

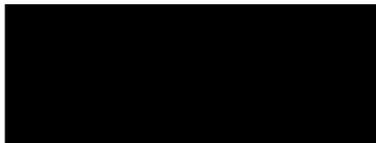
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

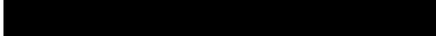


**U.S. Citizenship
and Immigration
Services**



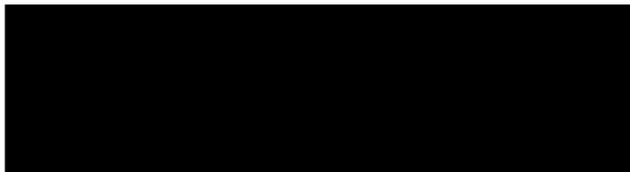
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Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

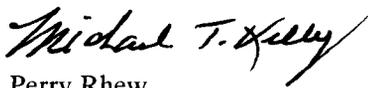


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 be denied.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify her 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 on the ground 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) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on April 2, 2009, the petitioner claimed to have 80 employees and a gross annual income of over \$7.4 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2009 to September 30, 2012 at an annual salary of \$60,000.

The support letter states that the beneficiary will work as a Senior Programmer Analyst for three years and will report to the petitioner's [REDACTED]. The letter states that the person in the proffered position will be responsible for performing the following duties:

- Design, develop, and utilize software systems for customized business applications;
- Analyze communications, informational and programming requirements;
- Plan and design programs and systems;
- Debug, troubleshoot, and modify software programs;
- Analyze software requirements;
- Formulate and design a software system;
- Hold technical discussions;
- Provide training and support in installation, implementation, and utilization of new systems, enhancements, and modifications.

The petitioner states that it requires at least a bachelor's degree or higher in Computer Science, Engineering, Business, Math, Science, Technology, MIS, CIS, Finance, Economics, a related analytic or scientific discipline, or the equivalent for the proffered position.

The Form I-129 indicates that the beneficiary will work at the petitioner's address only.

The petitioner also submitted a copy of its Employment Agreement with the beneficiary. The Employment Agreement states:

You will render all reasonable duties expected of a Programmer Analyst. These

services are to be provided at locations designated by [the petitioner], and will include the offices of [the petitioner's] clients. . . .

* * *

This is a contract for employment for Eighteen Months.

The petitioner submitted the beneficiary's credentials, indicating that she has a foreign degree. The education evaluation submitted states that the beneficiary's education is equivalent to a U.S. bachelor of science degree in civil engineering.

The petitioner also submitted a copy of its U.S. corporate income tax return, which indicates that it is in the business of computer consulting.

On May 30, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit a more detailed job description as well as an explanation of how the beneficiary's degree in civil engineering is relevant to the proffered position. The RFE also requested an organizational chart and evidence regarding the petitioner.

In response to the RFE, counsel submitted a copy of the petitioner's Master Agreement with [redacted] as well as a copy of a Statement of Work (SOW) issued for the beneficiary pursuant to this Master Agreement. Counsel states that ABB is a real estate broker, not a staffing company. The Master Agreement refers to ABB as "Contractor" and to the petitioner as "Sub-contractor."

The SOW states that the beneficiary will provide software development services [redacted] offices. The SOW does not provide a term of employment, but simply states that it shall commence upon the date of execution (in this case, March 27, 2009) and will continue until the parties decide to end it.

Additionally, counsel submitted copies of advertisements the petitioner ran in the past for programmer analysts. The advertisements do not list the petitioner by name and require at least a bachelor's degree or the equivalent, without specifying either that the degree must be held in a specific specialty or how degree-equivalency would be determined.

Counsel also submitted a second credential evaluation for the beneficiary. This evaluation, which was prepared by Park Evaluations & Translations, states that the beneficiary's degree together with two years of experience is equivalent to a bachelor of science degree in civil engineering with a concentration in computer information systems.

The petitioner submitted an organizational chart, however the beneficiary and her supervisor are not listed by name.

Although counsel stated that it was submitting copies of the petitioner's lease and photographs of its office space, it appears that this evidence was inadvertently omitted.

The director denied the petition on August 31, 2009.

On appeal, counsel submits a letter from [REDACTED]. The letter states as follows:

We expect [the beneficiary] to join our company upon approval of her H-1B petition per our direct contract with her H-1B [petitioner]. There is no vendor between our company and [the petitioner], which will act as her sole employer with the right to hire, fire, replace and control all aspects of her work. [The beneficiary] is set to customize our financial application modules, front-end user interfaces, and back-end database development (using PL/SQL). She will develop our financial reports, analyze business requirements and identify technical solutions to address these needs, translating user requirements into software specifications. We require demonstration of strong JAVA, JSP knowledge and exposure for developing Forms and Reports. The position is 50% Java and 50% Oracle development. . . . We generally require a Bachelor degree for the performance of this position.

As we are not a staffing company, we have no reason to contract [the beneficiary] to any third parties, and she will develop our above-described projects exclusively.

Be advised that we may have accidentally entered a different company's name on our work order with [the petitioner] for [the beneficiary's] work. . . .

The AAO will first consider whether 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 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, 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 notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client

companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. As discussed above, the record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner states that although the beneficiary will work at its client site, ABB, for the duration of the petition, it will maintain control over the beneficiary's employment. First, this assertion contradicts the petitioner's earlier statements that the beneficiary would be employed at the petitioner's offices for the duration of the petition as well as the Employment Agreement, which is only valid for 18 months. Other than assigning the beneficiary to work at the offices of ABB, it is not clear what role, if any, the petitioner has in her employment. No evidence was submitted that the beneficiary will be supervised by someone employed by the petitioner or that the beneficiary will use the tools or products of the petitioner. Further, no evidence was submitted that the project with [REDACTED] is expected to last the duration of the petition.

Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a programmer analyst on the project for [REDACTED] for the duration of the petition, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

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

The Programmer Analyst occupational category is addressed in two chapters of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The *Handbook* describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

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.

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Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

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 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. . . .

As evident in the excerpts above, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials.

While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and 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 petitioner has not established that the performance of the proffered position's duties requires 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. Further, the petitioner did not submit documentation to establish that parallel firms routinely require at least a bachelor's degree in a specific specialty.

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 programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

As discussed previously, the advertisements submitted did not state that a bachelor's degree in a *specific specialty* is required. While █████ stated on appeal that a bachelor's degree generally is required, ABB did not state that a bachelor's or higher degree in a specific specialty is a normal minimum requirement to perform the duties of a programmer analyst at ABB. Further, 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).

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 does not find that the evidence supports that the proposed duties reflect a higher degree of knowledge and skill than would normally be required of programmer analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

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 AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the 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 petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner failed to explain how the beneficiary's bachelor's degree in Civil

Engineering qualifies her to perform services in a computer specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). The second evaluation submitted from [REDACTED] writing on behalf of Park Evaluations & Translations is not acceptable because it does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) as no evidence was submitted that [REDACTED] has the authority to grant credit for training and/or work experience, which is a requirement under the regulation. Therefore, the evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The appeal will be dismissed and the petition denied. 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.

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