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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
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**U.S. Citizenship
and Immigration
Services**

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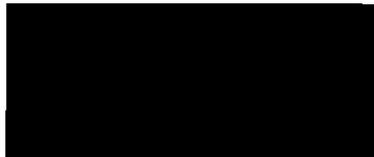


Date: **OCT 31 2011** Office: VERMONT SERVICE CENTER FILE:

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
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 is a software and technology solutions provider. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner had not established that the proffered position qualifies for classification 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) the Form I-290B, Notice of Appeal or Motion, along with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner indicated it was established in 2002, had 60 employees, and a gross annual income of [REDACTED]. The petitioner also stated on the Form I-129 that it wished to employ the beneficiary as a programmer analyst from March 23, 2009 to March 22, 2012 at an annual salary of [REDACTED]. The LCA accompanying the petition was certified on March 23, 2009 for a period from March 23, 2009 until March 22, 2012 and included two locations as the beneficiary's places of employment, [REDACTED].

In the March 24, 2009 letter accompanying the petition, the petitioner stated that it provided software and technology solutions and that it provided a full range of critical information technology services and solutions no matter where the customer's businesses are located. The petitioner further noted that it provided clients with effective software product development, business process and IT staffing services in various domains and is headquartered in [REDACTED]. The petitioner stated that the beneficiary would be employed as a programmer analyst in both [REDACTED]. The petitioner described the proposed job duties as:

- Analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer related solutions to our business clients.
- Gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems.
- Plan and develop new computer systems and devise ways to apply the IT industry's already existing technological resources to additional operations that will streamline our clients' business processes.
- Design or add hardware or software applications that will better harness the power and usefulness of our clients' computer systems.

- Employ a combination of techniques including, structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan systems and procedures to resolve computer problems.
- Analyze subject-matter operations to be automated, specify the number and type of records, files, and documents to be used as well as format the output to meet user's needs.
- Develop complete specifications and structure charts that will enable computer users to prepare required programs.
- Coordinate tests of the systems, participate in trial runs of new and revised systems and recommend computer equipment changes to obtain more effective operations.

The petitioner stated the position required a minimum of a U.S. baccalaureate degree or its equivalent in computers, engineering, or a related field. The petitioner noted that the beneficiary had a bachelor of technology degree in mechanical engineering from [REDACTED] and over eight years of experience in the relevant field.

On May 11, 2009, the director issued an RFE requesting an itinerary and the identity for each company to which the beneficiary would provide services. The director requested that the petitioner submit a letter from the end client identifying the name of the project to which the beneficiary would be assigned, the title and duties of the beneficiary's position, contact information for the end-client. The director also requested that if the beneficiary would perform work on an in-house project, the petitioner must submit evidence of the project, the length of time the beneficiary would work on the project, the team members assigned to the project, and how the beneficiary is qualified to work on the project, among other things.

In response, the petitioner stated that the beneficiary would work as a programmer analyst on an internal development project at its office located in [REDACTED]. The petitioner identified the project as Corporate Enterprise Application and noted that the product was not being sold to customers and would be used by the petitioner, its employees and its clients to access information regarding its current projects. The petitioner indicated that 22 employees had been assigned to the project but did not include their names, titles, or duties. The petitioner provided an itinerary for the beneficiary that also indicated that the beneficiary would work on the Corporate Enterprise Application for the duration of his H-1B classification. The petitioner indicated that the beneficiary's duties on this project would include:

- Provide design, development, implementation, and maintenance of our internal project, Corporate Enterprise Application;
- Analyze computer and business problems of existing proposed systems;
- Initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer related solutions to our business clients; and
- Analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our

company's ability to deliver more efficient and effective technological and computer related solutions to our business clients.

The petitioner also submitted an overview of the project including the technical architecture specifications.

On August 26, 2009, the director denied the petition.

On appeal, the petitioner asserts that the proffered position is a specialty occupation. The petitioner observes that in the RFE, the director requested evidence of the beneficiary's work assignment for an end-client or of the in-house project to which the beneficiary would be assigned. The petitioner states that its initial intent was to have the beneficiary work on a short-term project in [REDACTED] and then work on the in-house project in [REDACTED] but at the time of its response to the RFE, the short-term project in [REDACTED] was complete. Thus, according to the petitioner, the beneficiary was assigned to work only on the in-house project. The petitioner contends that this change in assignment does not significantly change the initial request for approval or alter the job description in a material fashion.

The AAO first considers 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.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular

work. The petitioner in this matter initially provided a broad overview of proposed duties and claimed that the duties constituted the duties of a programmer analyst. The petitioner also indicated that the beneficiary would work in two different locations. In response to the director's RFE, the petitioner stated that the beneficiary's work location would be restricted to work only at its offices on an in-house project. The petitioner's description of the beneficiary's work on the project as described in the itinerary encompassed an even more general description of the proposed duties of the proffered position. Neither description of the purported duties is sufficient to ascertain the beneficiary's day-to-day duties. It is not possible to determine that the beneficiary's duties, whether at the petitioner's office on a project or at the offices of a third party, comprise H-1B caliber work and that the H-1B caliber work would last for the duration of the petition. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a programmer analyst on its in-house project for the duration of the petition, 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

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.

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 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. The *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree or its equivalent in a specific specialty. 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 do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

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. The petitioner has not submitted other documentation demonstrating that the industry's professional association or other firms or individuals routinely recruit and hire only individuals with degrees in specific disciplines.

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.

The petitioner does not claim that it only hires individuals with a bachelor’s or higher degree in a specific specialty for the proffered position and the record does not include evidence that the petitioner only hires degreed individuals in a specific discipline for the proffered position. As 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, 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).

Beyond the decision of the director, the AAO will address the issue of whether the petitioner made a material change to the petition by changing the beneficiary’s place of employment for the duration of the petition.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form’s instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it

has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

In this matter although the petitioner did not add a new geographical area to the LCA filed with the Form I-129, the petitioner's change to requiring the beneficiary to work only on an in-house project is a material change in the terms and conditions of employment. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job

location, it must nonetheless document such a material change in intent through an amended petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.