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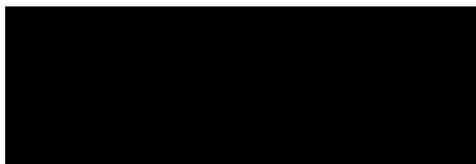
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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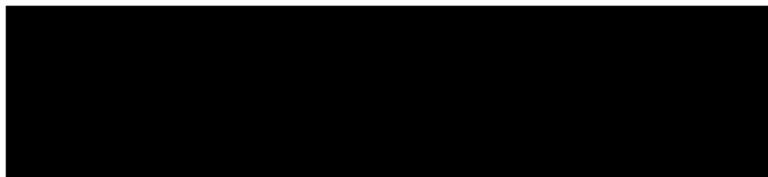
Date: **JAN 18 2012** Office: CALIFORNIA SERVICE CENTER

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,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 provider of voice over internet protocol (VOIP) services and products seeking to employ the beneficiary as a VOIP systems engineer 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 based upon her finding that the proffered position was not in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In the petition signed on September 25, 2009, the petitioner claimed to have one employee and a gross annual income of \$350,814. The petitioner indicated that it wished to employ the beneficiary as a VOIP systems engineer from October 1, 2009 to September 30, 2012 at an annual salary of \$65,000.

The petition was accompanied, in relevant part, by a letter from the petitioner, the beneficiary's educational evaluation and credentials, and a copy of the labor condition application (LCA). The petitioner's letter indicated that the duties of a VOIP systems engineer within its organization include:

- Overseeing implementation, quality performance testing, and network design of VOIP infrastructure;
- Designing customized software for client use with the aim of optimizing operational efficiency;
- Proposing, specifying and designing VOIP applications on SIP standards;
- Specifying automation and parameterization of the process for large scale processing;
- Building quality control check points for end-to-end quality and overall performance verification;
- Providing testing and quality assurance guidelines to junior engineers;
- Interacting with, and providing insight and advice to customer support managers;
- Designing, developing and integrating VOIP system application and network infrastructure, soft switches, SIP proxy, and billing platform;
- Monitoring all backbone links and network devices;
- Following evolution of VOIP protocol standards, codes, and analog telephone adaptors;
- Implementing, integrating and testing internet telephony services;
- Configuring and maintaining SIP-based servers and support operations;
- Using advanced SIP-based VOIP technologies, analyzing SIP logs and CDS; adding new features to VOIP products, services and infrastructure;

- Overseeing network hardware and software needs;
- Protecting systems from interruption or failure;
- Helping develop VOIP expertise; and
- Interacting with other developers.

The petitioner indicates that the position of VOIP systems engineer requires at a minimum a bachelor's degree in software engineering, computer science or the equivalent. The petitioner claims that the beneficiary has the equivalent of a U.S. bachelor's degree in industrial engineering.

On October 30, 2009, the director issued an RFE advising the petitioner, in part, to submit (1) evidence that a specialty occupation exists for the beneficiary, including copies of signed contracts between the petitioner and beneficiary, an itinerary of beneficiary's proposed services, and signed contractual agreements, statements of work, work orders, etc. between the petitioner and end-clients requiring the services of the beneficiary; (2) information regarding the petitioner, including copies of income tax returns, business licenses and organizational chart; and (3) evidence demonstrating that the proffered position is in a specialty occupation, including a detailed description of the work to be performed, evidence that the position commonly requires a bachelor's degree in a specific specialty, and evidence relating to the claimed complex nature of the petitioner's business and the proffered position's duties.

On December 10, 2009, the petitioner submitted a response to the director's RFE. In its response, the petitioner, through counsel, maintains that the position of VOIP systems engineer is akin to a software engineer and not simply of a database administrator. The petitioner states that 35% of the proffered position's duties include designing, developing and implementing soft switches, SIP proxy and billing platform. The petitioner claims that the proffered duties are highly complex. The response to the RFE is accompanied by sample of job postings for similar positions in the industry, an organizational chart, the petitioner's taxes, and advisory opinions from academics in the field.

