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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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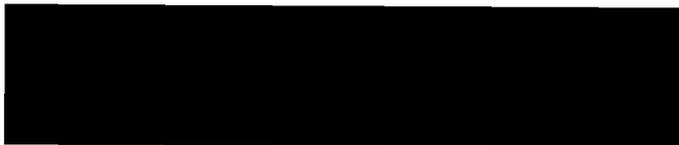


IN RE: Petitioner:
 Beneficiary:



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 states on the Form I-129, Petition for a Nonimmigrant Worker, that it is engaged in the hospitality industry, was established in 1976, employs 15 personnel, and had earned over \$1,000,000 in gross annual income when the petition was filed.¹ It seeks to employ the beneficiary as a systems analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) 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.

The petitioner stated on the Form I-129 that it wished to employ the beneficiary as a systems analyst from October 1, 2009 until September 30, 2012 at an annual salary of \$36,000. In the September 7, 2009 letter in support of the petition, the petitioner described the proposed job duties as:

- Research, design, develop, and maintain computer systems and programs for monitoring registrations, inventory, and vacancies with a computer network that will support multiple work stations and terminals (25%).
- Maintain database and network security, assure data fluidity, and make strategic technical decisions to maximize cost efficiency (25%).
- Design and develop utility programs and automation tools to test, track, and verify defects in software programs. Monitor system performance before and after program implementation in order to prevent reoccurrence of program operating errors (20%).
- Review new or modified computer programs, including documentation, diagram, and flowchart to determine if programs will perform according to user requirements and conform to guidelines (10%).
- Design and maintain the network of software and databases for the storage and retrieval of specific client information. Install system updates and conduct tests to verify that the system can achieve maximum performance. Conduct compatibility tests with existing software (20%).

The petitioner stated that the proffered position requires at least a bachelor's degree in computer

¹ The petitioner states, in its September 7, 2009 letter in support of the petition, that it was established in 1989, owns and operates a hotel located in Redondo Beach, California, and currently employs 15 personnel.

information systems, technical management, business administration or a related field. The petitioner asserted that the job duties are complex as the responsibilities include “generating database systems to thoroughly analyze the company’s credit, inventory, and management transactions focused around mathematic and statistical data.

On October 6, 2009, the director issued an RFE requesting a more detailed job description and evidence establishing the proffered position as a specialty occupation under the standards set forth for a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), among other items.

In a November 13, 2009 response, the petitioner re-stated the initially described duties adding that the duties described involved the petitioner’s hotel and that maintaining the database and network security assured that hotel transactions and client data are protected. The petitioner claimed the position parallels the position described in the Standard Occupational Classification Code number 15-1051.00 (computer systems analysts) and that the Department of Labor’s *Occupational Outlook Handbook (Handbook)* indicated that employers prefer applicants who have at least a bachelor’s degree when hiring system analysts.

The petitioner also provided five advertisements from other companies involved in the hospitality business including advertisements for: (1) an HRT analyst for Vail Resorts that required a bachelor’s degree but did not list a specific discipline; (2) an Oracle CRM senior functional analyst for Wyndham Worldwide that listed a bachelor’s degree in computer science, information systems, or a business related field with experience related to the duties described; (3) an IT solutions architect for Archstone that required a bachelor’s degree in computer science or a related field; (4) an analyst, web analytics for Hilton Worldwide that required a bachelor’s degree and indicated its preference for an advanced degree in website/ecommerce; and (5) a Java software engineer for an unnamed company that listed a bachelor’s degree in computer science or equivalent. The petitioner noted that the need for a systems analyst not only applied to large companies but also to companies like the petitioner with unique transactions.

The petitioner claimed that its policy was to only hire degreed individuals for the proffered position and had employed several qualified individuals for the position of systems analyst in the past. The petitioner noted, however, that it could not provide copies of diplomas or other personal information regarding the former employees for confidentiality reasons.

On December 3, 2009, the director denied the petition.

On appeal, counsel for the petitioner asserts that the *Handbook* establishes that employers only consider applicants with bachelor’s degrees in a specialized field directly related to the type of business the organization conducts for the position of systems analyst. Further, that when the *Handbook* references an employer’s preference it is in connection with a graduate degree or higher. Counsel contends that the *Handbook* does not find anything less than a baccalaureate level of education suitable for the position of systems analyst. Counsel also references the previously submitted job advertisements and avers that each job listing stated a specific field in which a bachelor’s degree was required for the proffered position. Counsel cites the information previously submitted by the petitioner regarding its business and notes the importance of protecting its hotel transactions and clients’ data. Counsel claims that the job duties of the

petitioner's proffered position require the services of an individual who is highly knowledgeable and skilled in the field of computer information systems, technical management, business administration, or a closely related field. Counsel also claims that the job duties require specific knowledge of structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting.

