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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**

D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

OCT 06 2011

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:

[REDACTED]

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,

Michael T. Kelly
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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, Petition for a Nonimmigrant Worker, the petitioner indicated that it was an information technology consulting company established in 2008, and that it sought to employ the beneficiary as a business intelligence consultant. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 101(a)(15)(H)(i)(b).

On July 14, 2009, the director denied the petition, determining that the petitioner failed to establish that (1) it was a qualifying U.S. employer or agent; or (2) the proffered position is a specialty occupation. On appeal, counsel asserts that the director improperly concluded that the proposed employment involves subcontracting to another party, and submits a brief and additional evidence in support of the appeal.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) counsel's brief in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the I-129 petition, the petitioner averred in its June 30, 2009 letter of support that it "offers a full range of services, including program consulting, implementation services, software sales, training and support." It further claimed that it operates a virtual office "because the majority of our work is done at our clients' sites or remotely from home offices." Regarding the beneficiary, the petitioner stated that she would be employed as a business intelligence consultant, and that she "will participate on client projects at individual client sites."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on July 17, 2009. In the request, the director asked the petitioner to submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must be submitted.

In a response dated August 6, 2009, counsel for the petitioner addressed the director's queries. Counsel stated that the petitioner planned to employ the beneficiary on an internal project, and that she will not be working as a contract employee. Specifically, counsel stated that she will work on "a long-term project aimed at standardizing and productizing [the petitioner's] existing product line." Counsel also submitted a letter from the petitioner's chairman and COO, who stated that should the beneficiary be employed at a client site in the future, an amended petition would be filed.

On August 19, 2009, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, it was required to submit the requested contracts and itinerary, and without this documentation, the petitioner could not establish that it met the definition of United States employer or agent.

As a preliminary matter, the AAO finds that, contrary to the director's findings, the petitioner will act as the beneficiary's employer in that it will hire, supervise, and ultimately control the beneficiary's work. Consequently, the director's finding that the petitioner does not meet the definition of U.S employer or agent is hereby withdrawn.

The issue before the AAO, therefore, is whether the proffered position qualifies as a specialty occupation.

In this matter, the director noted that, in conjunction with establishing that it routinely employs individuals to work on in-house projects, the petitioner must provide evidence of the contracts, proprietary software, or other specific active products that the beneficiary will be working on in order to meet its burden of proof. Otherwise, the director noted, there was no information to substantiate that the petitioner's business relies on in-house work rather than subcontracting workers to other firms. As discussed above, the director's findings with regard to the potential outsourcing of the beneficiary and thus the questions with regard to the petitioner's employment of the beneficiary are no longer at issue. However, the AAO concurs with the director's ultimate finding that the proffered position is not 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 requires [1] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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, 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 positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In a letter dated June 30, 2009, the petitioner explained that it would employ the beneficiary in the position of Business Intelligence Consultant. The petitioner described the proffered position as follows:

Reporting directly to the Chief Operating Officer, the Business Intelligence Consultant will be responsible for standardizing and productizing [the petitioner's] business solutions, including data models, data marts, and reports in the fields of Finance, Sales, Planning, and Labor, in order to develop a standard template for our future projects. Specifically, this individual will compile and analyze all of [the petitioner's] past project proposals and contracts to classify and categorize projects and project phases. Working closely with the Sales and Marketing departments as well as [the petitioner's] project managers, this individual will be responsible for identifying patterns and trends in client projects in order to pinpoint what aspects of [the petitioner's] projects can be standardized and which must be customized for individual clients. This individual will communicate with Project Managers and project leaders upon completion of client projects to understand what solutions can be standardized. S/he will present product proposals and standard solutions to management for feedback. The Business Intelligence Consultant will develop several versions of each standard model, report, and executive dashboard for Sales and Marketing teams to sell to future clients. The goal is to develop cost-effective business management products for our clients who cannot afford fully customized solutions. The standardized products will also be used as samples for sales and marketing presentations to demonstrate the intelligence management services [the petitioner] offers. Because the technology upon which these solutions are built evolves rapidly, the Business Intelligence Consultant will need to continually update these templates, so that [the petitioner] will be able to offer current solutions. S/he will also be responsible for developing, updating and maintaining our corporate Sharepoint site, the internal document and knowledge repository for the above solutions as well as client-specific documentation.

The petitioner concluded that the ideal candidate for the position should possess at least a bachelor's degree in computer science, information systems management, or a closely related field. Regarding the beneficiary's qualifications, the petitioner stated that she held a bachelor's degree in computer science from [redacted] in [redacted], as well as a master's degree in business administration with an emphasis in information systems management from [redacted]

After reviewing the petitioner's response to the RFE, the director denied the petition, finding that the record contained insufficient information regarding the ultimate duties of the proffered position to allow a determination as to whether the proffered position was a specialty occupation. As discussed previously, the director found that the beneficiary's duties would vary based on various client projects, thereby rendering it difficult to determine the exact nature of the beneficiary's work. However, as the AAO has determined that the petitioner will not employ the beneficiary on client

sites but instead in-house (via virtual office) on an internal project, the AAO will evaluate the record for evidence demonstrating that the proffered position meets the criteria for a specialty occupation position under 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the petitioner that the proffered position is a specialty occupation.

