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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 31 2011 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 provides physical therapy services. It was established in 2000, employs nine personnel, and had a gross annual income of over one million dollars when the petition was filed. It seeks to employ the beneficiary as a computer programmer and systems administrator, level 1 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 the petitioner failed to establish that the proposed position qualifies as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, 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, and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner stated that it wished to employ the beneficiary as a computer programmer/systems administrator, level 1 from October 1, 2009 until September 30, 2012. In the June 19, 2009 letter in support of the petition, the petitioner described the purpose of the position as:

- Maintaining computing environment by identifying system requirements;
- Install upgrades;
- Monitoring system performance;
- Developing and writing computer programs to store, locate, and retrieve *specific documents, data, and information*;
- Programming web site and updating it with new information dynamically;
- Developing information systems by designing, developing, and installing *software solutions*;
- Collecting, posting and managing account payments;
- Providing management with financial information by researching and *analyzing accounts*; and
- Preparing financial statements.

The petitioner added that the *specific duties of the position* are:

- Establish system by planning and executing the selection, installation, configuration, and testing of PC and server hardware, software, LAN and WAN networks, and operating and system management systems; define system and operational policies and procedures;
- Maintain system performance by performing system monitoring and analysis, and performance tuning; troubleshooting system hardware, software, networks

- and operating and system management systems; design and run system load/stress testing; escalate application problems to vendor;
- Secure system by developing system access, monitoring, control, and evaluation; establish and test disaster recovery policies and procedures; complete back-ups; maintain documentation;
- Prepare users by designing and conducting training programs; provide references and support;
- Upgrade system by conferring with vendors and services; develop, test, evaluate and install enhancements and new software;
- Write, update, and maintain computer programs or software packages to handle specific jobs, such as tracking inventory, storing or retrieving data, or controlling other equipment;
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements;
- Perform systems analysis and programming tasks to maintain and control the use of computer systems software as a systems programmer;
- Consult with and assist computer operators or system analysts to define and resolve problems in running computer programs;
- Prepare and install solutions by determining and designing system specifications, standards, and programming;
- Design Web sites and ensure that they are visually effective and easy to access;
- Test the web sites for functionality in different browsers and at different resolutions;
- Update current information on web pages;
- Be courteous and respectful of all Visionary Web customers and employees;
- Improve operations by conducting systems analysis; recommend changes in policies and procedures; and
- Perform daily back-ups on office computer system.

The petitioner stated that the position required a minimum of a baccalaureate degree in computer science or computing engineering and that the beneficiary held a bachelor's degree in computer science from a foreign university that had been evaluated as equivalent to a U.S. bachelor's degree in computer engineering.

On September 2, 2009, the director issued an RFE requesting additional evidence to establish that the duties of the proffered position comprised the duties of a specialty occupation.

In response to the RFE, the petitioner provided a similar description of the duties of the proffered position as previously provided and noted the percentage of time the beneficiary would allocate to each of the outlined duties. Counsel for the petitioner noted that the petitioner used two systems that required updates and that an in-house expert was needed to assist staff with software "glitches" relating to the two systems and to update the petitioner's website, billing and documentation. The petitioner also provided a September 24, 2009 letter prepared by [REDACTED]

[REDACTED]. [REDACTED] noted that "[c]omputer scientists and database administrators are increasingly employed in every sector of the economy. [REDACTED]

also identified a growing need for computer scientists and individuals with a mathematics-based expertise to handle all billings and accounting issues and noted that “small companies looked for qualified experts, typically with a bachelors or Masters degree in Computer Science to address these issues.” ██████████ opined: “individuals with a combination of experience inside and outside of the IT area will have the best qualifications and positive impact on their companies” as such individuals combined strong technical skills with good business skills.

The petitioner also provided four job postings for various information technology positions, including positions titled director-information technology, technical analyst marketing, systems analyst III, and database administrator. The advertised position titled director-information technology required a bachelor’s degree in information technology, computer science or related work. The advertised position titled systems analyst III, required a bachelor’s degree in information systems, business or equivalent field or if no degree seven years of relevant experience. The database administrator position required a bachelor’s degree and noted the employer’s preference for the degree to be in a computer related field. The technical analyst position required a bachelor’s degree but did not identify a specific field of study. The companies advertising ranged from a hospital to health care providers of unidentified size. The advertisements did not include sufficient information to determine that the advertised positions were parallel to the proffered position or that the organizations advertising were similar to the petitioner. For example, it appears that the successful applicant for the director-information technology position would have some supervisory duties, duties which are not included in the proffered position. In addition, the advertisement for the systems analyst III position is not for a level 1 position and also noted that seven years of relevant experience would be sufficient for employment in the advertised position.

