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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



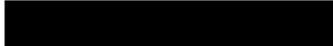
D2

Date: **FEB 02 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

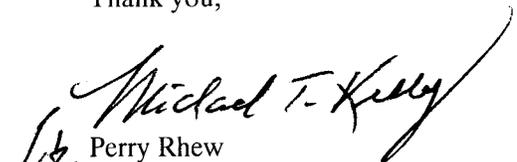


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
/s/ Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is a software development and consulting firm. To employ the beneficiary in what it designates as a systems analyst position, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would abide by the terms and conditions of H-1B employment and failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel submitted additional evidence, which he asserts overcomes the bases for denial.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions in support of the appeal.

The AAO will first address the director's finding that the petitioner had not demonstrated that it would abide by the terms and conditions of H-1B employment. This finding was based on a discrepancy between the number of employees the petitioner claimed on the visa petition and the number of employees it was able to document with evidence submitted in response to an RFE. Specifically, the petitioner claimed on the visa petition, submitted April 7, 2009, to have 12 employees. A quarterly wage report the petitioner submitted in response to the RFE, however, showed that the petitioner paid wages to only three employees during the first quarter of 2009.

On appeal, counsel stated, ". . . in 2007, the Petitioner had 13 employees and in 2008 10 Employees, the petitioner. See attached W-3 and W-2 for year 2008 and 29007." [Verbatim from the original.]

Counsel's assertion does not entirely explain the discrepancy. The record does contain 13 2007 W-2 forms and ten 2008 W-2 forms. Quarterly reports were submitted for the first three quarters of 2008, however, and they show that the petitioner paid wages to seven employees during the first quarter of 2008, to four employees during the second quarter of 2008, and to four employees during the third quarter of 2008. The record contains no evidence to support the assertion that the petitioner recently had 13 simultaneous employees. Under these circumstances, that the petitioner misstated, perhaps inadvertently, the number of its employees, is clear.

Even if it was an intentional misstatement, however, the number of employees is not, in itself, relevant to any material issue. The record contains no indication that any investigation was performed pertinent to the number of H-1B employees the petitioner now has, what wages it is obliged to pay them, and how much it has been paying them. As such, whether the petitioner has failed to pay its H-1B employees the wages proffered to them is unclear. The AAO perceives no

basis for the finding that the petitioner has not demonstrated that it would abide by the terms and conditions of H-1B employment. That basis of the decision of denial is withdrawn.

The remaining basis of the decision of denial is the issue of whether the petitioner has demonstrated that it would employ the beneficiary in a specialty occupation. The AAO will now address that basis.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which 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, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

With the visa petition, counsel submitted a diploma showing that the beneficiary received a bachelor of technology degree in information technology. Counsel also submitted a letter from the petitioner’s president, dated April 3, 2009, which stated the following as the duties of the proffered position:

- Working under the supervision of the Team Lead, analyze user requirements, current operational procedures, functional specification, and user’s data.
- Identify and document business or test requirements to the support the project.
- Perform object-oriented analysis and preliminary design/development of the solutions for client server platform.
- Utilize object-oriented language and concepts and databases appropriate to the project.
- Follow Team Lead’s direction in devising methods and appropriate to the project.

- Follow Team Leader's direction in devising methods and approaches to solve problems and meet user' needs.
- Create algorithms as needed to manage and implement proposed solutions.
- Participate in test planning and test execution for the functional, system, integration, and performance testing.
- Work with test automation tools for recording/coding in object-oriented languages, execute in regression testing cycles.
- Document and track issues and issue related resolution.
- Support Team Lead in completing test objectives according to the scheduled set forth by the project manager.
- Test and debug software.
- Complete ongoing training and learn new skills/program at company headquarters when required.

[Verbatim from the original.]

The petitioner's president further stated that the proffered position requires "a Bachelor's Degree in Computer Science/Engineering, Information Technology, Systems, Electrical/Electronics Engineering, or [a] related field." [Verbatim from the original.]

On June 8, 2005, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted (1) a statement of work (SOW), dated March 12, 2009 and signed on March 14, 2009, (2) a letter, dated July 10, 2009, from the petitioner's president; and (3) and counsel's own letter, dated July 17, 2009.

The SOW submitted indicates that the petitioner and [REDACTED] agreed, on March 14, 2009, that the petitioner would provide the beneficiary to IIT to work on a project adapting existing programs to a different platform. It states that the services pursuant to that SOW will begin on October 2009 and end on December 15, 2010. It does not say where the work would be performed.

The petitioner's president's July 10, 2009 states that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* indicates that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In his own letter, counsel stated that the petitioner, because it is in the software development industry, requires its programmer analysts to have a bachelor's degree in "Computers, Engineering, or related." The AAO observes that the instant visa petition states that the proffered position is a systems analyst position, not a programmer analyst position. Counsel also cited the *Handbook* for the proposition that such positions, even at entry level, require bachelor's degrees.

The director denied the petition on September 14, 2009, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. Part of the decision cited signature discrepancies as a basis for discounting the evidentiary value of the SOW.

On appeal, counsel provided evidence sufficient to reconcile the perceived signature discrepancy. The AAO will accord the SOW its full evidentiary value. The issue of whether the petitioner has demonstrated that it would employ the beneficiary in a specialty occupation, however, remains.