The director denied the petition on January 6, 2010.

On appeal, the petitioner, through counsel, submits an appellate brief reiterating the arguments made in its response to the director's RFE relating to whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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 384, 387 (5th Cir. 2000) (hereinafter *Defensor*). 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 petitioner states in the Form I-290B that the beneficiary will work as a VOIP systems engineer. The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* describes the position of software engineers as follows:

Software engineers design and develop many types of software, including computer games, business applications, operating systems, network control systems, and middleware. They must be experts in the theory of computing systems, the structure of software, and the nature and limitations of hardware to ensure that the underlying systems will work properly.

Computer software engineers can generally be divided into two categories: applications engineers and systems engineers. *Computer applications software engineers* analyze end users' needs and design, construct, deploy, and maintain general computer applications software or specialized utility programs. . . .

Computer systems software engineers coordinate the construction, maintenance, and expansion of an organization's computer systems. Working with the organization, they coordinate each department's computer needs—ordering, inventory, billing, and payroll recordkeeping, for example—and make suggestions about its technical direction.

* * *

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. . . .

Id. Therefore, the *Handbook's* information on educational requirements for software engineers indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty may be preferred or common, but is not necessarily the minimum entry requirement for the occupation.

Even if the proffered occupation is deemed to be akin to a software engineer, and not a computer scientist and database administrator as suggested by the director, the petitioner cannot demonstrate that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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 or its equivalent in a specific specialty. The evidence submitted by the petitioner in this regard fails to demonstrate that a bachelor's degree in a specific specialty is the minimum entry requirement for the particular position offered. Specifically, the AAO notes that the academic advisory opinions are conclusory in nature and are not supported by independent, objective evidence. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). The AAO additionally notes that [REDACTED] states in her opinion that the petitioner's company employs four customer support personnel and three software engineers, a fact that is not supported by the information provided by the petitioner. The opinion of [REDACTED] focuses almost entirely on the question of whether or not the proffered position is similar to a database administrator. The petitioner also submitted copies of job postings and advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the industry. The advertisements provided, however, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a

specific specialty. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, 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. The only job posting for a VOIP systems engineer does not indicate the specific specialty in which a bachelor's degree is required. The positions offered at AMS Staffing, TimeWarner and TWTelecom specifically state that equivalent experience or training is acceptable in lieu of a degree. Some of the postings refer to senior software engineer positions, compensated at an annual salary of up to \$25,000 more than the proffered salary. These postings are not indicative of a bachelor's degree requirement for a position similar to the one that the petitioner is offering here. Therefore, they cannot be found to be parallel positions in similar organizations. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

As the evidence in the record of proceeding fails to establish that a requirement of a minimum of a bachelor's degree, in a specific specialty, is common to the petitioner's industry in parallel positions among similar organizations, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Additionally, the petitioner has not satisfied 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 although a bachelor's degree requirement may be common, it is not normally the minimum requirement for entry into the proffered position. Moreover, beyond the decision of the director, it is noted that the LCA provided in support of the instant petition lists a Level I prevailing wage level for computer software engineers in Walnut Creek, California. This indicates that the LCA, which is certified for an entry-level position, is at odds with the petitioner's claimed requirements and many of the duties specified for the proffered position.

Given that the LCA submitted in support of the petition is for a Level I wage, it must therefore be concluded that either (1) the position is a low-level, entry position relative to other software engineers and, thus, based on the statistics-based findings of the *Handbook*, the proffered position is not a specialty occupation; or (2) the LCA does not correspond to the petition. In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to a Level III or IV position.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed Level III or IV position, and the petition must be denied for this additional reason.

Next, the AAO concludes that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence in the record of proceeding does not document a recruiting and hiring history of requiring for the proffered position at least a bachelor's degree, or the equivalent, in a specific specialty.¹

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO therefore

¹ In conformance with the definitions of specialty occupation at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), to satisfy this criterion the record of proceeding must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

affirms the director's determination 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. 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.