

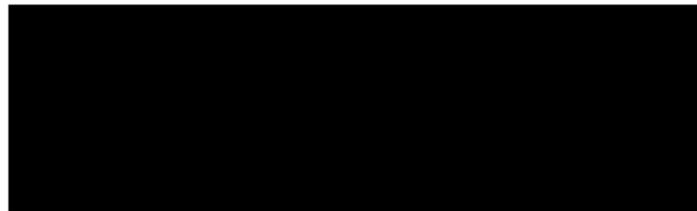
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



82

FILE:



Office: VERMONT SERVICE CENTER

Date:

MAR 02 2011

IN RE:

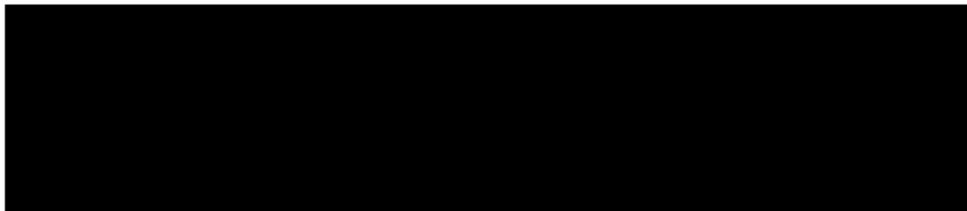
Petitioner:

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:

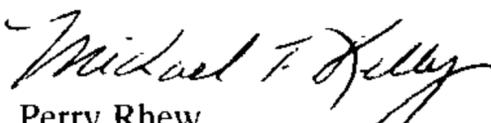


INSTRUCTIONS:

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 acting 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 the petitioner described itself as a "Leading publisher and on-line informational service provider." To employ the beneficiary in a position designated as a data operator, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The acting director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the acting director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 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 particular position's 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 position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

In the petitioner's March 14, 2008 letter of support filed with the Form I-129, the petitioner's senior administrative assistant addressed the duties proposed for the beneficiary as follows:

During his professional assignment, [the beneficiary] will utilize his electronic engineering education to update production data sets and perform routine backups according to established procedures. He will routinely update production data sets through shell scripts, as well as monitor, identify and escalate problems encountered during processing. He will also coordinate file system mount changes with the company's IT Department, and perform backup procedures both locally and offsite. A bachelor's degree and relevant IT experience is required to perform this professional assignment.

The July 10, 2008 letter from the petitioner's [redacted] in response to the RFE includes the following additional information, presented as a detailed job description of the proffered position, with the approximate expenditures of time related to each duty:

As a Data Operator, [the beneficiary] will utilize his electrical engineering education to perform the following job duties:

- Release new data to production for [the petitioner's] proprietary [redacted] platform, including: updating the platform's production servers to use the volumes with the most recently updated data; interfacing between [the petitioner's] Development and Production teams to align and comply data with [redacted] and developing scripts to audit and enhance data production processes (10%).
- Create backups of data for disaster recovery in multiple locations by developing automation processes and programming solutions to simplify and improve the quality of these procedures (10%);
- Perform quality assurance to verify the proper migration and integrity of all data and validate data recovery preparedness, including: verifying that data files are fully backed up from source volumes; verifying that data files are successfully distributed across multiple nodes of each supercomputer cluster

to enable massive parallelism; and verifying that tkey [sic] data files are valid, point to the correct data, and reflect current production data (15%).

- Troubleshoot issues during deployment of new data to production, including detecting issues during deployment of new data caused by not mounted, improperly mounted, or, not accessible volumes, and detecting and responding to server failures and other critical system errors (10%).
- Automate and improve current processes used to load and verify data integrity, and create and improve scripts to assist in updating [the petitioner's] proprietary platforms (10%);
- Generate data sets used by supercomputers for [the petitioner's] proprietary [redacted] platform in order to utilize the most up-to-date data available (5%).
- Verify that queries used to load new data to supercomputers environment return valid information (5%).
- Diagnose, trouble shoot, and correct faults related to unavailable data from the supercomputer environment (5%).
- Serve as the focal point for enabling utilization of the data of [redacted] a key customer partner, in [the petitioner's] supercomputer environment, and develop, enhance, maintain, and execute, scripts that load new data to production (5%).
- As a member of [the petitioner's] [redacted] (proprietary metadata asset tracking and process flow system) project team, develop intranet web applications using the C# programming language and [redacted]
- Develop applications using SQL server database and reporting tools to track [the petitioner's] data assets by implementing the next generation metadata warehouse --- which is critical for the company's management reporting and operations (10%).
- Utilize Enterprise Control Language (ECL) business property programming to provide critical data migration services for [the petitioner's] upcoming acquisition.