The AAO will now address the additional, supplemental requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A).

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent. In this instance, the petitioner may be able to meet this criterion by establishing (1) the occupational classification under which the proffered position should be classified and (2) providing evidence that the *Handbook* supports the conclusion that this occupational classification normally requires a bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation in the United States.

The AAO recognizes the *Handbook*, cited by both counsel and the petitioner's president, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> The *Handbook* describes the duties of systems analyst positions, in the chapter entitled Computer Systems Analysts, as follows:

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

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

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.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos287.htm> (last accessed October 11, 2011). As will now be discussed, the *Handbook* does not support the proposition that computer systems analyst positions constitute an occupational group that categorically requires for entry a minimum of a bachelor’s degree or the equivalent in a specific specialty.

The AAO observes that the duties of the proffered position as described by the petitioner’s president accord with the *Handbook* description of the duties of computer systems analysts. The AAO finds that the proffered position is a computer systems analyst position within the meaning of the *Handbook*.<sup>2</sup>

The *Handbook* states the following about the educational prerequisites of computer systems analyst positions:

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

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical

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<sup>2</sup> In the description of the duties of the proffered position, the petitioner’s president used the word “coding” in a way that suggests that the proffered position may have some programming duties. The AAO observes that if the beneficiary were to do a substantial amount of programming, then the position would be a programmer analyst position, rather than a computer systems analyst position. This would have no substantive effect on the issue of specialty occupation employment, however, as the *Handbook* discusses programmer analyst positions in the Computer Systems Analysts chapter, and the educational requirements are essentially identical.

skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

That employers *usually prefer* applicants with a bachelor's degree does not suggest that it is a minimum requirement.

Further, the *Handbook* indicates that even for those computer systems analyst positions that may require a degree, a degree in computer science, information science, applied mathematics, a branch of engineering, any of the physical sciences, or management information systems may suffice, as might an MBA. That wide array of subjects does not indicate a need for at least a bachelor's degree level of knowledge of a body of highly specialized knowledge *in a specific specialty*, as would be required to establish the proffered position as a specialty occupation position. Thus, the proffered position's inclusion within the occupational classification of computer systems analysts is not in itself sufficient to establish the position as a specialty occupation position.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the alleged requirement of a degree in two disparate fields does not establish the position as a specialty occupation. See § 214(i)(1) of the Act (requiring in pertinent part the "application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in *the* specific specialty" (emphasis added)); cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in one specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in the specific specialty or its equivalent that is directly related to the proposed position.

For the reasons discussed above, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit

only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner’s industry, or any other, requires computer systems analysts to possess a minimum of a bachelor’s degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of computer systems analysts that requires a minimum of a bachelor’s degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the software development and consulting industry. The record contains no other evidence to demonstrate that a minimum of a bachelor’s degree in a specific specialty or the equivalent is common to the petitioner’s industry in parallel positions among similar organizations. The petitioner has not demonstrated that a requirement of a minimum of a bachelor’s degree in a specific specialty or the equivalent is common to the petitioner’s industry in parallel positions among similar organizations, and has not, therefore, satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

As listed by the petitioner’s president, the proposed duties are to determine the requirements of the system needed, to design a system to meet those requirements, and then to implement, test, and debug that system. Other than the final duty, to participate in ongoing training, those duties are a close paraphrase of the duties of systems analysts in general as described in the *Handbook*. That duty appears to be incidental and is, in any event, insufficient to distinguish the proffered position as more complex or unique than other systems analyst positions.

Nothing in the duties of the proffered position as described in the record of proceeding sets it apart as more complex or unique than other systems analyst positions, and the record contains no other evidence on that point.

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

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties is so specialized and

complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent.

The descriptions of the duties of the proffered position, however, only describe generic duties of computer systems analyst jobs in general. As such, they contain no indication that the proposed duties possess complexity or specialization that would require knowledge usually associated with at least a bachelor's degree in a specific specialty, as these generalized terms of the duty descriptions do not distinguish the proffered position from computer systems analyst positions whose performance does not require knowledge usually associated with at least a bachelor's degree in a specific specialty.

The petitioner has not demonstrated that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

Beyond the decision of the director, the AAO finds that the record suggests an additional issue, which will now be discussed, that was not addressed in the director's decision. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified this additional issue.

The record shows that the petitioner intends to provide the beneficiary to IIT to perform duties adapting programs currently in use to a new platform. The programs to be adapted are entitled Wage Garnishment Processing Service, Garnishment Services, and Workers Compensations. Their functions are likely closely related to those titles. The record does not indicate what use IIT, an information technology company, has for such programs. The programs in question may not be an in-house project being developed by IIT for future sales, but a project it is developing for an end user, either at its own location or at the end user's location. If it is for an end user other than IIT, then the record contains no evidence of the duties that end user would assign to the beneficiary or its educational requirements for the person performing those duties. Because this issue was not previously raised, and the petitioner has not been accorded an opportunity to respond, the AAO will not rely upon it in this decision, even in part. However, if the petition were otherwise approvable, it would not be approved until this matter could be clarified.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.



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