

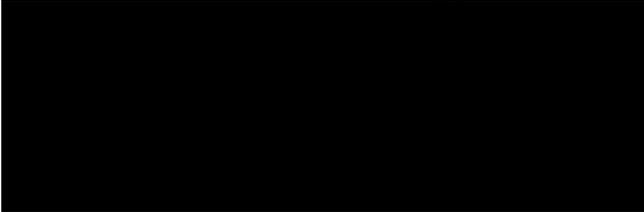
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



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FILE: EAC 03 005 53772 Office: VERMONT SERVICE CENTER

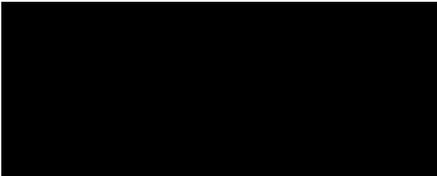
Date: JAN 05 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 provides software development and consulting services. It seeks to employ the beneficiary as a computer specialist. The petitioner, 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 because the proffered position is not a specialty occupation. On appeal, the petitioner submits additional evidence.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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.

Citizenship and Immigration Services (CIS) 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to the September 12, 2002 company letter, the beneficiary would perform duties that entail supporting all legacy computer systems, written in FoxPro and dBase, including ongoing maintenance, modifications, data extractions, and report generation. The letter explained "his duties will not be those of a full time computer programmer, which is why we intend to hire him as a '[c]omputer [s]pecialist'." The petitioner stated that the beneficiary's experience makes him an ideal candidate for the position.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director concluded that the proposed position resembled the description of a computer support specialist, an occupation that does not require a bachelor's degree. The director stated that the petitioner claimed to change the beneficiary's proposed position from a simple computer specialist to a software systems engineer. However, the director was not convinced that the duties of the proffered position were comparable to those performed by a systems engineer.

On appeal, counsel states that the director ignored the amended H-1B petition submitted in response to the request for evidence. Counsel contends that the duties of the proffered position are performed by a software engineer, a job that requires a bachelor's degree as indicated by the Online Wage Library. Counsel narrates the *Handbook's* description of a systems software engineer, and states that the DOL's *Dictionary of Occupational Titles (DOT)* rates a computer and information systems manager with an SVP of at least 8.0.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge,

and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In response to the request for evidence, counsel's November 26, 2002 letter stated:

[O]ur client has decided to change the beneficiary's proposed position from that of a simple "computer specialist" to that of a [s]oftware [s]ystems [e]ngineer, rather than attempting to prove that a computer support specialist falls within the category of a [s]pecialty [o]ccupation."

The letter further stated that the petitioner submitted documents, including a certified labor condition application, an H-1B petition, the Form I-129W, and a company letter with the noted changes. On appeal, counsel also submitted a job description for a computer specialist (systems engineer.)

This evidence is not persuasive in establishing the first criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A). 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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. 8 C.F.R. §§ 214.2(h)(2)(i)(E). Consequently, the AAO will not oblige counsel's request to accept the documents.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* discloses that the duties of the proffered position are performed by network and computer systems administrators. The *Handbook* states:

Network or computer systems administrators design, install, and support an organization's LAN (local-area network), WAN (wide-area network), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users. . . . They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users.

Systems administrators are the information technology employees responsible for the efficient use of networks by organizations. They ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Furthermore, they monitor and adjust performance of existing networks. . . . Administrators also troubleshoot problems as reported by users and automated network monitoring systems and make recommendations for enhancements in the implementation of future servers and networks.

Network and computer systems administrators support LAN, WAN, network segment, Internet, or intranet systems, and maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. This is similar to the beneficiary who will support all legacy computer systems including ongoing maintenance, modifications, data extractions, and report generation.

According to the *Handbook*, employers do not require a bachelor's degree in a specific specialty for network and computer systems administrators. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, computer support specialist.

Nor can the petitioner establish the other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the duties of the proffered position are performed by network and computer systems administrators, jobs that do not require a bachelor's degree in a specific specialty.

Nor has the petitioner shown that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, no evidence in the record establishes the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* reveals that the duties of the proffered position are performed by network and computer systems administrators, jobs that do not require a bachelor's degree in a specific specialty.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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