

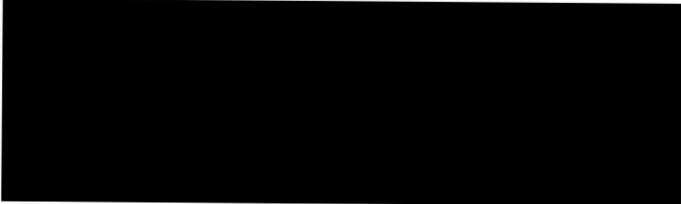
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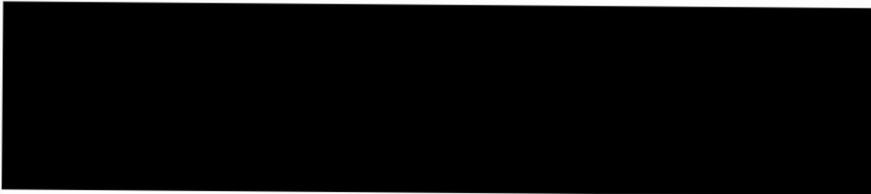


FILE: WAC 04 068 50400 Office: CALIFORNIA SERVICE CENTER Date: **MAR 08 2006**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 is an online retailer of automotive parts and accessories, with five employees. It seeks to employ the beneficiary as a network engineer 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 he determined the petitioner had failed to establish its proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's two requests for evidence; (3) counsel's responses to those requests; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety prior to reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

- (1) the theoretical and practical application of a body of highly specialized knowledge, and
- (2) 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.

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

The term “degree” in the above criteria is interpreted by CIS to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, 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 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, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as a network engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s December 16, 2003 letter in support of the petition; and its March 29, 2004 letter provided by counsel in response to the director’s first request for evidence.

As stated by the petitioner, the duties of the proffered position would require the beneficiary to:

- Plan, research, and maintain networks including all related hardware and software, ensuring all equipment complies with industry standards; introducing new technologies in server and infrastructure areas; planning and implementing future developments; and providing tactical design and technical support for network by developing systems plans and specifications, as well as project schedules;
- Install and configure work group on the network server and diagnose problems, requiring the installation and support of new server hardware and software network infrastructure; maintenance of both software and hardware; the identification and resolution of emergency network anomalies, as well as less critical network issues; the monitoring of system performance, including the definition of maintenance procedures and the responsibility for meeting operations requirements; and the design of networks and oversight of installation;
- Write test plans, and perform automated and manual test procedures applying knowledge in Windows XP and NT/2000 Professional networking environment, providing solutions and undertaking project work;

- Design and develop web sites, advising on networking issues, and managing the websites and maintaining internal networks;
- Diagnose and resolve applications on operating systems and LAN problems, including providing technical support to users; managing IP addresses; implementing and monitoring network security; issuing passwords and writing associated code; monitoring employee use of the web; and installing operating systems, email accounts, IP addresses, web browsers, local workstation network configuration and software configuration;
- Analyze server logs, conduct audits of systems on records and configuration information, requiring the development of documentation, including user guides and scheduling routine backup of system database; and
- Recommend innovative procedures and solutions to improve system efficiency, including updating as-built network documentation; maintaining the database for network configurations; and troubleshooting, repairing and upgrading all local area networks and wiring closets.

To determine whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 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)).

In his denial, the director, relying on the 2004-2005 edition of the *Handbook*, found the proffered position of network engineer to reflect the employment of computer support specialists and systems administrators. The AAO agrees.

As described by the petitioner, the duties of the proffered position are closely aligned to those performed by network or computer systems administrators. As described in the 2006-2007 edition of the *Handbook*:

Network administrators and computer systems administrators design, install, and support an organization's local-area network (LAN), wide-area network (WAN), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments, including professional offices, small businesses, government, and large corporations. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. These workers gather data to identify customer needs and then use that information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

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 the performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also trouble-shoot problems as reported by users and by automated network monitoring systems and make recommendations for enhancements in the implementation of future servers and networks.¹

With regard to the educational requirements imposed on individuals seeking employment as network or computer systems administrators, the *Handbook* states:

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. While there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; however, other jobs may require only a computer-related associate's degree. For systems administrators, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field.

A number of companies are becoming more flexible about requiring a college degree for support positions. However, certification and practical experience demonstrating these skills will be essential for applicants without a degree. The completion of a certification training program, offered by a variety of vendors and product makers, may help some people to qualify for entry-level positions. Relevant computer experience may substitute for formal education.

Based on the above discussion, the AAO finds no specific degree requirement to be attached to employment as a network or computer systems administrator. The *Handbook* states only that many employers require some type of formal college education, not that an academic requirement is the norm within the industry or that this education must, at a minimum, be a baccalaureate degree or its equivalent in a directly related field. Although the *Handbook* also indicates that many employers prefer applicants with degrees, employer preference is not synonymous with the normally required language of the first criterion. Instead, it proves only that employers find such degrees desirable, not that they require them. Moreover, the *Handbook* notes that employers who seek degreed systems administrators do not necessarily require job candidates to hold degrees in a directly related field, as required for classification as a specialty occupation. Accordingly, the proffered position may not be established as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel contends that the director confused the proffered position of network engineer with that of a systems analyst and points to the director's references to the occupation of systems analyst in his denial. The AAO notes counsel's concern, but does not find the director's initial references to the proffered position as a systems analyst to have affected his analysis of the proffered position's duties. Instead, it finds the

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos268.htm.

director's decision to have correctly identified the proffered position as aligned to the occupation of computer support specialists and systems administrators.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either 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 in the specific specialty. On appeal, counsel contends that the petitioner's previous submission of the results of its own research regarding the degree requirements of two of its competitors, copies of four Internet job advertisements and a letter from the beneficiary's previous employer establish the proffered position as a specialty occupation under the first prong of the criterion. The AAO does not agree.

