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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

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2011

IN RE: Petitioner: [redacted]
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: SELF-REPRESENTED

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 before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the case will be remanded for further action consistent with this decision and entry of a new decision.

The petitioner is a software development and services business that seeks to employ the beneficiary as a systems analyst. The petitioner, therefore, endeavors to classify the beneficiary 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).

Section 214(g)(1)(A)(vii) of the Act, 8 U.S.C. § 1184(g)(1)(A)(vii), sets the H-1B cap relevant to this proceeding by mandating that the total number of aliens who may be issued H-1B visas or otherwise provided H-1B nonimmigrant status during any fiscal year after fiscal year 2003 may not exceed 65,000.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), states: "In the case of a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title, the period of authorized admission as such a nonimmigrant may not exceed 6 years."

Section 214(g)(5) of the Act, 8 U.S.C. § 1184(g)(5), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who:

> (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;
>
> (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
>
> (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Section 214(g)(6) of the Act, 8 U.S.C. § 1184(g)(6), states:

> Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b), who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5).

Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), states:

> Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c) [of section 214 of the Act], toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

Title 8 C.F.R. § 214.2(h)(13)(iii)(A) states in pertinent part:

> An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The present petition was filed on September 11, 2007, requesting a Fiscal Year (FY) 2007 employment start date of September 15, 2007. The beneficiary earned a U.S. master's degree before the date the petition was filed. On May 26, 2006, U.S. Citizenship and Immigration Services (USCIS) had ceased to accept new cap-subject H-1B petitions for the 2007 fiscal year. By July 26, 2006 the statutory numerical limit of 20,000 had been reached for the cap exemption for aliens possessing a master's or higher degree from a United States institution of higher education.

Again, the FY 2007 cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, was reached on May 26, 2006, and the 20,000 exemption to that cap pursuant to section 214(g)(5)(C) of the Act was reached on July 26, 2006. Thus, in her decision to deny the petition, the director correctly found that the cap had been reached by September 11, 2007, the date on which this petition was filed, and that the beneficiary was no longer eligible for an exemption to the FY 2007 cap on the basis of his U.S. master's degree.

On appeal, the petitioner does not contest the validity of the director's determination that the present petition was filed (1) after the H-1B cap had been reached and (2) after the 20,000 limit on cap exemptions for the holders of a U.S. master's or higher degree had passed. Rather, the petitioner contends that the director failed to apply the USCIS "remainder" policy on determining the periods of admission of the beneficiaries of previously approved H-1B petitions, who have been outside the United States for more than one year but have not exhausted the six-year limit on stay in the United States in H status set by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

Specifically, the petitioner states on appeal:

> [The beneficiary] qualifies for the H-1B "Remainder" Option granted by [USCIS] in the attached memo dated December 5, 2006. . . . based on the following facts:

- He was granted H-1B status on October 24, 2003 on case [redacted]
- He was in the United States in H-1B status for two years, five months and seven days;
- He was counted in the Fiscal Year 2004 H-1B Cap on case [redacted]; and
- He has been abroad for more than one year.

In support of these contentions, the petitioner submits: (1) a copy of the Memorandum from [redacted] *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.* AFM Update 06-29 (December 5, 2006) [redacted] December 5, 2006 Memo];[1] (2) a list reflecting the beneficiary's prior periods of stay in H-1B status in the United States; (3) color copies of the beneficiary's passport pages with related passport stamps; (4) the petitioner's calculations of the number of days that the beneficiary has spent in H-1B status in the United States; and (5) copies of Form I-797A (Notice of Action) documents pertaining to the beneficiary.

The [redacted] December 5, 2006 Memo summarizes as follows the time limitations on stay in the United States in H-1B or L-1 status:

> An alien may be admitted to the United States in H-1B status for a maximum period of six years and in L-1 status for a maximum period of five (specialized knowledge workers) or seven years (managers and executives). *See* INA 214(g)(4) and 214(c)(2)(D) of the Immigration and Nationality Act ("INA" or "Act"). At the end of the maximum period, the alien must either change to a different status (other than from H to L or from L to H) or depart the United States. USCIS regulations provide

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[1] With respect to the [redacted] memo, it is noted that unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS as a matter of law. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law").

> that an alien who has been outside the United States for at least one year may be eligible for a new six-year period of admission in H-1B status or a new five-year or seven-year period in L-1 status. *See* 8 CFR 214.2(h)(13)(iii)(A) and 214.2(l)(12).

On appeal, the petitioner relies upon part II.C, "H-1B 'Remainder Option'" of the [redacted] December 5, 2006 Memo. This section opens with a review of the limitation on stay in H-1B status in the United States:

> Section 214(g)(4) of INA provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." INA section 214(g)(7) provides, in pertinent part, as follows:
>
> > Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.
>
> In AAO Adopted Decision 06-0001, USCIS has confirmed that the six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States.