The AAO notes that the *Handbook* does not contain an occupation entitled Business Intelligence Consultant. Based on a review of the petitioner's business, its description of the proffered position, and the educational background of the beneficiary, it appears that the proffered position is most akin to that of a computer systems analyst. According to the 2010-2011 edition of the *Handbook*, the duties of a computer systems analyst are 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 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.

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.

One challenge created by expanding computer use is the need for different computer systems to communicate with each other. Many systems analysts are involved with “networking,” connecting all the computers within an organization or across organizations, as when setting up e-commerce networks to facilitate business between companies.

The duties of a computer systems analyst, which include custom development of applications as needed, conforms to the description of the proffered position.

The *Handbook* continues:

Work environment. Computer systems analysts work in offices or laboratories in comfortable surroundings. Many work about 40 hours a week, but some work more than 50 hours a week. Some analysts telecommute, using computers to work from remote locations.

The work environment of a computer systems analyst, as described by the *Handbook*, also appears to correlate with the description of the proffered position since the petitioner contends that the beneficiary will primarily work from home.

With regard to the educational requirements of a computer systems analyst, the *Handbook* states:

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

Education and training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

The *Handbook* reports that, while employers usually prefer applicants with at least a bachelor's degree, they do not require a bachelor's degree in a specific specialty. Accordingly, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

It is noted that, on appeal, counsel contends that the proffered position is akin to that of an operations research analyst. The AAO, however, disagrees with counsel's contentions. Specifically, the *Handbook* describes the occupation of operations research analyst in relevant part as follows:

Operations research analysts formulate and apply mathematical modeling methods to develop and interpret information that assists management with policy formulation and other managerial functions. Using analytical techniques, operations research analysts help managers to make better decisions and solve problems. The procedures of operations research were first formalized by the military. They have been used in wartime to effectively deploy radar, search for enemy submarines, and get supplies to where they are most needed. In peacetime and in private enterprises, operations research is used in planning business ventures and analyzing options by using statistical analysis, data mining, simulation, computer modeling, linear programming, and other mathematical techniques.

In addition to the military, operations research analysts today are employed in almost every industry, as companies and organizations must effectively manage money, materials, equipment, people, and time. Operations research analysts reduce the complexity of these elements by applying analytical methods from mathematics, science, and engineering, to help companies make better decisions and improve efficiency. Using sophisticated software tools, operations research analysts are largely responsible for solving complex problems, such as setting up schedules for sports leagues or determining how to organize products in supermarkets. Presenting the pros

and cons of each possible scenario, analysts present solutions to managers, who use the information to make decisions.

The occupation of operations research analysts requires the implementation of mathematical modeling methods to develop policy formation. This does not correlate to the duties of the proffered position as described, which indicates that the beneficiary will develop standardized business management products for its clients. Absent additional evidence to the contrary, the AAO finds that the proffered position is most akin to that of a computer systems analyst.¹

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

The petitioner has submitted no evidence to demonstrate that a bachelor's degree in a specific specialty is common to the petitioner's industry in positions that are both parallel to the proffered position and located in organizations that are similar to the petitioner. Thus, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner provides no evidence to demonstrate that it routinely hires only degreed individuals for the proffered position, which is critical since the record does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. The AAO notes that while a petitioner may believe or otherwise

¹ Even if the AAO were to accept counsel's assertion that the proffered position was akin to that of an operations research analyst, the beneficiary would not be qualified to perform the duties of such an occupation. According to the *Handbook*, operations research analysts should have a bachelor's degree coupled with extensive coursework in mathematics and other quantitative subjects. It is unclear how the beneficiary's degree in computer science and master's degree in business administration would qualify her for the tasks included in this occupational category.

assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

The petitioner has submitted no independent documentation, such as letters or expert testimony, in support of the contention that complex knowledge is required to perform the duties of the proffered position. Instead, the petitioner and counsel simply provide their own opinions with regard to the qualifications necessary for a Business Intelligence Consultant to successfully function in the proffered position.

Although the petitioner contends that the duties of the proffered position are so specialized that they require a person who holds a degree in computer science, information systems management, or a closely related field, it is the actual detailed job description that must be analyzed to determine whether a position is a specialty occupation. The description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. Moreover, without project specifications that include comprehensive descriptions of the AAO USCIS is unable to discern the nature of the position and the level of sophistication and complexity the job might entail.

Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a degreed individual could perform them. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. In fact, the duties of the proffered position are somewhat vague and generalized. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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