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

Date: MAR 02 2011

IN RE:

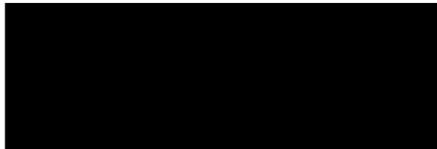
Petitioner:

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:

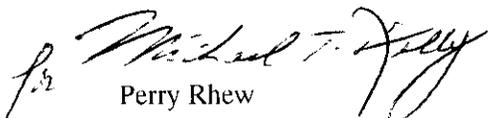


INSTRUCTIONS:

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, 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 software development firm with 70 employees. To employ the beneficiary in what it designates as a systems analyst position, the petitioner endeavors 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner's vice president asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, 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 the petitioner'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, 8 U.S.C. § 1184(i)(1), 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 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.

With the visa petition, the petitioner submitted a letter, dated March 25, 2009, from the petitioner's vice president. That letter stated the duties of the proffered position as follows:

[T]he beneficiary will analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer[-]related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already existing technological resources to additional operations that will streamline our clients' business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques including, structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject-matter operations to be automated, specify the number and type of records, files, and documents to be used as well as format the output to meet user's needs. As a Systems Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems and recommend computer equipment changes to obtain effective operations.

The petitioner's vice president also stated:

As with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field.

The AAO notes that the assertion that a bachelor's degree in engineering, without further specification, is tantamount to an assertion that the proffered position does not require a minimum of a bachelor's degree or the equivalent in a specific specialty, and does not qualify as a position in a specialty occupation.

This is because the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to

the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

That the petitioner's vice president effectively admitted that the proffered position does not qualify as a position in a specialty occupation is sufficient reason, in itself, to dismiss the visa petition and deny the appeal. The AAO will, however, continue the analysis of the specialty occupation issue.

Because the evidence submitted was insufficient to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies as a specialty occupation, the service center, on July 1, 2009, issued an RFE in this matter. The service center noted that the evidence in the record suggests that the petitioner is an IT consulting firm that provides its workers to many clients at remote locations. The service center observed that the record does not make clear where the beneficiary would work. The service center noted that the petitioner is obliged to provide an itinerary listing the locations where the beneficiary would work, when she would work there, and what her duties would be.

The service center further requested a letter from each of the prospective end-users of the beneficiary's services stating (1) the name of the project to which the beneficiary would be assigned; (2) whether the petitioner provided the beneficiary directly to the end-user, or through an intermediary, and the name of the intermediary, if applicable; (3) whether the end-user or the petitioner supervises the beneficiary's performance; (4) the name, title, and contact information for the person who primarily supervises or would supervise the beneficiary's work; and (5) whether that end-user has the ability to assign the beneficiary to different end-user.

The service center also stated:

If the beneficiary will work on an in-house project, submit evidence describing the in-house project, the length of time the beneficiary is expected to work on the project, team members assigned to the project, their titles and duties, and invoices showing the development of the product for your customer or evidence that [the petitioner] normally engages in software development.

In response to the RFE, counsel submitted a letter, dated July 31, 2009, from the petitioner's vice president, who stated that the beneficiary would work at the petitioner's location, under the petitioner's supervision, throughout the three-year period of requested employment, on the petitioner's in-house Marisa project, developing medical imaging software for the petitioner's client, [REDACTED] which project the petitioner's vice president stated had commenced during April of 2004 and would continue for a minimum of three to four years. The petitioner's vice president also referred to a nondisclosure agreement between the petitioner and [REDACTED] stating that it "executed specifically in anticipation of the development of this software application" was the only contractual agreement entered into by the petitioner and [REDACTED] pertinent to the Marisa project.

The record contains a copy of that nondisclosure agreement. It does not address the work the petitioner will perform, what it will be paid, or how long the project is anticipated to last. It gives no details of the project, nor even confirms that it pertains to the Marisa project. Further, it was executed on August 25, 2004, although the petitioner's vice president stated that the petitioner began working on the project during the previous April. The absence of additional contractual documents specifying the material terms of the asserted contractual commitment of [REDACTED] – documents which would be expected as a normal course of contractual commitment between two entities for definite services to be provided by one for definite payments by the other – undermines the credibility of the petitioner's claim regarding the beneficiary working on the asserted project for [REDACTED]

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).

In that same letter, the petitioner's vice president stated that the duties of the proffered position as follows:

Specifically, the Beneficiary will be responsible for testing the Marisa project as it progresses. This will include the creation of new test cases for UI components, the maintenance and execution of existing test cases, and the implementation of test cases into C# using NU framework. The Beneficiary will be expected to define test plans and specifications, conduct research regarding any problems that arise during testing, and report and follow-up product failures. The Beneficiary will also assist in defining the processes require [sic] to promote the overall quality of the Marisa project.

The petitioner's vice president also cited the employment contract between the petitioner and the beneficiary as evidence that the petitioner directly employs and supervises the beneficiary. That employment contract is in the record. It states, *inter alia*, "[The beneficiary] agrees that [her] duties shall be primarily rendered at the [petitioner's] business premises *or at such other places as the [petitioner] shall in good faith require.*" [Emphasis supplied.]

