

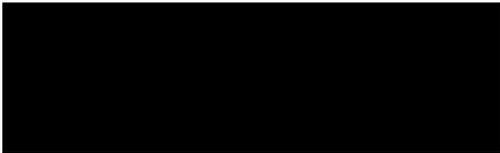
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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

EXEMPT COPY



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Date: NOV 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*  
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 in the business of developing software packages and providing IT (information technology) services, and that it has five employees. To employ the beneficiary in what it designates as a programmer 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. The director also found that the petitioner had failed to demonstrate that it would abide by the terms and conditions of the beneficiary's H-1B employment.

On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of 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 counsel's brief and attached exhibits in support of the appeal.

The AAO will first address the specialty occupation issue.

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 (5<sup>th</sup> 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, counsel submitted a letter, dated April 4, 2009, from the petitioner’s executive director. The petitioner’s executive director provided the following description of the duties of the proffered position:

As a Programmer Analyst, [the beneficiary] will perform highly complex and specialized duties. She will be responsible for requirements gathering and documentation. Working on developing and modifying the applications for Wireless domain. Programming in C and C++, using Bluetooth Technology, UMA, DRM and NFC Technology. Using Windows NT & 2000, Sun Solaris, Linux. Programming in C, C++, VC++, Java2, Servlets, Swings, and HTML; and using Oracle, SQL Server[.]

Because the evidence submitted was insufficient to demonstrate that the visa petition was approvable, the service center, on June 29, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center also specifically requested (1) copies of any signed contracts between the petitioner and the beneficiary, (2) an itinerary of the beneficiary’s projected employment, (3) the petitioner’s 2007 and 2008 Federal income tax returns, and (4) quarterly wage reports for the previous four quarters.

In response, counsel provided (1) another letter, dated July 18, 2009, from the petitioner’s executive director; (2) documentation pertinent to the petitioner’s IHE-XHS Integration Profiles project; (3) a copy of a letter, dated March 18, 2009, from the petitioner’s executive director to the beneficiary, (4) the requested quarterly wage reports; and (5) the joint 2008 Form 1040 U.S. Individual Income Tax Return of the petitioner’s owner and the owner’s wife, including a Schedule C pertinent to the petitioning business.

The AAO notes that the service center also requested the petitioner’s 2007 tax returns, which counsel did not provide. Counsel offered no explanation of that omission.

Although the petitioner did not provide an itinerary, as such, in his July 18, 2009 letter, the petitioner’s executive director stated, “[The beneficiary] will be working on a project at our corporate offices.” The executive director also stated, “The project [the beneficiary] will be working on is entitled “IHE-XDS Integration Profiles.” All work for this project will be completed at our

facility.” The AAO notes that, if the executive director meant to state that the beneficiary would be working exclusively on the IHE-XDS Integration Profiles and at the petitioner’s own offices throughout the entire period of requested employment, then that statement would be materially equivalent to the requested itinerary.

The director denied the petition on September 2, 2009, finding, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation; and further finding that the petitioner had not demonstrated that it would comply with the terms and conditions of the beneficiary’s H-1B employment as listed on the certified LCA. In that decision, the director appeared to find the evidence insufficient to establish the existence of the IHE-XDS project, and to further find that the petitioner would not employ the beneficiary at its own location on its own projects, but would, for a fee, provide him to other companies to work on their projects.

On appeal, counsel stated, “Petitioner has a specialty occupation available for the beneficiary. Please see attached documentation for details.” Counsel made no substantive argument.

Counsel also provided a letter, dated October 1, 2009, from the petitioner’s executive director, who asserted that the petitioner would employ the beneficiary at its own location on its own project, the IHE-XDS project, and would assign her duties and supervise her performance.

The petitioner has consistently stated that it would employ the beneficiary on the IHE-XDS project and provided sufficient evidence to demonstrate that such a project exists. The AAO finds no evidence to support the director’s conclusion that, to the contrary, the petitioner would provide the beneficiary to other companies to work on their projects. The remaining question pertinent to the specialty occupation issue is whether the petitioner has demonstrated that, in her work on that project, the beneficiary would perform specialty occupation duties.

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.<sup>1</sup> The *Handbook* discusses programmer analyst positions in the section entitled Computer Systems Analysts, in which it states:

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.

Programmer analyst positions, then, combine the duties of a computer systems analyst with those of a computer programmer. As to the duties of computer systems analysts, the *Handbook* states:

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<sup>1</sup> 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.

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 follow; then they work with programmers to "debug," or eliminate errors, from the system.

The *Handbook* discusses computer programmer positions in the section entitled Computer Software Engineers and Computer Programmers. As to the duties of those positions, the *Handbook* states:

*Computer 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.

The duties the petitioner's executive director described in the April 4, 2009 letter are entirely consistent with the duties of a programmer analyst, and the AAO finds that the proffered position is, in fact, a programmer analyst position. The *Handbook* states the following about the educational requirements of the duties of computer systems analyst positions, including programmer analyst positions:

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.

