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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 08 145 50833 OFFICE: CALIFORNIA SERVICE CENTER DATE: NOV 03 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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.

The petitioner avers that it is a software development and consulting business that was established in 1995 and currently has 16 employees. It seeks permission to employ the beneficiary as a business analyst and, therefore, endeavors to classify the beneficiary 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 proposed position was not a specialty occupation because the petitioner's type of business and organizational structure could not support a business or management analyst.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred that it wished to employ the beneficiary as a business analyst. In an accompanying letter of support, the petitioner listed the duties of the position as follows:

1. Investigate and resolve software issues and defects reported by business users and others.
2. Maintain inventory database. Create new, or delete, inventory items.
3. Prepare work orders to assign [the petitioner's] consultants to provide service to [the petitioner's] customers.
4. Test software to ensure it meets specifications and identify any defects.
5. Monitor Accounts Receivable activity. In case of non-payment of invoices on time, remind and request defaulters to expedite payment.
6. Run simulations of business event processing.
7. Answer customer questions, inquiries, and complaints. In consultation with management provide customers with satisfactory solutions.
8. Answer telephones and distribute calls within the office.
9. Perform any other duties that may be assigned by her by [the petitioner's] management.
10. Analyze and document business requirements.
11. Work with technical analysts to research problems and find and implement solutions.
12. Communicate with software vendors to request service regarding software defects.
13. Support business users in the processing of business events.
14. Communicate issues and status to management and others.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 29, 2008. In the request, the director asked the petitioner to submit, among other items, a more detailed description of the work to be performed by the beneficiary. When responding to the director's request for a more detailed job description, the petitioner portrayed the proffered position vastly differently than it had in its initial letter. Rather than answer telephones and customer complaints, among other duties, the petitioner claimed that the beneficiary would:

[D]esign and document workflow and make appropriate recommendations that will positively impact operational effectiveness. [T]rack and analyze business unit trends and make appropriate recommendations that will positively impact the unit. [B]e a Project Manager and lead a number of key projects for the business unit and the company. [B]e a functional expert on the specified applications and will be the sole point of contact between the business unit and Information Technology's Application Development.

On July 24, 2008 the director denied the petition. The director, looking at the duties of the position that the petitioner submitted in response to the RFE, likened the job to a management analyst position. The director declined to find that the proffered position was a specialty occupation because the petitioner did not have the organizational complexity to support a management analyst position.

On appeal, counsel disagrees with the director's findings and attempts to clarify some apparent inconsistencies. Counsel states that the director selectively used excerpts from the Department of Labor's *Occupational Outlook Handbook (Handbook)* to make erroneous conclusions. Counsel states that it was presumptuous for the director to decide for the petitioner what the petitioner's needs are, and that for a company like the petitioner, it is reasonable to employ a business analyst. Counsel references and submits an expert opinion letter from [REDACTED] Dr. [REDACTED] concludes that the petitioner's desire to employ a business analyst is both reasonable and consistent with the petitioner's plans to expand its company.

As a preliminary matter, the AAO shall address the director's decision to assess whether the proffered position is a specialty occupation based upon the duties that the petitioner described in its response to the director's RFE rather than the duties initially listed on the petitioner's letter of support. As stated earlier in this decision, the director issued an RFE that requested the petitioner to submit, among other items, a more detailed job description for the beneficiary. Thus, the petitioner was asked to elaborate further on the duties that it had originally depicted for the beneficiary. Instead, however, the petitioner presented in its RFE response a job description that bore no relationship to the one that it had initially submitted; each job description lists entirely different tasks and responsibilities.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). An RFE does not provide a petitioner with an opportunity to make material changes to any aspect of the petition that it had previously filed. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather described an entirely new position. The director was in error when she used the job description provided in the RFE response to assess whether the position was a specialty occupation. As the AAO maintains plenary power to review each appeal on a de novo basis,<sup>1</sup> the analysis of this criterion will be based on the job description submitted with the initial petition.

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

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<sup>1</sup> 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 [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 which [2] 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, 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, 8 U.S.C. § 1184(i)(1), 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 (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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although the petitioner states that the proffered position has the title of business analyst and likens it to a management analyst position, the initial description of the duties does not support that it is any type of an analyst position. With duties that include answering phones, responding to customer complaints, preparing work orders, testing software, monitoring accounts receivable, and maintaining an inventory database, the position is a mix of the administrative support and computer support specialist positions as described in the *Handbook*.<sup>2</sup>

The *Handbook's* information on educational requirements in the administrative support 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. Instead, most individuals working in this occupation are high school graduates or individuals with relevant work experience. Although some employers may look for a candidate in an administrative support position to have a college degree, this is an employer's preference, not a normal minimum requirement for entry into the occupation.

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<sup>2</sup> *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed October 19, 2009).

Similarly, the *Handbook's* information on educational requirements in the computer support specialist 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, as indicated in the following excerpt from the "Educational and training" subsection of the *Handbook's* "Computer Support Specialist" chapter:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist or systems administrator. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. And for some jobs, relevant computer experience and certifications may substitute for formal education. . . .

A number of companies are becoming more flexible about requiring a college degree for support positions. In the absence of a degree, however, certification and practical experience are essential. Certification training programs, offered by a variety of vendors and product makers, may help some people to qualify for entry-level positions.

As evident above, the *Handbook* does not indicate that a computer support specialist position normally requires at least a bachelor's degree in a specific specialty. The *Handbook* only indicates many, but not all, employers prefer at least a bachelor's degree level of education, while other employers are satisfied with an employee having only an associate's degree and/or certification. More importantly, the evidence of record regarding the particular position does not demonstrate requirements for the theoretical and practical application of a high level of specialized computer-related knowledge. The petitioner states only that the beneficiary will "investigate and resolve software issues" and "test software." A bachelor's degree level of computer knowledge is not inherent to either of these generically described duties. Thus, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel

positions among similar organizations. 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 noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification, nor has the petitioner submitted evidence that the industry's professional associations have made a degree a minimum requirement for entry. The letter from ██████████ that the petitioner submits as evidence of its need for a business analyst position is not persuasive because ██████████ conclusions were based upon his assessment of the job description that the petitioner provided in response to the director's RFE, **not the job description that the petitioner initially submitted.** Thus, ██████████ opinion carries no weight because he is referring to a different job than the one being offered here. 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. 1988). Therefore, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve customer service and basic office tasks. The petitioner, therefore, has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner has no past hiring practices, as the beneficiary would be its first business analyst. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed 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 in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement for either an administrative support or computer support specialist position. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* in any meaningful way and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those of position in a small office that could be filled by an individual who possesses on-the-job experience rather than a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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