The H-1B Remainder Option section provides that when an alien has reached the maximum period of admission, a new petition may be approved only if the alien has remained outside the United States for one year. The section then observes: "The statute, regulations, and current policy guidance, however, do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission." (Emphasis in original). The H-1B Remainder Option policy is then stated as follows:

> There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.
>
> Specifically, the "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status. For example, an alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31,

2004), and then remained outside the United States for all of 2005, could seek to be admitted in January 2006 for the "remainder" of the initial six-year period, i.e. a total of one year. If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap. If the alien was not previously counted against the H-1B numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

In the alternative, admission as a "new" H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without regard to the alien's eligibility for any "remaining" admission period) after having been outside the United States for more than one year. For example, the alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, is eligible to apply for a "new" period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension. "New" H-1B aliens are subject to the H-1B numerical limitations unless they qualify for an exemption. *See* INA §§ 214(g)(1) and (g)(5).

Moreover, the [redacted] memo states that:

The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, I-797 Approval notices and/or H-1B visa stamps.

A review of USCIS records indicates that the beneficiary was previously the beneficiary of the following approved H-1B petitions:

- Petitioner [redacted], valid from October 24, 2003 to October 23, 2006, for which approval was revoked on March 15, 2005;
- Petitioner [redacted], valid from March 1, 2004 to January 27, 2006; and
- Petitioner [redacted], valid from June 29, 2005 to May 22, 2008, for which approval was revoked on September 21, 2006.

USCIS records also indicate that the beneficiary departed the United States on May 3, 2006. A letter from [redacted] indicates that the beneficiary worked for that firm, in India, from September 1, 2006 to March 1, 2007. According to the record, it appears the beneficiary was present in H-1B status in the United States as follows:

- From October 23, 2003 to June 20, 2004;
- From July 21, 2004 to February 11, 2006; and
- From February 14, 2006 to May 3, 2006.

The record, therefore, indicates that at the time the instant petition was filed, the beneficiary: (1) had already been counted against the H-1B cap within the six years prior to the employment start date requested in the petition; (2) had resided and been physically present outside the United States for the immediate prior year; and (3) there was time remaining in the beneficiary's maximum six-year period of admission permitted by section 214(g)(4) of the Act.

The [redacted] memo must not be interpreted as countermanding or contradicting section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), which provides in relevant part (emphasis added):

> Any alien who has already been counted, within the six years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations *unless the alien would be eligible for a full six years of authorized admission at the time the petition was filed.*

Under the plain language of Section 214(g)(7) of the Act, this exemption to being H-1B cap-subject again applies only if the beneficiary was not eligible for a full six years of authorized admission at the time the petition was filed. As such, it must first be determined whether the beneficiary is once again "eligible for a full six years of authorized admission."

At first impression it would appear that the only requirement that an alien must meet to be once again eligible for a full six years in H-1B status is for the alien to have "resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year." 8 C.F.R. § 214.2(h)(13)(iii)(A).[2] However, it must be noted that, if an H-1B cap number is not available at the time the petition is filed for the fiscal year in which the employment start date is requested, the beneficiary is not truly "eligible" at that time for admission to the United States in H-1B status, even if the requisite time abroad has been established.[3]

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[2] Although this regulatory language also refers to an alien's maxing out of H-1B status in the United States, this phrase should not be mistaken as a regulatory prerequisite to becoming eligible again for another maximum six year period of stay in the United States in H-1B status. To interpret this regulatory language otherwise would lead to the absurd result of an alien not being eligible again for H-1B classification, even after being absent from the United States for more than one year, if he or she only spent five years and 364 days in the United States in H-1B status. Taking that interpretation, the alien would be eligible for a one day approval but, immediately upon admission, would be required to depart the U.S. again before being eligible for another full six year period of stay in H-1B status. Therefore, this phrase in the regulatory language should only be interpreted as detailing the conditions under which an alien who has spent the maximum period of stay in the United States in H-1B status may once again seek an extension, change of status, or readmission to the United States as an H or L nonimmigrant. *See id.*

[3] The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes

Thus, although the petitioner has provided supporting evidence to demonstrate that the beneficiary has resided and been physically present outside the United States for the immediate prior year, the H-1B cap for FY 2007 had already been reached for FY 2007 by the time the petition had been filed. Consequently, as the beneficiary was also ineligible as of that date for an exemption to that cap, the beneficiary is exempt from the H-1B cap under section 214(g)(7) of the Act for whatever remains of the six year maximum period of stay permitted in H-1B or L classification . The AAO therefore finds that the evidence of record establishes that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act and should not be counted again against the cap for purposes of the instant petition.

Accordingly, the AAO withdraws the director's denial of the petition.

Upon further review, however, the petition cannot be approved based on the record as presently constituted. More specifically and beyond the decision of the director, the petitioner has failed to establish that the beneficiary would be employed in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [1] 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 requires [2] 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:

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eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

(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 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.

