

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

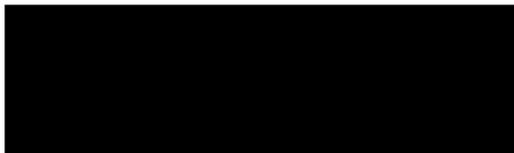
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

12

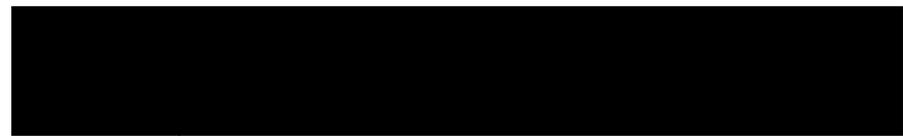


Date: DEC 09 2011 Office: CALIFORNIA SERVICE CENTER FILE:

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 \$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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 remain denied.

The petitioner avers to be a supplier of audio and DJ equipment that seeks to employ the beneficiary as a database administrator 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 determining that the petitioner had failed to establish the proposed position as a specialty occupation. The director also found that the evidence in the record raised concerns about whether the beneficiary would be paid the proffered wage.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, 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) the Form I-290B, Notice of Appeal or Motion, along with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner indicated it was established in 1996, had 5 employees, and a gross annual income of over \$7,000,000. The petitioner also stated on the Form I-129 that it wished to employ the beneficiary as a database administrator from September 15, 2009 until September 14, 2012 at an hourly wage of \$23.98. The LCA accompanying the petition was certified on September 3, 2009 for a period from September 15, 2009 until September 14, 2012.

In the undated letter accompanying the petition, the petitioner noted that the beneficiary would "be responsible for the performance, integrity and security of a database" and "may also plan, develop and establish the needs of users and monitor user access and security." The petitioner listed the beneficiary's major duties as:

- Creating database structures that consolidate the conceptual, logical and physical models of data stored by the Authority;
- Mapping the petitioner's conceptual design for a planned database in outline;
- Refining logical design so as to be translated into a specific data model;
- Further refining physical design to meet system storage requirements;
- Communicating regularly with technical, applications and operational staff to ensure and improve the quality, accuracy, integrity and security of information and data resources;
- Maintaining data standards, procedures and definitions;
- Developing, managing and testing backup and recovery plans to ensure that storage, archiving, backup and recovery procedures are functioning correctly;
- Analyzing the data stored in the database and making recommendations relating to performance and efficiency of that data storage.

The petitioner noted that the beneficiary had obtained a foreign degree that had been evaluated as the equivalent of a bachelor's of science degree in computer science from a regionally accredited college or university in the United States.

On September 25, 2009, the director issued an RFE requesting among other things: a more detailed description of the work to be performed, including the percentage of time spent on specific duties; the petitioner's organizational chart; and specific information regarding the petitioner's employees, including wage reports and payroll summaries.

In response, the petitioner provided the following description of duties and allocation of time associated with the duties of the proffered position:

- Develop standards and guidelines to guide the use and acquisition of software and to protect vulnerable information. Modify existing databases and database management systems or direct programmers and analysts to make changes. Create database structures that consolidate the conceptual, logical and physical models of data stored by the Authority - 25 percent of the time.
- Plan, coordinate and implement securities measures to safeguard information in computer files against accidental or unauthorized damage, modification or disclosure. Communicate regularly with technical, applications and operational staff to ensure and improve the quality, accuracy, integrity and security of information and data resources – 12.5 percent of the time.
- Prepare online mailings and responses to e-mail support inquiries. Provide technical expertise in the design, implementation, and maintenance of database management systems (DBMSs) that support company business applications – 12.5 percent of the time.
- Specify users and user access levels for each segment of database. Develop data model describing data elements and how they are used, following procedures and using pen, template, or computer software. Ensure logical data models are mapped effectively and efficiently into physical data models that take advantage of the characteristics of the specific DBMS used – 12.5 percent of the time.
- Maintain data standards, procedures and definitions. Develop, manage and test backup and recovery plans to ensure that storage, archiving, backup and recovery procedures are functioning correctly – 18.75 percent of the time.
- Plan, evaluate, and support operational software. Monitor and maintain database security and database software – 6.25 percent of the time.
- Develop software maintenance and support plan, ongoing performance monitoring and troubleshooting problems in real-time. Maintain availability and integrity of databases through multiple access schemes; facilitate sharing of common data by overseeing proper key index management and data dictionary maintenance – 12.5 percent of the time.

Counsel for the petitioner also referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* and the *O*NET Online Summary Report* for the occupation of database administrator. Counsel provided job postings for database administrators from ten organizations. Counsel noted further that maintaining the security of the database had become a critical element of management of the database and that the proffered position could only be performed by an individual with a bachelor's degree in computer science or a closely related field. Counsel also

pointed out that the petitioner employed a network analyst who had been accorded H-1B classification and that the petitioner required all of its computer specialists to possess a bachelor's degree. Counsel asserted that the duties of the proffered position are so complex and specialized that they may only be executed by an individual who had attained a baccalaureate degree. The petitioner's organizational chart listed a network analyst and the proffered position as the petitioner's IT department and showed both individuals reported to the director of product orientation, shipping, and customer relations and services. The organizational chart did not depict any programmer/analysts in the organization.

On November 16, 2009, the director denied the petition.