A preference for a degree, of course, is not a minimum requirement. A preference for a bachelor's degree in computer science, information science, applied mathematics, engineering, or the physical sciences is even more clearly not a requirement for a minimum of a bachelor's degree or the equivalent *in a specific specialty*. Yet further, that section of the *Handbook* indicates that programmer analyst positions may be available to those with degrees in other areas. That section of the *Handbook* does not state, nor even suggest, that programmer analyst positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty, nor does any other evidence in the record. Accordingly, the fact that the proffered position as described in the record of proceeding appears to be within the occupational category of computer analysts is not in itself sufficient to establish the proffered position as one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

As the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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 was noted above, the *Handbook* does not report that the petitioner's industry requires a bachelor's or higher degree in a specific specialty as a normal requirement for the type of position that is the subject of this petition. Further, the record of proceeding does not contain evidence that a professional association of programmer analysts requires a minimum of a bachelor's degree or the equivalent in a specific specialty for entry. Also, the record of proceeding contains no letters or affidavits, from firms or individuals in the industry, attesting that, for the type of position proffered here, firms in the industry routinely recruit and employ only persons with at least a bachelor's degree or the equivalent in a specific specialty.

As the evidence in the record of proceeding has not demonstrated that a requirement for at least a bachelor's degree in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, although other programmer analyst positions may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, this particular proffered position proffered is so complex or unique that it can be performed only by an individual with a degree.

The AAO finds that the duties as described in this record of proceeding (such as, for instance, determining the requirements of the program to be written, and then coding the program into various languages) are generic to programmer analysts in general, and, therefore, do not establish the proffered position as more complex or unique than programmer analysts positions that can be performed by persons with less than a bachelor's degree, or the equivalent, in a specific specialty. Nothing in the descriptions of the proffered position shows that it is so complex or unique that it can only be performed by a person with at least a bachelor's degree or the equivalent in a specific specialty, notwithstanding that other programmer analyst positions are not.

Because it has not shown that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, as the record of proceeding contains no evidence of a previous history of recruiting and hiring to fill the proffered position, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes 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.

As reflected in this decision's earlier quotation of it, the AAO acknowledges the following characterization of the beneficiary's duties from the April 4, 2009 letter from the petitioner's executive director:

As a Programmer Analyst, [the beneficiary] will perform highly complex and specialized duties. She will be responsible for requirements gathering and documentation. Working on developing and modifying the applications for Wireless domain. Programming in C and C++, using Bluetooth Technology, UMA, DRM and NFC Technology. Using Windows NT & 2000, Sun Solaris, Linux. Programming in C, C++, VC++, Java2, Servlets, Swings, and HTML; and using Oracle, SQL Server[.]

However, the AAO finds that neither the duties as so described, nor any other evidence in the record of proceeding, establishes that the duties claimed to be "highly complex and specialized" involve, to paraphrase this regulatory provision, "specific duties" with a "nature" that is "so specialized and complex" as to require knowledge that is "usually associated with the attainment of a baccalaureate or higher degree."

The AAO acknowledges that, to the extent that they are described in the record of proceeding, the duties appear to require specialized computer and IT-related knowledge and facility with certain computer programs and applications. However, it is not self-evident that such knowledge is of a nature and level usually associated with attainment of at least a bachelor's degree in a specific specialty, as opposed to some lesser level of knowledge such as may be attained by community or junior college coursework, vendor-provided instruction, vocational or technical school classes, on-the-job experience, or some combination thereof. In this regard the AAO notes that the use of unexplained acronyms and technical words of art does not add weight to the petitioner's contention. Further, the record of proceeding is not supplemented with submissions that remedy this evidentiary deficiency. Accordingly, the AAO is not persuaded by the executive director's claim.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The duty descriptions in this record of proceeding do not satisfy this criterion's requirement for knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. As the evidence in the record does not establish that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Because the petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position. The appeal will be dismissed and the petition denied on this basis.

The other basis for the decision of denial was the director's finding that the petitioner had not demonstrated that it would abide by the terms and conditions of H-1B employment. The director's finding was based on her analysis of financial documents submitted, which she found show that the petitioner has not paid its H-1B employees as required. On appeal, the petitioner provided a list of its recent H-1B petitions, showing the dates its H-1B workers began and ceased work, and which were still working for it.

The regulation at 20 C.F.R. § 655.731 requires that petitioners pay their H-1B workers in accordance with the representations made on the visa petition and the LCA. The documentation provided does not demonstrate that the petitioner regularly paid each of its H-1B employees the full amount of the wages due to them in accordance with 20 C.F.R. § 655.731. This materially undermines the credibility of the petitioner's attestations that it would abide by the terms and conditions of the employment of the instant beneficiary as related in the LCA and the Form I-129.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO need not further address its affirmation of the director's denial of the petition for the petitioner's failure to establish that it would abide by the terms and conditions of H-1B employment. However, the appeal will also be dismissed and the visa petition denied for the petitioner's failure to demonstrate that it would abide by the terms and conditions of H-1B employment.

The record suggests an additional basis for denial that was not addressed in the decision of denial.

In the June 29, 2009 RFE the service center directed the petitioner as follows: "Federal Income Taxes: Provide signed copies of the petitioner's filed Federal income taxes . . . for the years: 2007 and 2008." The petitioner provided a copy of its 2008 tax return, but did not provide its 2007 tax return. That requested evidence was relevant to whether the petitioner was actually in business during that year, the wages the petitioner paid to its employees, and possibly to other material issues. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The visa petition must also be denied for this additional reason.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.