when preferred, the bachelor's degree is not normally required to be in a specific specialty closely related to the proffered position, as would be required of a specialty occupation position. The AAO further notes that the *Handbook* observes that for jobs “in a technical or scientific environment” or a “business environment” employers “often seek” degrees in a limited number of fields, thus indicating, again that there is no particular educational credential normally required for entry in the computer systems analyst occupation.

Thus, the *Handbook*, cited by counsel, does not support the assertion that computer systems analyst positions are categorically specialty-occupation positions, as the *Handbook* does not show that such positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty.

For the reasons just discussed, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was noted above, the *Handbook* does not support the proposition that the petitioner's asserted requirement for a bachelor's degree in a specific specialty is common to the petitioner's industry, in

organizations similar to this petitioner, for systems analyst positions that are parallel to the one proffered here.

Counsel provided no submissions from a pertinent professional association and no letters or affidavits from others in the petitioner's industry. Other than the evidence from the *Handbook*, the vacancy announcements provided are the only evidence in the record pertinent to the recruitment and hiring practices of other firms.

One of the vacancy announcements provided was placed by C&S Wholesale Grocers for a senior program analyst to work in Keene, New Hampshire. That announcement states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

Another vacancy announcement was placed by Jacobs Engineering Group for a programmer/analyst III to work in Pasadena, California. That announcement states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

Another announcement was placed by Activision Education for a programmer analyst. That announcement states that the position requires either a master's degree or a bachelor's degree and five years of progressively responsible experience, and that the requisite degree must be in computer science, computer engineering, electrical engineering, instrumentation and control engineering, or a related field.

Another announcement was placed for a program systems analyst to work at the Space and Missile Systems Center in El Segundo, California. That announcement states that the position requires a master's degree and 12 years of experience or a bachelor's degree and 15 years of experience. It does not state that the requisite degree must be in any specific specialty.

Another announcement was placed by Northrop Grumman for a computer systems analyst II to work in Redondo Beach, California. It states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

The final vacancy announcement is for a computer programmer-analyst to work for CyberCoders near New Haven, Connecticut. It states that a bachelor's degree is preferred for the position, but that it is not required. It does not indicate that the preferred degree should be in any specific specialty.

Of the six vacancy announcements provided, five state that they require a bachelor's degree, but do not indicate that the degree must be in a specific specialty. The sixth indicates that a degree is only preferred, rather than a minimum requirement, and that the preferred degree need not be in any specific specialty. Further, none of those positions appear to be in the same industry as the petitioner, which is an exporter. In sum, those vacancy announcements do not support the proposition that a requirement of at least a bachelor's degree or the equivalent in a specific specialty is common to the petitioner's industry for systems analyst positions that are parallel to the one proffered here and appear in organizations similar to the petitioner.

As the record of proceeding has not demonstrated that a requirement of a minimum of a bachelor's degree, or the equivalent, in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree.

The AAO observes that the proposed duties as described in this record of proceeding involve JavaScript Programming and UNIX Programming and other computer/IT duties which are apparently compatible with computer-systems-analyst positions in general. However, the AAO finds that if a particular level of formal education, or the equivalent, in a particular specialty would be required to perform the position, it is certainly not self-evident in the record's description of the proffered position and the duties comprising it. The position is described in terms of generalized and generic functions which are not supplemented by any documentary evidence bringing to light any elements of relative complexity or uniqueness that may reside in the position. Thus, the proffered position is not distinguished from the broad occupational class of computer systems analysts, for which, as previously discussed, the *Handbook* does not establish a categorical need for at least a bachelor's degree in a specific specialty.

As the petitioner has not shown that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty, it has failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will now discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

On the visa petition, the petitioner stated that it was established during 2005. In his June 1, 2009 letter the petitioner's CEO stated that the petitioner was established during 2007. Elsewhere in the same letter the petitioner's CEO stated that the petitioner was established during 2005 but did not begin business until 2007. The petitioner's CEO further stated that it has no quarterly wage reports for quarters prior to the third quarter of 2007, which suggests that it had no employees prior to October of 2007. The petitioner submitted the instant visa petition on April 1, 2009, the first day of the second quarter of 2009.

The quarterly wage reports submitted cover each quarter since the petitioner began business through the day before the visa petition was submitted. They show that the petitioner had only one employee during the fourth quarter of 2007, during three quarters of 2008, and during the first quarter of 2009. They show that during the final quarter of 2008 and petitioner had two employees. A California Form DE-6 Quarterly Wage and Withholding Report shows that during the final quarter of 2008, the petitioner added the second person. That person's job description has not been provided.

The other employee, the petitioner's sole employee during the other five quarters and through the day before the visa petition was filed, represents that he is the petitioner's CEO, rather than, for

instance, a systems analyst. The record contains no evidence that the petitioner has ever previously employed a systems analyst.

As the record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO will next consider the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties of the proffered position 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 was noted above in the discussion of the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the proposed duties as described in the record of proceeding are generic duties of a computer systems analyst. As such, the duties are not developed to a level of specificity that might show a level of specialization and complexity that would require the application of knowledge usually associated with at least a bachelor's degree in a specific specialty. Nothing about those duties, or any one of them, establishes that they are more specialized and complex than those of computer system analyst positions whose performance does not require knowledge usually associated with at least a bachelor's degree, or the equivalent, in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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. The appeal will be dismissed and the petition denied.

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