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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 139 50557 Office: CALIFORNIA SERVICE CENTER Date: **MAY 02 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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 states on the Form I-129 that it provides information technology services, that it employs 15 personnel, and had \$800,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a programmer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the petitioner had failed to demonstrate that there is a credible offer of employment consistent with the needs of the petitioner. On appeal, counsel for the petitioner submits a brief and documentation.

The record of proceeding before the AAO includes: (1) the Form I-129 filed April 2, 2007 and supporting documentation; (2) the director's May 4, 2007 request for evidence (RFE); (3) counsel for the petitioner's June 4, 2007 response to the RFE; (4) the director's June 29, 2007 denial decision; and (5) the Form I-290B, counsel's brief, the petitioner's organizational chart, the petitioner's bank statements, and photographs of the petitioner's business in support of the appeal.

To meet its burden of proof in this regard, the 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 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 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, 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 seeks the beneficiary's services as a programmer. In a March 20, 2007 letter appended to the petition, the petitioner stated it "is a leading international IT service provider that develops and delivers intuitive, flexible, scalable solutions to retailers" and that it offered a number of customer services software modules for sale. The petitioner provided copies of pages from its website listing its products (software modules) and services, including system integration, Microsoft product installation and setup, and Cisco router/switch setup. The petitioner indicated that the beneficiary, in the proffered position, would design and develop customer service modules using ASP, ASP.NET, VB, JAVA, or other development tools. The petitioner listed the beneficiary's responsibilities as:

- Design, develop, implement, and maintain our customer service modules;
- Given a detailed design, analyze user specifications and requirements and encode, test, debug, and document programs on complex projects;
- Revise and update programs and documentation as required;
- Interface with business analyst to obtain requirements and to provide best practice recommendations;
- Coordinate, develop and execute complex project plans independently as well as with a team;
- Document call flow configurations and call flow charts;
- Perform other duties as assigned.

On May 4, 2007, the director requested copies of the petitioner's 2005 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, California State Quarterly Wage Reports, and the petitioner's valid business licenses.

In response, the petitioner provided its 2005 IRS Form 1120 showing that it was an import and export company and that it sold merchandise and its 2006 IRS Form 1120 showing that it was involved in logistics and information technology and that it provided services. The petitioner also provided a copy of its business license for the 2007 year showing that it was a food distributor.

On June 29, 2007, the director observed that the evidence in the record showed that the petitioner had addresses in Irvine, Commerce, and Costa Mesa, California and that the only business license submitted showed the petitioner in the business of food distribution. Upon review of the proffered position and the inconsistencies regarding the nature of the petitioner's business, the director found that the petitioner had not shown that it had a credible offer of employment for a specialty occupation position to proffer to the beneficiary. The director determined that there was insufficient evidence provided to justify the petitioner's need for the beneficiary's services in a specialty occupation.

On appeal, counsel for the petitioner asserts that while the petitioner's primary business is providing information technology services, it also provides container hauling from terminals, warehousing, cold storage and distribution, transloading, and transportation. Counsel contends that as the petitioner's business continues to expand there is a great need for the beneficiary's services to design and develop customer service modules using AST, ASP.NET, VB, JAVA and other developmental tools. The petitioner submits an organizational chart depicting three departments including administration, information technology, and warehouse. The organizational chart shows one person employed in the administration department; the beneficiary and four individuals employed in the information technology department; and 13 to 15 individuals employed in the warehouse department.¹ The petitioner also provides copies of its bank statements and photographs of its business premises. Counsel contends that the company's profile, warehouse pictures, and bank statements all indicate that the petitioner's business is expanding and growing as it continues providing IT services. Counsel also notes that the beneficiary holds a master's degree in computer science from a United States university.

Counsel's assertions are not persuasive. The record in this matter does not contain evidence substantiating that the petitioner's business is expanding. The petitioner has not provided contracts for services or products; the petitioner has not provided copies of invoices or billing statements; the petitioner has not provided any type of documentary evidence establishing the petitioner's actual expansion into the information technology area. Going on record without supporting documentary evidence is not sufficient for purposes 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 has failed to explain how the photographs of the petitioner's warehouse business and the bank statements reveal the source of the petitioner's funding or demonstrate the petitioner's expansion into the field of information technology.

In addition, the AAO has reviewed the petitioner's 2007 third quarter state employee wage report, the quarter in which the petition was filed, and attempted to compare the employees names on the wage report to the petitioner's organizational chart submitted on appeal. The AAO does not find any of the four first names listed on the petitioner's organizational chart as individuals employed in the information technology

¹ The petitioner identifies the employees on the organizational chart using only first names, thus the AAO is unable to ascertain the exact number of employees and whether some individuals hold two or more positions.

department, also listed in the petitioner's 2007 third quarter state employee wage report. Thus, the petitioner has failed to substantiate that it employs individuals, other than the beneficiary, in an information technology department.

The AAO acknowledges that the petitioner's profile as indicated on its website suggests that the petitioner's business includes selling software technology and the installation of the software technology; however, the profile does not provide concrete information regarding the petitioner's foray into the sale and provision of these services. Without sales receipts, purchase orders, or invoices regarding the sale and installation of software, the record is insufficient to establish that the petitioner's business has progressed into the information technology field. Moreover, even if the petitioner has plans to sell, install, and service software modules, the record does not establish that the petitioner's United States business is involved in the design of software. The record does not contain evidence that the sale, installation, and servicing of the petitioner's software modules requires a specialty occupation position in the field of computer technology.

The AAO has reviewed the description of the duties of the proffered position and the nature of the petitioner's business to determine whether the proffered position is a specialty occupation. When 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.

The AAO first considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The Department of Labor's 2006-2007 *Occupational Outlook Handbook (Handbook)* indicates: "Computer programmers write, test, and maintain the detailed instructions, called programs that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer."

The AAO finds that the petitioner's description of the proffered position corresponds generally to the duties of a computer programmer. However, a petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a programmer writes programs; a computer systems analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. In this matter, the petitioner has described the duties of the position in generalities, without specific descriptions of the duties as the duties relate to the petitioner and the nature of its business and without documentary evidence of the specific projects the beneficiary would be engaged in.

Moreover, the *Handbook* indicates that there is no universally accepted way to prepare for the position of a computer programmer and that although bachelor's degrees are commonly required, some programmers may qualify for certain jobs with two-year degrees or certificates. In this matter, the petitioner's general description of the types of duties the beneficiary would perform for the petitioner coupled with the inconsistent and deficient information regarding the nature of the petitioner's business precludes a

determination that the petitioner's business requires an individual with a four-year bachelor's degree in computer technology. The record does not contain sufficient evidence to demonstrate that the individual in the proffered position would be performing duties equivalent to a programmer with a four-year degree in a specific discipline.

The petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the generally described proffered position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: 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 not submitted any letters, job advertisements, or other evidence of its industry's standards regarding the use of computer programmers, the required degree, if any for such a position, and whether similar organizations "routinely employ and recruit only degreed individuals." Accordingly, the record does not demonstrate that a degree requirement is common to the industry in parallel positions among similar organizations. In the alternative, the petitioner may submit evidence under the second criterion to establish that the duties of the proffered position are more complex and unique than those of a general computer programmer. The petitioner's general description of the duties of the proffered position and the lack of information relating to the design of software as well as the nature of the petitioner's actual business do not allow a conclusion that any of the actual duties of the position are unique or complex. The petitioner has not established that the proffered position qualifies as a specialty occupation pursuant to either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO observes that the petitioner has not provided evidence that it has previously hired a programmer. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. 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. 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 at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish 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. