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U.S. Citizenship
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Services

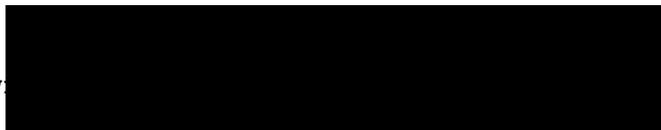
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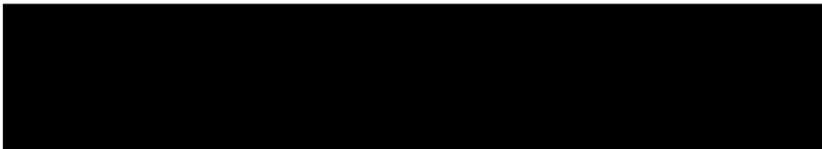
FILE: LIN 04 192 50456 Office: NEBRASKA SERVICE CENTER Date: DEC 9 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Nebraska Service Center denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner is an information software consulting and development company. The petitioner seeks to employ the beneficiary as a Programmer Analyst 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 failed to establish that the proffered position was a specialty occupation, or that the petitioner had a specialty position available for the beneficiary. The director also questioned the physical location of the petitioner's premises.

On appeal the petitioner, through counsel, asserts that the evidence establishes the beneficiary will be engaged in in-house employment for the petitioner. The petitioner asserts further that the evidence contained in the record establishes that the proffered position meets the definition of a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (3) the director's denial letter; (4) Form I-290B, Notice of Appeal to the AAO (Form I-290B) with brief and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

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 term "specialty occupation" is further defined at Title 8 of the Code of Federal Regulations (8 C.F.R.) section 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.

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.

To determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (CIS) 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is thus not the title of the position nor an employer's self-imposed standards, but whether 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.

The petitioner states that it seeks the beneficiary's services as a computer programmer analyst. Evidence of the beneficiary's duties include: the Form I-129 and attachments; a June 15, 2004, letter of support from the petitioner, submitted at the time of filing; the petitioner's January 25, 2005, response to the director's RFE; and the Form I-290B and attachments.

The petitioner stated in its June 15, 2004, letter of support that TVS International, Inc. is an information technology and software consulting company founded in 2001, and that as a programmer analyst the beneficiary would:

- Design, write, develop and utilize custom-made software applications;
- Study work systems, engage in systems analysis, and design programming and applications;
- Be involved in systems integration, troubleshooting, network installation and design and development of software applications;
- Maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards;
- Provide training and support in the installation, implementation and customization of application software;
- Offer solutions for various software problems and analyze compatibility of various systems;
- Research and evaluate user requests for new or modified programs in areas such as finance and human resources;
- Be responsible for satisfying the client/user in terms of the specific deliverables in the project;
- Create detailed design documents and deliver tested, bug-free and documented programs;
- Participate in the testing process and ensure the successful implementation and use of the system, and hold consultations, make recommendations for modifications, and utilize knowledge to develop programs to meet customized requirements;

Prepare flow charts and diagrams for programs, prepare write-ups to describe installation and operating procedures, and test software programs.

In response to the director's RFE, and concerns that the beneficiary may be performing unknown services at other client worksites, the petitioner stated that:

[T]he petitioner is software [*sic*] consulting company but also a software development company. Currently, the company is in the process of developing a new automated remote vaulting application called Online Backup & Recovery System (OBRS). The beneficiary is currently working onsite at TVS International Inc. in their Department of Software Engineering in the capacity of Programmer Analyst.

The petitioner asserts further in its response to the RFE that, as a programmer analyst, 30% of the beneficiary's time will be spent being, "responsible for a full range of programming duties, including, testing, developing and maintaining programs. Specifically, he will conceive, design and test logical structures as per programming specifications, including performing object-oriented and server-side programming." The petitioner asserts that 25% of the beneficiary's time will be spent converting the design, "into a logical series of instructions that the computer can follow," and that 20% of the beneficiary's time will be dedicated to coding, "these instructions in a conventional programming language such as Java technologies and C++." The petitioner asserts that 15% of the beneficiary's time will be spent updating, repairing, modifying and expanding existing programs, and the states that 10% of the beneficiary's time will be spent debugging and utilizing, computer-assisted software engineering tools to automate the coding process.

