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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

Date: OCT 14 2010 Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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

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:

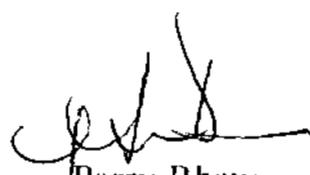


INSTRUCTIONS:

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 Director, California Service Center, denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner states on the Form I-129, Petition for Nonimmigrant Worker, that it was established in 2007, provides IT services, has one employee and two contractors, and had a gross annual income of \$336,184 when the petition was filed. It seeks to employ the beneficiary as a programmer analyst and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that based on the inconsistencies in the record the petitioner had not submitted a bona fide job offer.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on April 1, 2009, the petitioner indicated that it wished to employ the beneficiary as a programmer analyst for three years, from October 1, 2009 to September 27, 2012 at an annual salary of \$45,000. The petitioner provided its address as [REDACTED] Washington.

In the letter submitted in support of the petition, the petitioner noted that the beneficiary would work at the address above and at other sites as required. The Labor Condition Application (LCA) submitted with the petition indicated that the beneficiary would work at the address on [REDACTED]. The support letter indicated that as a programmer analyst, the beneficiary would:

Design, Development and Implementation of Multiple Systems. Recommend software application and database solutions to the clients. Evaluate interface between hardware and software. Conduct test plans and code enhancement features and participate in writing product and user documentation. Consult with customers concerning maintenance of software system. Provide Systems Analysis. Require working knowledge of Microsoft Technologies including, C#, ASP, ASP.NET, SQL Server 2000/2005 and Oracle.

The petitioner stated that the above described duties required a bachelor's degree in computer science or a directly related field. The petitioner provided an education evaluation which stated that the beneficiary's education is equivalent to a U.S. master's degree in computer information systems from a regionally accredited college or university in the United States. The petitioner also submitted a March 31, 2009 employment agreement between the petitioner and the beneficiary noting the job offered was that of a programmer analyst at an annual salary of \$45,000, with a start date of October 1, 2010. The employment agreement did not specify the

duties or work location of the beneficiary.

On June 29, 2009, the director issued an RFE indicating, in part, that the evidence of record was not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised that as it appeared to be engaged in the business of consulting, staffing, or job placement, the petitioner must provide evidence of the specialty occupation work for the beneficiary with the actual end client where the work would ultimately be performed. The RFE also requested a more specific job description.

In response to the RFE, the petitioner submitted a document labeled "itinerary" which indicated the beneficiary's employment would start on October 1, 2009 and would end on or before September 27, 2012. The petitioner indicated that the beneficiary would be working on the development of a fully integrated dashboard suite development, a project that was currently in its initial phase. The petitioner indicated that the beneficiary would be working at [REDACTED] Washington and her job responsibilities would include:

- Analyzing and Understanding the business requirements.
- Design, Development and Implementation of Multiple Systems
- Preparing Test Cases, Test Data, Test Results and reporting.
- Analyzing existing code and proposing technical solutions.
- Integration and Unit testing.
- Recommend software application and database solutions to the clients.
- Evaluate interface between hardware and software.
- Conduct test plans and code enhancement features and participate in writing product and user documentation.
- Perform manual and automated test of various software applications developed.

The itinerary also indicated the beneficiary would allocate her time as follows:

- 20 percent – Designing applications that would implement the requirements into executable modules.
- 20 percent – Write design and functional documents and help in writing technical documentation and help for the products.
- 15 percent – Requirements gathering and preparing requirement specification documentation.
- 20 percent – developing software solutions using ASP.Net, C#, VB.Net, SQL Server and other Microsoft technologies.
- 20 percent – Testing including unit testing, smoke testing and integration testing.

The petitioner noted that the beneficiary would be involved in initiation, design, development, testing and production phases of its Dashboard Suite and that the project was expected to include design and development activities for 24 months followed by production and ongoing improvements for another two years. The petitioner noted that the project was in its initiation phase and the beneficiary was expected to contribute her skills for a period of three years. The

petitioner also provided a Dashboard Market Analysis, Dashboard Product Specification and Requirement Specification, dated February 22, 2009, which indicated that development and quality assurance of the system was expected to take 24 months followed by an additional two years of improvements. Neither the market analysis nor the product and requirement specification indicated the number and type of personnel required of the project or noted the initial start time of the project.

The petitioner also submitted its organizational chart and its 2008 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation.

The director denied the petition on October 1, 2009 noting the discrepancies in the beneficiary's work location and advising the petitioner that there was no evidence that it had offices located at [REDACTED] the beneficiary's proposed work location listed on the submitted itinerary. The director determined that the petitioner had not established that a bona fide job offer existed.

On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation, the petitioner will be the beneficiary's employer, and the beneficiary will work at the petitioner's software development offices located at [REDACTED]. Counsel submits a lease showing that the petitioner has leased premises at the [REDACTED] address and advises that this is the work location as well as noting that this address is only 15 miles from the petitioner's office address. The record also includes other documentary evidence showing the petitioner had identified the [REDACTED] address as its address in public records.

The crux of determining whether a proffered position comprises a bona fide job offer for the H-1B nonimmigrant classification is to determine whether the petitioner has established that it has sufficient specialty occupation work to employ the proposed beneficiary for the duration of the H-1B nonimmigrant classification. In that regard, the AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] which requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

Upon review of the record of proceeding, the record lacks substantive evidence that the proffered position entails work of a specialty occupation. Although the petitioner stated that the beneficiary would work on a proposed project, in-house, the project, as noted above, does not specify the number of personnel necessary for the project and although the petitioner states that the project is in its initial phase, does not identify specifically what work the beneficiary would contribute to the project on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a programmer analyst on one project for the duration of the petition at one specific work location, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

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

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

The *Handbook* describes computer programmers as follows:

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

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

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

* * *

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

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

* * *

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

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects

combined with practical experience can qualify people for some jobs in the occupation. . . .

As evident in the excerpts above, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties in this matter do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge necessary for performance of the proffered position.

As the *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Further, the petitioner did not submit documentation to establish that similar firms routinely require at least a bachelor's degree in a specific specialty.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

No evidence was provided that the petitioner has a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of programmer analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The petitioner therefore failed to establish that the proposed position qualifies for classification as a specialty occupation. The AAO affirms the director's finding that the petitioner has not provided sufficient probative evidence demonstrating that it has sufficient H-1B caliber work for the beneficiary for the expected duration of the H-1B employment classification.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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