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



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 04 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:
[REDACTED]

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 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 a "Provider of healthcare services." To employ the beneficiary in what it designates as a computer 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. The ostensible reason for denial was the petitioner's failure to demonstrate that the offer of employment in this case is reasonable and credible. The director's analysis, however, is more directed at the question of whether the proffered position qualifies as a specialty occupation.

On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and 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 counsel's brief and attached exhibits 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, 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 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.

The record contains what purports to be a lease, by the petitioner, of its premises from APEP, Inc. That lease was signed by [REDACTED] as the petitioner’s secretary. It was also signed by [REDACTED] as [REDACTED]. It remains unexplained by the petitioner how the same individual could act as the agent for two separate legal entities in completing what is essentially a contract between those two entities. Absent a credible explanation, the veracity of this lease agreement is in doubt and, therefore, the lease will be accorded little to no weight in this proceeding.

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On the Form I-129 visa petition, submitted April 20, 2009, the petitioner stated that it has 16 employees. With the visa petition, counsel provided a letter, dated March 31, 2009, from the petitioner’s president, who stated, “[The petitioner] currently employs a total of 16 full[-]time employees.” Those two statements, taken together, indicate that all 16 of the petitioner’s employees work full-time for the petitioner.

The petitioner’s president also stated the duties of the proffered position as follows:

[D]evelop and support [the petitioner’s] applications, interfaces, and reports; perform maintenance on existing software products; ascertain and solve specific software problems; adhere to all standards for software development, testing, documentation, software management and quality assurance.

The petitioner’s president further stated: “The normal minimum requirements for the performance of the above job duties [include] a bachelor’s degree in Computer Science.” The petitioner’s president did not indicate how he had reached that conclusion, but asserted that, because that degree is a prerequisite of the proffered position, the proffered position qualifies as a specialty occupation.

Because the evidence submitted was insufficient to show that the visa petition was approvable, the service center, on April 28, 2009, issued a RFE in this matter. The service center requested, *inter*

alia, a more detailed description of the duties of the proffered position and an explanation of why those duties require a minimum of a bachelor's degree or the equivalent in computer science.

In response, counsel provided various documents, including the lease described above. He also stated the following as to the duties of the proffered position:

To begin an assignment, Beneficiary shall consult both management and end-users to define the goals of the system. He shall then design a system to met those goals while specifying the inputs that the system will access, decide how the inputs will be processed, and format the output to meet end-users' needs. To achieve the same, Beneficiary shall use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure his plans are efficient and compete. He shall also prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

After the system is approved, the beneficiary shall determine what computer hardware and software will be needed to set it up. He shall coordinate tests and observe the initial use of the system to ensure that it performs as planned. He shall prepare specifications, flow charts, and process diagrams for computer programmers to follow; then work with programmers to "debug," or eliminate errors, from the system. As stated above, in addition to running tests, he shall diagnose problems, recommend solutions, and determine whether program requirements have been met.

Because that description of the beneficiary's duties is a paraphrase of the duties of computer systems analyst duties in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, and because the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, the AAO finds that the duties described by counsel do, in fact, describe a computer systems analyst position's duties.¹ Counsel argued that, based upon his description of the duties of the proffered position, it clearly qualifies as a specialty occupation. Counsel did not, however, indicate how he determined that the proffered position would involve the performance of those duties.

Counsel's pronouncements pertinent to the duties of the proffered position are not even arguably extrapolations from the evidence in the record but, rather, tantamount to fresh, new testimony. Such assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Counsel's assertions are without any apparent basis, and unsupported assertions of counsel are insufficient to sustain the burden of proof.

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 December 20, 2010.

Counsel also submitted copies of some of the petitioner's State of Illinois Form UI-3/40 Employer's Contribution and Wage Reports. The most recent report was for the fourth quarter of 2008. That report indicates that the petitioner employed 33 people. Only 12 of those people were paid more than \$3,000 during that quarter, which would equate to an annual wage of only \$12,000. This is difficult to reconcile with the petitioner's assertion, on the visa petition and documents submitted with it, that it then employed 16 people and that all worked full-time.

Further still, counsel submitted vacancy announcements. Those vacancy announcements will be addressed below.

The director denied the visa petition on June 22, 2009. Although the director stated that she was denying the visa petition because the petitioner had failed to demonstrate that the job offer is reasonable and credible, the analysis was concerned chiefly with whether the petitioner had demonstrated that the proffered position qualifies as a specialty occupation pursuant to any of the four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is set out above. The AAO will therefore treat the denial as having been for failure to demonstrate that the proffered position qualifies as a specialty occupation.