Upon review, 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.

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.²

In this matter, the petitioner has provided a description of duties that corresponds generally to the occupational category addressed in the *Handbook’s* (2010-11 online edition) - “Computer Systems Analysts.” Under significant points the *Handbook* states: “Employers generally prefer applicants who have at least a bachelor’s degree; relevant work experience also is very important.”

The *Handbook’s* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization’s tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears

² 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.

elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

* * *

[W]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation. . . .

Contrary to counsel's assertions, as evident in the excerpts above, the *Handbook's* information on educational requirements for a systems analyst occupation does not indicate that a bachelor's or higher degree, or the equivalent, in a specific specialty is a normal minimum entry requirement for this occupational category. Rather, as noted under significant points as well as under the education and training section in the *Handbook*, employers usually prefer applicants who have at least a bachelor's degree. These statements do not indicate a bachelor's degree is a normal minimum entry requirement or that a bachelor's degree in a specific specialty is required. Moreover, the *Handbook* acknowledges that despite a preference for technical degrees, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Thus, the *Handbook* recognizes that the systems analyst occupation accommodates a wide spectrum of educational credentials. Moreover, while the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the petitioner has not provided a description of position duties that demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge. In that regard, the AAO observes that the petitioner listed not only a bachelor's degree in computer information systems or technical management as degrees for the proffered position but also the general degree of business administration. However, when a job may be performed by a degree of generalized title or a range of degrees, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The petitioner's acknowledgement that a business degree would be sufficient for the proffered position is tantamount to an acknowledgment the proffered position is not a specialty occupation.

As evident above, the information in the *Handbook* does not indicate that a systems analyst position normally requires at least a bachelor's degree or its equivalent in a specific specialty. As it is not self-evident that, as described in the record of proceeding, 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 is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The AAO has reviewed the five job announcements submitted by the petitioner to establish an industry wide standard for a bachelor's degree in a specific discipline. The AAO observes first that the job description for the proffered position is broad and generic and thus an accurate comparison of the actual duties of the proffered position and those in the five job announcements is not possible. Second, the petitioner has not adequately addressed the concern that its organization is not similar to the organizations advertising other than that all the organizations appear engaged in the hospitality industry. Contrary to counsel's assertion, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. Finally, the five advertisements provided establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. Again contrary to counsel's claim, two of the five advertisements do not indicate that a bachelor's degree in a specific discipline is a requirement for entry into the proffered positions. 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.³

³ According to the *Handbook*'s detailed statistics on systems analysts managers, there were approximately 532,200 systems analysts employed in 2008. *Handbook*, 2010-11 ed., available at

As such, even if the job announcements supported the finding that the position of systems analyst for a hotel with 15 personnel required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a systems analyst position that can be performed by persons without a specialty degree or its equivalent.

Turning to the third criterion, although the petitioner also claims that its established practice is to hire degreed employees for the position of computer systems analyst, the petitioner has not provided the necessary documentary evidence to support the claim. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 ('Reg. Comm'r 1972)). Moreover, the standard is not whether the petitioner employs individuals with a degree in the proffered position, but whether it only employs individuals with a bachelor's degree in a specific specialty. No evidence was provided 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).⁴

<http://www.bls.gov/oco/ocos020.htm> (last accessed November 2011). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just five job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally [REDACTED] *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

⁴ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d 384, 387 (5th Cir. 2000). In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require

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 acknowledges the importance of protecting hotel transactions and client data; however, the petitioner has failed to explain what specific duties this would require of the beneficiary that would not be required of a systems analyst that does not have a bachelor's degree in a specific discipline. We also acknowledge counsel's claim that the job duties require specific knowledge of structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting. However, 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 petitioner does not list particular duties involved in structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting for the proffered position. The evidence in this 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 systems analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty.

As also observed above, the petitioner indicates that a bachelor's degree in business administration among other degrees would suffice for the successful applicant of the proffered position. Again, however, the requirement of a bachelor's degree in a general field of study does not establish a position as a specialty occupation. To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁵

such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it

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).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.