On appeal, counsel for the petitioner asserts: that the proffered position is a specialty occupation as set out in the *Handbook*; that the job advertisements provided demonstrate that a bachelor's degree in a computer-related field is an industry-wide requirement; that the petitioner has a unique need for a database administrator to ensure the performance, integrity and security of the database for its online superstore; that the petitioner normally requires a degree for the proffered position; and that the director misapplied the standard when determining whether the duties of the position are so specialized and complex as to require the individual performing the duties to possess a bachelor's degree. Counsel contends that this is a bona fide job offer and that the director's reference to the wage received by the petitioner's other H-1B employee is speculative, was not previously questioned in the director's RFE, and is not relevant to the decision in this matter.

Regarding the director's determination that the petitioner failed to comply with wage requirements pursuant to a different petition with a different beneficiary, the AAO withdraws the director's decision on that issue. The failure to pay a different H-1B beneficiary the prevailing wage is not a ground to deny the instant petition.

However, we find that the petitioner has not established that 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 [(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 [(2)] 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 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 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.

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. 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's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner 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. In this matter the petitioner fails to provide a detailed description of the actual day-to-day duties the beneficiary would perform in the proffered position.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

The petitioner's description of the duties of the proffered position is general and appear to incorporate the duties of a network, systems and database administrator, as those occupations are described in the *Handbook* (2010-11 online edition) - "Computer Network, Systems, and Database Administrators."

The *Handbook* reads in pertinent part:

Network and computer systems administrators design, install, and support an organization's computer systems. They are responsible for LANs, WANs, network segments, and Internet and intranet systems. They work in a variety of environments, including large corporations, small businesses, and government organizations. They install and maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to users. These workers gather data to evaluate a system's performance, identify user needs, and determine system and network requirements.

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.

Systems administrators are responsible for maintaining system efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades. Many of these workers are also responsible for maintaining network and system security.

Database administrators work with database management software and determine ways to store, organize, analyze, use, and present data. They identify user needs and set up new computer databases. In many cases, database administrators must integrate data from old systems into a new system. They also test and coordinate modifications to the system when needed, and troubleshoot problems when they occur. An organization's database administrator ensures the performance of the system, understands the platform on which the database runs, and adds new users to the system. Because many databases are connected to the Internet, database administrators also must plan and coordinate security measures with network administrators. Some database administrators may also be responsible for database design, but this task is usually performed by *database designers* or *database analysts*.

The *Handbook* indicates that the education and training of these information technology professionals varies widely. The *Handbook* states in pertinent part:

Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions. Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems administrators are computer science, information science, and management information systems (MIS), but a degree in any field, supplemented with computer courses and experience, may be adequate. A bachelor's degree in a computer-related field generally takes 4 years to complete and includes courses in computer science, computer programming, computer engineering, mathematics, and statistics. Most programs also include general education courses such as English and communications. MIS programs usually are part of the business school or college and contain courses such as finance, marketing, accounting, and management, as well as systems design, networking, database management, and systems security.

For network architect and database administrator positions, a bachelor's degree in a computer-related field generally is required, although some employers prefer applicants with a master's degree in business administration (MBA) with a concentration in information systems. MBA programs usually require 2 years of study beyond the undergraduate degree, and, like undergraduate business

programs, include courses on finance, marketing, accounting, and management, as well as database management, electronic business, and systems management and design. In addition to formal education, network architects may be required to have several years of relevant work experience.

While the *Handbook* indicates that a bachelor's degree level of education in a computer-related field may generally be required for database administrators, the description of duties as generically described in this matter here do not provide sufficient detailed consistent information to demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.² As it is not self-evident that, as described in the record of proceeding, that the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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 already discussed, the petitioner has not established that its proffered position as described is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner's reliance upon the job vacancy advertisements to establish an industry-wide standard is misplaced. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of ten advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the retail sales industry. The petitioner fails to establish however that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, only one of the ten advertisements is from an organization involved in the retail online

² The AAO observes that the petitioner in this matter did not provide an independent description of the duties of the proffered position but rather tracked the duties listed for a database administrator as set out in the Department of Labor's *O*NET* Online Summary Report. Listing the same duties as supplied in an overview of a database administrator fails to disclose what exact duties the beneficiary would be performing for the petitioner.

industry and this particular advertisement does not provide a description of duties for the advertised position that is parallel to the petitioner's broadly described position. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions. Moreover, two of the ten advertisements require only a general bachelor's degree to perform the duties of the advertised position. Another advertisement requires only a bachelor's degree in a technical major such as engineering or computer science. Another advertisement requires a bachelor's degree but lists a number of possible fields of study including business administration, math, computer science, or engineering, thus indicating that the duties of the advertised position may be performed by a person with a degree in any one of those disciplines, an implication that the advertised position is not a specialty occupation. Thus, upon review of the advertisements submitted, the petitioner has not established that an industry-wide standard exists for the proffered position as generally described and that the standard demonstrates the position is a specialty occupation.

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 record of proceeding does not support counsel's claim that the petitioner has a unique need for a database administrator to ensure the performance, integrity and security of the database for its online superstore. 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 Obaighena*, 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 record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a general information technology position that can be performed by persons without a specialty degree or its equivalent.

Although the petitioner previously employed an individual in a network administrator position and the individual was accorded H-1B classification, the record does not include the duties of the previously approved position. It is not possible to discern from this record that the duties of the proffered position in the instant matter correspond to the duties of the position in the previously approved H-1B petition. Moreover, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same general description of duties that is contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). Further, as the petitioner noted that this is the first database administrator it has attempted to hire, there is no evidence that the petitioner has a prior history of recruiting and

hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO again finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of an individual performing the generally described duties who is not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Based on the above discussion, the AAO affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The appeal will be dismissed and the petition denied for the above stated reason. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. In this matter, the petitioner has not sustained its burden.

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