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FILE: EAC 05 229 53890 Office: VERMONT SERVICE CENTER Date: **JAN 31 2008**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 in the food and dairy industry and was established in 1990. It employs an indeterminate number of employees and has an estimated \$1,300,000 stated gross income.¹ It seeks to employ the beneficiary as a computer 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 failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the Form I-290B, counsel's appeal brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 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.

¹ Although the Form I-129 states that the petitioner employs 20 individuals, on appeal, counsel includes a list of 15 employees.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner states that it is seeking the beneficiary’s services as a computer systems analyst. Evidence of the beneficiary’s duties is limited to the petitioner’s response to the RFE which states the following duties:

Analyze software requirements to determine feasibility of application or design within time and cost constraints. Formulate and define scope and objectives through fact-finding to develop or modify software programming applications or information systems. Effort approx. 25%

Consult other staff to evaluate interface between hardware and software, and operational and performance requirements of the overall system. Effort approx. 5%.

Formulate and design software system, using scientific analysis to predict and measure outcome and consequences of design. Includes preparation of functional specifications and designing of software programs and website for the company. Build detailed design specs., and programs for scientific and business application. Design data conversion software programs. Effort approx. 35%

Develop and direct software systems testing procedures, programming and documentation. Also include testing units and computer software systems, design and develop report system, generate various reports, prepare business reports, user manuals and instruction manual. Approx. 25%.

Coordinate installation and troubleshooting of the software system. Approx. 5%

Maintain [the] software system. Approx. 5%

To make its determination as to whether the employment described in the record 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) which require that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, or that 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)).**

In determining whether a proposed 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.

The AAO first turns to the *Handbook* for its discussion of computer systems analysts. As stated by the *Handbook*, computer systems analysts:

solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems' resources to additional tasks....

The duties of the proffered position, as described by the petitioner, are not like those described above for a computer systems analyst and instead are more similar to the *Handbook's* description of the duties of a computer systems administrator. As stated by the *Handbook*, computer systems administrators:

design, install, and support an organization's computer systems. They are responsible for local-area networks (LAN), wide-area networks (WAN), network segments, and Internet and intranet systems. They work in a variety of environments, including professional offices, small businesses, government organizations, and large corporations. They maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to system users. These workers gather data to identify customer needs and then use the

information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

Systems administrators are responsible for maintaining network efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Furthermore, they monitor and adjust the performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades.

The *Handbook's* information about the qualifications of computer systems administrators is as follows:

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.... For systems administrator jobs, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field.

The *Handbook* reports that a baccalaureate degree is the minimum educational requirement for computer systems administrator jobs. It does not however, indicate that the degrees held by candidates must be in a field directly related to computer systems as required for classification as a specialty occupation. In addition, the *Handbook* states that "when hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree." The *Handbook* does not indicate that a baccalaureate degree is required, but rather that employers prefer applicants with degree. Accordingly, the listed duties do not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Based on the evidence in the record, the AAO finds that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish its degree requirement as the norm within its industry under the first prong of the second criterion, counsel does not submit any documentation. In his appeal brief counsel states that "it should be emphasized that it has been long established that the requirement of a degree in computer applications is normally required in similar organizations for the position of systems analyst." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, the proffered position has not been established as a specialty occupation based on an industry-wide degree requirement. The petitioner has not satisfied the first prong of the criterion at 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 that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations not requiring a degree in a specific discipline. Consequently, the petitioner fails to establish the second alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually 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. The petitioner has stated that this is a new position; therefore, eligibility under this criterion cannot be established.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F.3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. On appeal the petitioner indicates for the first time that the petitioner has three businesses and that the beneficiary would have been responsible for the entire operations. The petitioner submits a purchase order between itself and Joemak, Inc. and a second with JN 516 Corporation. The job duties to be provided by the beneficiary are identical but do not detail the duties in relation to the business entities. Neither of the new descriptions nor the one submitted in support of the original petition establish that the knowledge required to perform the duties requires a degree in computer systems or a related field. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. 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)).

The petitioner failed to establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that the AAO has already determined that the proffered position is a specialty occupation since the AAO has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 a 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 petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition 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).

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.

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.