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

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FILE: WAC 03 212 54163 Office: CALIFORNIA SERVICE CENTER Date: **JAN 06 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

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

The petitioner is a home health care company that seeks to employ the beneficiary as a systems analyst. 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 petitioner did not establish that it has a bona fide position that is a specialty occupation. On appeal, the petitioner states that the proffered position is more commonly referred to as a programmer analyst, and that the position is a specialty occupation.

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 petitioner's letter of support; (3) the director's request for additional evidence, dated July 22, 2003; (4) petitioner's former counsel's response to the director's request; (5) the director's denial letter; and (6) 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 systems analyst. The petitioner described itself as a home health care company with eleven regular employees and an unspecified number of contracted health care employees. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; and the former counsel's response to the director's request for further evidence. According to the letter of support submitted by the petitioner, the beneficiary would solve computer, database, and other information technology issues that confront the petitioner on a daily basis; review and analyze the use of the existing hardware and software utilities, and suggest ways and means of maximizing these utilities to improve the petitioner's profitability and efficiency; design new systems, including the acquisition of new hardware and software that would optimize the use of the petitioner's manpower; submit to management ways to utilize the existing or newly acquired software and hardware to document policies and procedures to eliminate errors among health care personnel; and act as the internal technical person for computers and information technology. In its response to the director's request for further evidence, counsel stated that the proffered position was directly under the director of patient care services, as the beneficiary's functions would ultimately impact the delivery of patient services. The petitioner stated that it required a candidate to possess a baccalaureate degree in computer science or information technology.

In his decision, the director stated that there was no doubt that the duties of the proffered position constituted a specialty occupation. The director then denied the petition because the petitioner had failed to establish that there was a reasonable and credible offer of employment that is consistent with the needs of the petitioner. The director also inferred that the petitioner failed to establish other criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner described the duties of the position further by stating that the beneficiary would be responsible for the computer information management that relates to all aspects of the petitioner's operations planning, monitoring, testing, accounting, forecasting, coordination, scheduling, and, more importantly, quality control. The petitioner also drew attention to the beneficiary's role in assuring that the petitioner operates in compliance with Federal regulations, and assure the highest quality of patient information confidentiality. Finally, the petitioner states that the beneficiary will be the only person employed by the petitioner who has the technical knowledge and know-how to generate data reports. The petitioner states that this type of systems analyst position is more commonly referred to as a programmer analyst.

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

The AAO turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The petitioner described the position as both a systems analyst and a programmer analyst. The AAO does not concur with the director's statement that a systems analyst, with the duties described by the petitioner, is a specialty occupation. The 2004-2005 edition of the *Handbook*, in its examination of systems analysts, states that while there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, most employer place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. Relevant work experience also is very important. The *Handbook* also states that many employers seek applicants who have had bachelor's degrees in computer science, and that persons with degrees in a variety of majors still find employment in these computer occupations.

With regard to parallel positions in similar businesses, the petitioner's former counsel stated in the response to the director's request for further evidence, that he had not been able to find data to establish that companies with eleven employees would commonly employ systems analysts. The petitioner did not provide documentation from professional systems analyst associations or individuals in the industry as to whether a baccalaureate degree in a specific specialty is required for entry into the profession. The petitioner also did not provide sufficient documentation to support the complexity or uniqueness of the proffered position. Although counsel reiterated the duties of the position in the response to the director's request for further evidence, and stated that the complexity of the duties and responsibilities of the proffered position would qualify the position as a specialty occupation, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In its response to the director's request for further evidence, the petitioner stated that the proffered position was new. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. To the extent that they are depicted in the record, the majority of duties of the position appear routine to the initiation or continuation of any office-based computer programming. Although the petitioner, on appeal, provides a more detailed description of the basic duties of the position, it provides no information on the existing computer programs or databases, if any, currently used by the petitioner, and their present complexity or specialized nature. Thus, it is not possible to evaluate whether any work to be performed by the beneficiary on the petitioner's computer programs or databases is either complex or specialized enough to warrant knowledge usually associated with a baccalaureate or higher degree. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

It is also noted that the director's question with regard to whether the petitioner has a bona fide position for the beneficiary is well founded. The director found that the proffered position is not a bona fide position, and, therefore, that the proffered specialty occupation did not exist. An H-1B alien is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner filed the Form I-129 on July 15, 2003. According to the corporate income tax information submitted by the petitioner, the petitioner sustained losses for both fiscal year 2001 and 2002. Although the petitioner's former counsel stated that the petitioner anticipated realizing \$188,500 in net income for fiscal year 2003, and the Form I-129 states this same net annual income, the petitioner provided no evidence that it had generated this type of income. The documentation submitted by the petitioner as to its employees and wages paid to them is not sufficient to establish the actual or projected net income. Based on this insufficient information, the petitioner has failed to establish that it will employ the beneficiary as a full-time systems analyst, and that the beneficiary will be coming to perform services in a specialty occupation, in accordance with Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b).

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.