On appeal, the petitioner additionally asserts that the beneficiary would be:

[R]esponsible for a full range of programming duties, including, testing, developing and maintaining programs on the development of the new automated remote vaulting application called Online Backup & Recovery System (OBRS). This is a new software application which will be used for business purposes for the petitioner's clients. The company will develop and design it and market it to its vendors and clients for business purposes.

The petitioner provided a document entitled, "OBRS Project Plan" which describes the OBRS project and gives an overview of the idea behind the product. No other evidence relating to the OBRS project or its actual development and production by the petitioner was provided.

The petitioner made no mention of the OBRS product in its initial Form I-129 submission or prior to the director's issuance of a RFE based, in part, on the director's concern that the beneficiary would be performing services at other locations. In response to the director's RFE, and on appeal, however, the petitioner asserts that the beneficiary will work only on in-house product development of the petitioner's OBRS product. The petitioner submitted no independent evidence to establish that TVS International, Inc. is actually involved in the development, or production of an OBRS product. The petitioner's Form I-129 and letter of support state that the petitioner is an information technology and software consulting company. The letter makes no mention of in-house software production work at the petitioner's place of business. Moreover, the record contains no employee contract information or other independent evidence to corroborate the petitioner's assertion that the beneficiary will be employed as an in-house computer programmer analyst. Accordingly, the AAO is unable to determine whether the beneficiary will work on an in-house project at TVS International, Inc., what an in-house project would entail, or the length of time that the beneficiary would work on such a project. Simply going on record without supporting documentary evidence is not sufficient

for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the AAO notes that the Form I-129 indicates that as of the filing date in June 2004, the petitioner had three employees. The petitioner states that in 2003, it had one employee. The OBRS project plan revised September 2004, names ten employees reporting to three people, and the project team for the OBRS project names a minimum of fifteen positions involved in the development of the project. The petitioner has not established that it has the current resources to develop the OBRS project, or presented other information giving a phased development of the project with three employees.

The AAO additionally notes that the petitioner's Labor Condition Application (LCA), certified by the Department of Labor on June 18, 2004, indicates that the beneficiary's work location would be at 801 W. Big Beaver Road, Suite 500, in Troy, Michigan. The record also contains a copy of the petitioner's January 9, 2001, Michigan, Articles of Incorporation indicating that the petitioner's registered office is located at 801 W. Big Beaver Road, Suite 500 in Troy, Michigan. The record contains no other evidence, however, to establish that the petitioner's business is presently located in Troy, Michigan. Wage and Tax statements for 2003, and Employer's Quarterly Federal Tax Returns for 2004, contained in the record indicate that employees work for the petitioner at various locations in Charlotte, North Carolina. The petitioner's 2002 and 2003, Michigan Single Business Tax Annual Returns, and 2001 and 2003 U.S. Corporation Income Tax Returns, contained in the record reflect that the petitioner's business address is in Mylapore, Chennai, India. The director notes in his decision that independent research conducted by CIS revealed that a business other than the petitioner's is located at the 801 W. Big Beaver Road, Suite 500, Troy, Michigan address. The petitioner addresses none of these concerns on appeal.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location, when requested at the discretion of the director. A director maintains the discretion to request any evidence that he or she independently requires in order to adjudicate an H-1B petition, which may include contracts between a petitioner and the beneficiary or its client(s). See 8 C.F.R. § 214.2(h)(9)(i). The AAO finds that the director properly exercised his discretion to request an itinerary of employment in the present matter. See Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995). The AAO agrees that the evidence in the record does not establish where the beneficiary will work, or what the beneficiary will be doing. The record does not contain a complete itinerary of employment explaining the petitioner's work in multiple locations. Accordingly, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B).

For the reasons discussed below, the AAO finds that the petitioner has also failed to establish that the proffered position qualifies as a specialty occupation as defined in the Act and the regulations.

To determine whether the position duties described above are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The petitioner has characterized its position as that of a programmer analyst. The AAO therefore turns to the 2006-2007, *Handbook's* description of that occupation. The *Handbook* states on page 105, that, "programmer-analysts are responsible for both the systems analysis and the actual programming work." The *Handbook* states further on page 104, that computer programmers:

[W]rite, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test local structures for solving problems by computer.

....