The AAO notes that the petitioner in its March 29, 2004 letter responding to the director's first request for evidence identified two competitors as similar organizations and indicated they employed degreed network engineers. However, the petitioner has provided no documentation to support its claims. Simply going on record without supporting documentation is not sufficient to meet 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)). Accordingly, the record does not establish these businesses as similar organizations or their network engineer positions as parallel to the proffered position. The AAO also notes that the petitioner's letter, although it indicates that its competitors require degrees, does not indicate that they require degrees in a field directly related to their employment, as required for classification as a specialty occupation.

The four Internet job advertisements submitted by the petitioner also fail to establish the petitioner's degree requirement as an industry norm. None of the four announcements come from organizations that are similar to the petitioner, an on-line retailer of automotive parts and accessories. Instead, the announcements are published by two information technology companies, a consulting business, and a firm that does not identify the industry in which it operates. Only one of these announcements describes employment that might be considered parallel to the proffered position and that advertisement states only that a degree may be required, not that it is required. As a result, none of the Internet job announcements describe employment that meets the dual requirements of the first prong, i.e., employment that is both parallel to the proffered position and is found in similar organizations.

The same deficits are found in the April 28, 2004 letter provided by the beneficiary's employer. Although the letter indicates the duration of the beneficiary's employment, it does not provide a description of the duties he performed as a network engineer between June 1, 2002 and May 15, 2004. Accordingly, it does not establish his prior employment as parallel to the proffered position. The letter also fails to provide a description of the prior employer's business, nor is it accompanied by any documentation that would establish the employer's similarity to the petitioner. Therefore, the letter does not satisfy the requirements of the first prong. The AAO notes, however, that even if the letter established the beneficiary's former employer as an organization similar to the petitioner and his previous employment as parallel to the proffered position, the practices of a single employer would be insufficient to establish an industry-wide degree requirement.

The AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) -- the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific 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.

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 names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. On appeal, counsel contends that the petitioner's vacancy announcement for the proffered position, submitted in response to the director's first request for evidence, demonstrates its normal hiring practices with regard to the proffered position. Again, the AAO does not agree.

While the job announcement submitted by the petitioner does indicate that job candidates seeking employment in the proffered position must hold a bachelor's degree in computer or electronic engineering or the equivalent, it is insufficient to establish the petitioner's normal hiring practices. Instead, the AAO has reviewed the record to determine whether it demonstrates that the petitioner's president and chief executive officer, identified in a March 2, 2004 letter from the petitioner's director as having previously performed the duties of the proffered position, holds a computer-related degree. It does not.

The AAO has found the record to indicate only that the president holds a baccalaureate degree, not a baccalaureate degree in a computer-related field. The letter written by the director states that the president "holds a bachelor's degree in the field," but does not identify the field to which she refers. The list of the names, titles and duties of the petitioner's staff included in the record, which also discusses the educational background of each employees, identifies the president as holding a bachelor's degree from the University of Southern California (USC), but fails to indicate the specific degree he was awarded. The petitioner has provided no other documentation related to the president's academic background, e.g., a copy of the petitioner's diploma or similar certification of his USC degree. Accordingly, the record does not prove that the petitioner previously required a computer-related degree for the proffered position and, therefore, does not establish the position as a specialty occupation based on the petitioner's normal hiring practices.

In assessing whether the petitioner has met its burden with regard to the fourth criterion -- the nature of the specific duties is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree -- the AAO has again reviewed the duties of the proffered position, as described by the petitioner in its March 29, 2004 response to the director's request for evidence. It finds no evidence in the record that would indicate that the tasks to be performed by the beneficiary would require the beneficiary to have greater knowledge or skill than that normally needed by a network or computer systems administrator. Nor does the record establish that the proffered position

represents a combination of jobs that would require the beneficiary to have a unique set of skills other than those possessed by a network or computer systems administrator. Accordingly, the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel notes the computer-related academic courses taken by the beneficiary for his baccalaureate degree and contends that it is “inconceivable” that the duties of the proffered position could be performed by an individual who does not hold a baccalaureate degree in a computer-related field. The record, however, contains no evidence to support counsel’s statements, e.g., expert opinions regarding the complexity of the duties that would be performed by the beneficiary. Without supporting documentary evidence, the assertions of counsel are insufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In reaching its decision, the AAO has noted that the record contains evidence indicating that the beneficiary, at the time of filing, was the beneficiary of an H-1B petition filed by a previous employer. CIS approval of a prior Form I-129 on behalf of the beneficiary does not, however, provide a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) or at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, 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.