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. USCIS must examine the

ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384. 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 seeks the beneficiary's services as a systems analyst. Evidence of the beneficiary's duties includes: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to a job description submitted with the petition, the beneficiary's proposed duties as a systems analyst would be as follows:

> JOB TITLE: Systems Analyst
>
> Analyzes user requirements, procedures, and problems to automate processing or to improve existing computer system: Confers with personnel of organizational units involved to analyze current operational procedures, identify problems, and learn specific input and output requirements, such as forms of data input, how data is to be summarized, and formats for reports. Writes detailed description of user needs, program functions, and steps required to develop or modify computer program. Reviews computer system capabilities workflow, and scheduling limitations to determine if requested program or program change is possible with existing system. Studies existing information processing systems to evaluate effectiveness and develops new systems to improve production or workflow as required. Prepares workflow charts and diagrams to specify in detail operations to be performed by personnel in system. Conducts studies pertaining to development of new information systems to meet current and projected needs. Plans and prepares technical reports, memoranda, and instructional manuals as documentation of program development. Upgrades system and corrects errors to maintain system after implementation.
>
> As a Systems Analyst, [the beneficiary] will be responsible for complex client/server software system application analysis, development, production, installation, configuration, and system administration and maintenance; lead the activities of development, quality assurance, production, installation, configuration and upgrade of [redacted] applications on client/server application platforms and implement the [redacted]; manage various SAP applications including database management, user management security, transport, hot packages and general system administration; plan and prepare technical reports, memoranda and instructional manuals of program development and system management and administration.

The petitioner further stated that it required the incumbent to hold a minimum of a master's degree in computer science, electronics, computer engineering, mathematics, physics, or an equivalent field of study.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the petitioner has failed to establish that the proffered position is a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (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)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the duties of the proffered position indicates that the position is akin to that of a computer systems analyst. According to the *Handbook*, the educational requirements for this occupational category are as follows:

> Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.
>
> ***Education and training.*** 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.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at http://www.bls.gov/oco/ocos287.htm (last accessed June 28, 2011).

While the *Handbook* indicates that various degrees are accepted for entry into the position of systems analyst, the *Handbook* does not indicate that a bachelor's degree in a *specific specialty* is required. Therefore, based on the description of duties provided and the minimal evidence contained in the record regarding the beneficiary's work history and experience, it cannot be concluded that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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. Factors often considered by USCIS when determining the industry standard include: 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)). The petitioner, however, submitted no evidence to demonstrate that a specific degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner makes no attempt to explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner has not

submitted documentation of its hiring practices or history to support a finding that it normally requires a degree or its equivalent for the position, if in fact a specific degree had been required. The record, therefore, does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. 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 at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require 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"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)* based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not related the listed duties to its information technology consulting business beyond what is normally encountered in the occupational field, and the duties of the position described appear to encompass routine duties typically found in the field of computer systems analysis. While the petitioner claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.[4]

The AAO finds that, to the extent that they are described, the duties of the proffered position do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. For this additional reason, the petition may not be approved.

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[4] Further, as discussed in greater detail *infra*, given that the Labor Condition Application (LCA) submitted in support of the petition is for a Level I wage, it must be concluded that either (1) the position is a low-level, entry position relative to other systems analyst and, thus, is not "so specialized or complex"; or (2) the LCA does not correspond to the petition.

Even if the petitioner had established that the proffered position required a bachelor's or higher degree in a specific specialty, the petitioner failed to establish that the beneficiary is qualified to perform the duties of such a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In its letter dated August 28, 2007, the petitioner indicates that the beneficiary possesses a master's degree in telecommunications from the [redacted], and a bachelor of engineering degree in electronics from [redacted] in Indore, India. The record contains photocopies of the degree certificates from both educational institutions which corroborate these claims.

However, on his resume, the beneficiary claims to possess a master's degree in computer engineering from the [redacted], and a bachelor of science degree in computer engineering from [redacted] in India. There is no further information in the record to explain these contradictory claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, if USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Since the record is devoid of evidence to demonstrate the actual degrees of the beneficiary, the AAO cannot conclude with sufficient certainty that the beneficiary possesses a specific level of

educational qualification. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. As such, absent a finding that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is required and a determination of what that degree must be, there is no basis upon which the nature of the beneficiary's academic qualifications can be determined. Consequently, there is no need to address the beneficiary's qualifications further.

Finally, it is further noted that, according to the petitioner's LCA, the proffered position is not a senior position, as suggested in the petitioner's job description. More specifically, the LCA provided in support of the instant petition lists a Level I prevailing wage level for computer systems analysts in [redacted] California. As such, the beginning level position offered to the beneficiary which, according to the petitioner's job positing, requires the incumbent to possess at least a master's degree in a variety of fields, cannot be found to be parallel to the position described by the petitioner.

As noted above, given that the LCA submitted in support of the petition is for a Level I wage, it must be concluded that either (1) the position is a low-level, entry position relative to other systems analyst and, thus, based on the statistics-based findings of the *Handbook*, the proffered position is not a specialty occupation; or (2) the LCA does not correspond to the petition. In other words, even if it were determined that the proffered position requires at least a master's degree in a specific specialty or its equivalent, such that is would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to that Level III or IV position.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed Level III or IV position, and the petition must be denied for this additional reason.

Therefore, the matter is remanded to the director in order to determine (1) whether the proffered position is a specialty occupation, (2) whether the beneficiary qualifies to perform the duties of a specialty occupation, and (3) whether the LCA submitted in support of the petition in fact corresponds to the petition.. The director may request such additional evidence as is deemed necessary in rendering a decision.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has only met that burden in part.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.