Programmers write programs according to the specifications determined primarily by computer software engineers and system analysts. After the design process is complete, it is the job of the programmer to convert that design into a logical series of instructions that the computer can follow. The programmer codes these instructions in a conventional programming language such as COBOL; an artificial intelligence language such as Prolog; or one of the most advanced object-oriented languages, such as Java, C++, or ACTOR. . . . Many programmers update, repair, modify, and expand existing programs.

The *Handbook* discusses the position's educational requirements on page 105, and states in pertinent part that:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates.

The *Handbook* describes the computer systems analyst occupation on page 116, and states in pertinent part that:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems . . . that vary with the kind of organization.

....

In some organizations, *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas.

The *Handbook* discusses the computer systems analyst position's educational requirements on pages 116 and 117, and states in pertinent part that:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. . . . Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). . . . Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system analysts. The level of education and type of training that employers require depend on their needs. . . . Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills.

In the present matter, the petitioner has failed to establish where the beneficiary would work and what specific duties the beneficiary would perform, and the AAO finds that the duties of the proffered programmer analyst position as initially listed by the petitioner, are generic and provide no meaningful description of the specific tasks that the beneficiary would perform on a daily basis. The same lack of specificity is found in the petitioner's response to the director's request for evidence, and in the information submitted on appeal.

The AAO requires information about the specific duties of a proffered position in the context of the petitioning entity's business operations, in order to make a determination regarding the nature of that position and its degree requirements, if any. The present record fails to offer a detailed, meaningful description of the proffered position, or of the beneficiary's duties as they relate to the petitioner's, or its clients', businesses. Moreover, while both a computer systems analyst and a computer programmer position may require a baccalaureate degree in a specialty, the information contained in the *Handbook* reflects that a worker may enter either occupation with less than a baccalaureate degree, and that for those positions that require degrees, the degree may be in a broad range of backgrounds. Accordingly, the petitioner has failed to establish that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

The petitioner also failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which states that a "[d]egree 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."

To establish its degree requirement as an industry norm, the petitioner submitted several internet job advertisements for programmer analyst positions. The petitioner has failed to establish the specific duties and nature of the proffered position. The AAO is therefore unable to determine whether the internet positions are similar to the proffered position, and the AAO finds that the job advertisements do not establish the petitioner's degree requirement as the norm within its industry. The record contains no information from a

professional association in the petitioner's industry, and the record contains no letters or affidavits from firms or individuals in the industry attesting to the educational requirements of the proffered position. Moreover, the relevant educational requirement information contained in the *Handbook* reflects that, depending on the needs of the employer, the educational requirement for a programmer analyst position ranges from a two-year degree or certificate requirement, to a technical degree or degree in a variety of majors requirement, to a requirement for a bachelor's degree in computer science, information science or management information systems, and as discussed above, the petitioner has failed to establish the uniqueness or complexity of the proffered position. The petitioner has therefore failed to establish that the proffered position is a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has additionally failed to establish that the proffered position qualifies as a specialty occupation under the third prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), which states that, "the employer normally requires a degree or its equivalent for the position."

To determine a petitioner's ability to meet the third criterion, CIS reviews the petitioner's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In the present matter, the petitioner provides educational background information and copies of H-1B approval notices for beneficiaries [REDACTED] and [REDACTED] for whom the petitioner filed Form I-129s in the past. However, the record contains no employment contract or other evidence to establish that the previous H-1B nonimmigrant visa beneficiaries' were employed by the petitioner as on-site programmer analysts. Moreover, the H-1B approval notices do not refer to the employment positions on which the approvals were based, and the record contains none of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in the previous records of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the proffered position in the instant petition.

The AAO notes further that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). No other evidence was provided with regard to the petitioner's previous hiring practices in similar positions. The petitioner therefore failed to establish that the position is a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner also failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which states 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." As previously discussed, the description of the proffered position duties is too generic to determine the specific tasks that the beneficiary would perform on a daily basis. The petitioner

has provided no description of the specific tasks to be performed by the beneficiary, and the record contains no evidence to establish the specialized and complex nature of those tasks. This generic description makes it impossible to assess whether the proffered position's duties meet the specialized and complex threshold of the fourth criterion contained in 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petitioner has failed to demonstrate that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the above discussion, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed for an in-house project, or that the proffered position meets the requirements of a specialty occupation. The petitioner additionally failed to submit a complete itinerary of employment explaining the beneficiary's work in other locations. The burden of proof in nonimmigrant visa proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained its burden of proof in the present matter. The appeal will therefore be dismissed.

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