In her letter, the [redacted] also asserted that duties comprising the proffered establish that it is "most closely akin to a Computer Programmer position."

As described by the petitioner's human resources manager, the duties of the proffered position include releasing new data, installing new data volumes, updating production servers to access the new data, and troubleshooting related deployment issues; creating disaster backup recovery systems and testing those systems; improving and verifying data loading and verification processes, generating data sets, developing intranet web applications, developing applications and reporting tools to be used with the petitioner's [REDACTED] Language for data migration.

The petitioner provided a section [REDACTED] pertinent to computer support specialists, apparently to suggest that the proffered position is such a position, and to support the proposition that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into such a position.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ As to the duties of such a position, the *Handbook* states:

Computer support specialists provide technical assistance, support, and advice to individuals and organizations that depend on information technology. They work within organizations that use computer systems, for computer hardware or software vendors, or for third-party organizations that provide support services on a contract basis, such as help-desk service firms. Support specialists are usually differentiated between *technical support specialists* and *help-desk technicians*.

[Emphasis in the original.]

As to the duties of technical support specialists, the *Handbook* states:

Technical support specialists respond to inquiries from their organizations' computer users and may run automatic diagnostics programs to resolve problems. In addition, they may write training manuals and train computer users in the use of new computer hardware and software. These workers also oversee the daily performance of their company's computer systems, resolving technical problems with Local Area Networks (LAN), Wide Area Networks (WAN), and other systems.

[Emphasis in the original.]

The AAO concurs that the duties of the proffered position are very similar to those of computer support specialists, or, more specifically, technical support specialists. Thus, the AAO will treat the proffered position as a computer support specialist position.

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.

As to the educational requirements of computer support specialist positions, the *Handbook* states:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science, computer engineering, or information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. Some employers will hire applicants with a college degree in any field, as long as the applicant has the necessary technical skills. For some jobs, relevant computer experience and certifications may substitute for formal education.

The *Handbook* does not support, therefore, the proposition that computer support specialist positions normally require a bachelor's degree in a specific specialty or the equivalent.

The record contains two evaluations, dated July 10, 2008 and October 30, 2008, from [REDACTED] both of whom are professors of computer science at [REDACTED]. They state that they based their evaluations on the description of duties provided by the petitioner.

[REDACTED] stated that the proffered position requires:

[A] high level of knowledge of computing, mathematics, and engineering . . . [as well as] computer programming, shell scripting, parallel computing, high performance computing, cluster computing, data warehousing, and database design [and] programming.

[REDACTED] further stated, "The foundational knowledge required for this position is gained by completing a 4-year Bachelor's degree emphasizing computing, engineering, and mathematics."

[REDACTED] conceded that some of the duties of the proffered position, including those pertinent to back-ups, installing new data volumes, updating production servers to access the new data, and troubleshooting related deployment issues, are typical of technician-level computer operator positions. Professor Tindall stated, however, that the programming duties of the proffered position require, at a minimum, a bachelor's degree in a computer-related field.

The AAO notes that, despite the extensive résumés of the two evaluators, neither has established their expertise pertinent to the hiring practices of firms seeking to fill positions similar to the proffered position in the instant case, whereas the *Handbook's* information which is based upon the DOL's

² The record contains a third evaluation that is dated March 17, 2008. It does not address the requirements of the proffered position, however, but only the beneficiary's qualifications for the proffered position. As such, it is of no relevance to the issue discussed.

extensive labor market research. The AAO further finds that the record of proceeding does not establish that either of the professors is a recognized authority in the area in which they provided their evaluations for the petitioner, namely, the education required to perform a particular position. Also, the record of proceeding contains no extrinsic evidence of any expertise of the evaluators in the area, such as scholarly research conducted by the professor on the specific area upon which he is opining; books, articles, or treatises authored by him in the area of claimed expertise; or recognition by professional organizations as an authority in the area he is evaluating.