On appeal counsel provided additional vacancy announcements. Counsel also asserted that the evidence submitted demonstrates that the proffered position is in a specialty occupation, citing the similarity between his description of the duties of the proffered position and those contained in the *Handbook* section pertinent to computer systems analyst positions.

As to the education required for a computer systems analyst position, the *Handbook* states:

When 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.

That employers *usually* prefer applicants with at least a bachelor's degree does not indicate that a bachelor's degree is a minimum educational requirement. Further, even for those jobs which prefer a bachelor's degree, the *Handbook* suggests that a degree in computer science, information science,

applied mathematics, engineering, management information systems, or any of the physical sciences may suffice. The *Handbook* does not suggest that computer systems analyst positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty.

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).

Vacancy announcements in the form of printouts of content from popular job search websites and individual companies' websites were provided in response to the RFE and on appeal.

One of those vacancy announcements is for a senior systems analyst and was placed by [REDACTED]. It states that [REDACTED] seven major hospitals with almost 3,100 beds and has a combined annual operating budget of \$2.1 billion, all of which indicates that it is vastly larger than the petitioner in this case. That vacancy announcement does not indicate any educational requirement.

Another vacancy announcement is for an application systems analyst II and was placed by the [REDACTED]. That announcement contains no indication that [REDACTED] is of the same approximate size as the petitioner. That announcement states that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

Another announcement is for a clinical applications analyst [REDACTED]. It states that [REDACTED] four health care facilities. Nothing in that vacancy announcement suggests that it is of the same approximate size as the petitioner. The vacancy announcement states that the position requires a current California RN license, two years of nursing experience, and prior experience with hospital IT systems technology, including MS Office applications. It does not indicate that the position requires any college degree.

Another announcement is for a claims systems analyst – cost containment unit [REDACTED]. It contains no indication that [REDACTED] is of the same approximate size as the petitioner. Although that announcement indicates that the position requires a bachelor's degree, it does not state that the degree must be in any specific specialty.

Another announcement is for a programmer analyst [REDACTED]. It contains no indication that [REDACTED] is of the same approximate size as the petitioner. Although that announcement indicates that the position requires a bachelor's degree, it does not state that the degree must be in any specific specialty.

Another announcement is for [REDACTED]. It contains no indication that [REDACTED] is of the same approximate size as the petitioner. Although

that announcement indicates that the position requires a bachelor's degree, it does not state that the degree must be in any specific specialty.

Another vacancy announcement was placed by [REDACTED]. The job title as shown on the copy counsel provided was truncated by the page margin, but ends "... [REDACTED] [REDACTED]". The announcement contains no indication that [REDACTED] is of the same approximate size as the petitioner. That announcement states that the position requires a college diploma or university degree in computer science or management information systems, but not that the degree must be a minimum of a bachelor's degree.

Another announcement is for an [REDACTED]. It contains no indication that [REDACTED] is of the same approximate size as the petitioner. That announcement states, "Bachelor's degree in Computer Science, Math, or Business preferred," which does not indicate that the position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

Another announcement was placed by [REDACTED] integration, applications analyst II, and contains no indication that [REDACTED] is of the same approximate size as the petitioner. It indicates that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

Another announcement was placed by [REDACTED] for a lead programmer/analyst, and contains no indication that [REDACTED] is of the same approximate size as the petitioner. That announcement indicates that the position requires a bachelor's degree in information technology, computer science, software engineering, or a closely-related field.

The final vacancy announcement was placed by [REDACTED] for an analyst, programmer and contains no indication that [REDACTED] is of the same approximate size as the petitioner. As to the education required for the position it states:

Four[-]year University or College Degree in Computer Science, Math or Engineering. Other degrees such as Information Technology, Business Administration, Management Information Systems or Allied Disciplines will be considered if it is in combination with experience above the required level.

The evidence suggests that the petitioner's business consists of providing healthcare professionals, possibly nurses, physical therapists, etc. to various healthcare facilities. None of the companies that placed the vacancy announcements provided appear to be in that same business. Further, none have been demonstrated to be of the same approximate size as the petitioner. Some of the vacancy announcements contained no educational requirement; some required a bachelor's degree, but not in a specific specialty; and some did not even appear to be for parallel positions. None of those vacancy announcements is evidence that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations.

Further, even if all 11 of those vacancy announcements had been placed by similar organizations in the petitioner's industry and were for parallel positions, 11 announcements would be statistically insufficient to show a common industry-wide requirement.

For all of these reasons, the petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and 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)(3).²

As was noted, the description of the beneficiary's ostensible duties provided by counsel may not and will not be considered. The description of the duties of the proffered position provided by the petitioner is so abstract that it provides no support for the petitioner's assertion that those duties require a minimum of a bachelor's degree or the equivalent in computer science. Therefore, the petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

² To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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 evidence and 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.