Based on the information in the record the director denied the petition on October 30, 2009.

On appeal, counsel for the petitioner identifies specific elements of the petitioner’s description of duties and correlates the described duties to a section in the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)* on Computer Systems Analysts. Counsel notes that the *Handbook* indicates that employers prefer applicants who have at least a bachelor’s degree for the position of Computer Systems Analyst. Counsel also provides a November 23, 2009 letter from the petitioner indicating that the current off the shelf program that it was using had numerous glitches and that it needed to gather and transition data from this system to a new system. The petitioner states that one of the primary responsibilities of the position focuses on establishing a customized paperless software program which integrates the medical records with the accounting/billing function and training staff on the use of the system. Counsel also provides a proposal from an outside company to transition its current system to a new one to evidence its need for an in-house information technology position.

We find that the petitioner has not established that 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.

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

The Computer Programmer and Systems Administrator occupational categories are addressed in the *Handbook* (2010-11 online edition) in two chapters – “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.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some

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.

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. . . .

Id.

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. . . .

Id. Therefore, 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 wide spectrum of educational credentials.

In addition to the chapters in the *Handbook* relating to programmer/analysts, the AAO has also reviewed the chapter on "Computer Network, Systems, and Database Administrators" as some of the generally described duties of the position appear to relate to systems administrators.

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

Network and computer systems administrators design, install, and support an organization's computer systems. They are responsible for LANs, WANs, network segments, and Internet and intranet systems. They work in a variety of environments, including large corporations, small businesses, and government organizations. They install and maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to users. These workers gather data to evaluate a system's performance, identify user needs, and determine system and network requirements.

Systems administrators are responsible for maintaining system efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades. Many of these workers are also responsible for maintaining network and system security.

* * *

Webmasters or *Web administrators* are responsible for maintaining Web sites. They oversee issues such as availability to users and speed of access, and are responsible for approving the content of the site. Webmasters also collect and analyze data on Web activity, traffic patterns, and other metrics, as well as monitor and respond to user feedback.

The *Handbook* provides in pertinent part:

Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions. Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems

administrators are computer science, information science, and management information systems (MIS), but a degree in any field, supplemented with computer courses and experience, may be adequate. A bachelor's degree in a computer-related field generally takes 4 years to complete and includes courses in computer science, computer programming, computer engineering, mathematics, and statistics. Most programs also include general education courses such as English and communications. MIS programs usually are part of the business school or college and contain courses such as finance, marketing, accounting, and management, as well as systems design, networking, database management, and systems security.

* * *

For Webmasters, an associate degree or certification is sufficient although more advanced positions might require a computer-related bachelor's degree. For telecommunications specialists, employers prefer applicants with an associate degree in electronics or a related field, but for some positions, experience may substitute for formal education. Applicants for security specialist and Web developer positions generally need a bachelor's degree in a computer-related field, but for some positions, related experience and certification may be adequate.

As evident in the excerpts above, the *Handbook's* information on educational requirements in the systems administrator/webmaster 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, this occupation also accommodates a wide spectrum of educational credentials and an associate degree or certification and experience is all that is required for some positions. Additionally, while the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the duties of the proffered position do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the 2010-2011 *Handbook* indicates no specific degree requirement for employment as a programmer/analyst or systems administrator, 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. The advertisements submitted establish at best that a bachelor's degree is generally preferred, but not a bachelor's degree or the equivalent in a *specific specialty*. Moreover, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. Similarly, the September 24, 2009 opinion letter prepared by [REDACTED] does not establish that the proffered position is a specialty occupation. It appears [REDACTED] bases her opinion on the beneficiary's qualifications not on the job requirements of the position. She does not list the reference materials relied on or any objective evidence as a basis for a conclusion that the duties of the proffered position comprise the duties of a specialty occupation as defined above. [REDACTED] opinion that small companies look for qualified experts, typically individuals with a bachelor's or master's degree, corresponds generally with the *Handbook's* indication that employers have a general preference for individuals with experience, strong technical skills, and a general bachelor's degree. [REDACTED] opinion, however, does not establish the proffered position is a specialty occupation. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

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 programming/systems administrator positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner does not claim and the record does not support a determination that the petitioner only hires individuals with a bachelor's or higher degree for the proffered position. 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)). Moreover, as discussed above, the standard is not whether or not the petitioner employs individuals with a bachelor's degree in the proffered position, but whether it only employs individuals with a bachelor's degree in a specific specialty. No evidence was provided that the petitioner has a prior history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty for the proffered position. 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 a programmer/system administrator 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 AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

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 is on the petitioner to establish eligibility for the benefit sought. In this matter, the petitioner has not sustained its burden.

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