Not only have the professors not established their credentials as experts in the area in which they are opining, but the AAO also finds that their evaluations lack a factual basis sufficient to establish that their conclusions are reliable. Neither the evaluation documents themselves nor any other evidence in the record establishes that either professor has knowledge of the particular position at issue here as it would actually be performed in the context of the petitioner's business. Rather, it appears that the evaluators based their findings on descriptions of the duties of the proffered position that are general and generic descriptions that do not relate the actual work that the beneficiary would perform within the context of this particular petitioner's business. The professors do not demonstrate, nor even assert, knowledge of the petitioner's particular business operations or how the list of asserted duties presented to the evaluators would actually be performed in the context of the petitioner's particular business operations.

Further still, the evaluators' opinions are conclusory. They do not cite studies, treatises, surveys, or any other factual basis for them. (In this regard, the AAO takes particular notice of the fact that [REDACTED] asserts a general industry educational standard for firms like the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.) Likewise, the professors do not provide a substantive, analytical basis for their opinions and ultimate conclusions. Yet further, the professors' opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for those conclusions about the educational requirements for the particular position here at issue.

For the reasons discussed above, the AAO accords no probative weight to the evaluations that the petitioner procured from the two professors. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

For efficiency's sake, the AAO here notes that its comments and findings with regard to the professors' submissions apply also to their evidentiary value with regard to the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), and should be regarded as incorporated in the discussion of those criteria that follow later in this decision. For the reasons discussed above, the AAO finds that neither of the professors' evaluations is probative for those criteria.

The AAO also finds that, even if the petitioner had demonstrated that the proffered position is a computer programmer position, that would not establish that it is in a specialty occupation.

Pertinent to the educational requirements of computer programmers, the *Handbook* states:

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

Many 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.

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess strong programming skills. A graduate degree in a related field is required for some jobs.

That passage demonstrates that a wide variety of educational paths may lead to a position as a programmer. It does not demonstrate that a bachelor's degree in a specific specialty or the equivalent is necessary to perform in the proffered position, and [REDACTED] did not indicate in what way the duties of the proffered position are more demanding than those required by other computer programming positions not requiring a degree in a specific specialty.

For the reasons discussed above, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner also provided vacancy announcements from various other companies. Those announcements describe vacancies at LexisNexis for various account managers and software engineers. The abstract descriptions of the duties of those positions bear no resemblance to the description of the duties of the proffered position. Further, the record contains no indication that the petitioner provides services similar to those provided by LexisNexis or that the two companies are similar in size.

Similarly, counsel submitted vacancy announcements for programmer analysts at Compulink and Delphi, and programmers for L-3 communications and American Systems, but no indication that those companies are similar to the petitioner. The descriptions of the duties of those positions are also insufficient to show that they are similar to the actual day-to-day duties of the proffered position.

None of the vacancy announcements have been shown to be for a similar position and none have been shown to be from similar organizations. As the record contains no indication that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to the first alternative clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner initially suggested that the proffered position is a computer (technical) support specialist position, and subsequently submitted evidence suggesting that it is a computer programmer position. 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 there is a spectrum of degrees - including degrees not in a specific specialty - that may be acceptable for the type of position that is the subject of this petition. The AAO acknowledges that the duty descriptions that the petitioner ascribes to the proffered position indicate that the position requires specialized knowledge in computer-related areas. However, the AAO also finds that neither the duty descriptions nor any other aspect of the record of proceeding establish that the proffered position is more complex than or unique from either computer support specialist or computer programmer positions that are highly technical but are nevertheless performed by persons without at least a bachelor's degree, or the equivalent, in a specific computer-related specialty.

In a letter dated July 10, 2008 the petitioner's human resource manager stated that two other individuals hold positions at that company designated as data operator positions, but that their duties are not similar to the proffered position. She further stated that the petitioner has not previously employed anyone in the proffered position or in a substantially similar position. The petitioner has not, therefore, demonstrated that it normally requires a degree or its equivalent for the proffered position, and has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. As already noted in this decision, the AAO finds that the duties as described in the proffered position are highly technical. However, the AAO also finds no evidence in the record of proceeding of an objective standard by which the AAO could determine an educational level of knowledge in any specific specialty that would be required to perform the duties of the proffered position. The AAO has fully considered the proposed duties as described by the petitioner, but finds that it is not self-evident that those duties as described are more specialized and complex than computer support specialist or computer programmer duties that are not usually associated with at least a bachelor's degree in a specific specialty.

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 finds that the acting 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 documents submitted on appeal have not remedied that failure. Accordingly, the acting director's decision to deny the petition shall not be disturbed.

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.