Counsel also provided an undated letter from the petitioner's vice president. That letter is addressed to no one and contains no indication of the purpose for which it was produced. That letter gives the following description of the duties of the proffered position:

- Assisting in the development of a highly scalable medical imaging software application using Microsoft.Net technologies and advanced image processing algorithms;
- Project testing, including the creation of new test cases, the maintenance and execution of existing test cases, and the implementation of test cases into C# using NUnit framework;
- Defining test plans and specifications, researching problems that arise during testing, and reporting and following-up on any product failures;
- Assisting in defining the processes required to promote the overall quality of the product; and
- Working in conjunction with other team members and the client to develop the application and respond to problems and concerns as needed.

The director denied the visa petition on August 10, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. On appeal, counsel provided a letter, dated September 4, 2009, from the chief operating officer of [REDACTED] and a brief signed by the petitioner's vice president.

The letter from [REDACTED] chief operating officer states that an agreement exists between [REDACTED] and the petitioner pursuant to which the petitioner provides software services on [REDACTED] project but at the petitioner's own office, that it has been doing so since April 2004, and that the program development is expected to continue for the next three to four years. It further states that the petitioner does not provide staffing to [REDACTED] and that [REDACTED] does not assign work to or supervise any of the petitioner's workers. It does not mention the beneficiary in any context.

In the appeal brief, the petitioner's vice president noted that the visa petition, the LCA submitted to support it, and the evidence submitted in response to the RFE all state that the beneficiary would work at the petitioner's office in Houston, Texas. He also cited the September 4, 2009 letter from [REDACTED] as evidence that the beneficiary would work exclusively at the petitioner's office. He acknowledged that the petitioner assigns some of its employees to work at other companies' locations, but asserted that the beneficiary would not be among them. He did not address the assertion, made in the beneficiary's employment contract, that the petitioner may assign the beneficiary to work at any other location.

In his July 31, 2009 letter, the petitioner's vice president indicated that the Marisa project had been ongoing for more than five years and was then expected to continue for "at least the next 3-4 years," but that no contractual evidence of that project existed other than an agreement that the petitioner will not disclose [REDACTED] confidential information. The AAO finds that assertion

incredible. Although some evidence in the record indicates that such a project exists, absent evidence of the nature and extent of the project, including the contracts between the petitioner and [REDACTED] describing the work to be performed, the evidence is insufficient to show what the beneficiary's duties are with respect to that project, where she performs them, or if, indeed, she is involved in that project at all. This is sufficient reason, by itself, to find that the petitioner has failed to demonstrate that it would employ the beneficiary in a specialty occupation. The AAO will continue, however, with the specialty occupation analysis.

The AAO recognizes the U.S. Department of Labor's (DOL) *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 *Handbook* describes the duties of computer systems analyst positions as follows:

Nearly all organizations rely on computer and information technology (IT) to conduct business and operate efficiently. *Computer systems analysts* use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

Most systems analysts work with specific types of computer systems—for example, business, accounting, and financial systems or scientific and engineering systems—that vary with the kind of organization. Analysts who specialize in helping an organization select the proper system hardware and software are often called *system architects* or *system designers*. Analysts who specialize in developing and fine-tuning systems often have the more general title of *systems analysts*.

To begin an assignment, systems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to

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.

follow; then they work with programmers to “debug,” or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

The AAO finds that the various descriptions of the duties of the proffered position comport with the computer systems analyst occupation as discussed in the *Handbook*.

The petitioner’s vice president asserted, in his March 25, 2009 letter, “As with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor’s degree, or equivalent, in computers, engineering, or a related field.” In his July 31, 2009 response to the RFE the petitioner’s president stated that such positions require a “Bachelor in Computer Science degree or a related field or equivalent.” He provided no evidence in support of those broad, and somewhat contradictory, assertions.

The *Handbook*, however, describes the educational requirements of computer systems analyst positions as follows:

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 bachelor’s degrees does not indicate that a bachelor’s degree, or a bachelor’s degree in a specific specialty, is normally a minimum requirement for entry into the occupation. Further, that passage indicates that people with degrees in various subjects may qualify for systems analyst positions, rather than that the position requires a minimum of a bachelor’s degree or the equivalent in a specific specialty. Neither the *Handbook* nor any other evidence in the record demonstrates that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into a systems analyst position.

The petitioner 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).

Therefore, the record contains no evidence pertinent to the recruitment and hiring practices of other employers. 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 organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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." Upon review of the entire record of proceeding, the AAO finds that the petitioner has not shown that the proffered position is sufficiently more complex than or unique from systems analyst positions performed by persons without at least a bachelor's degree in a specific specialty. The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and it has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to anyone the petitioner has previously hired as a programmer analyst. The petitioner has not, therefore demonstrated that it normally requires a degree for the proffered position and that the 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).

As was noted above, the duties of the proffered position are consistent with the duties of computer systems analysts in general. The petitioner did not argue, and the AAO does not find, that the petitioner has demonstrated that 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. The AAO finds that a higher level of complexity and specialization relative to computer systems analyst positions performed by persons without a degree has not been established. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in his determination that the record before him 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.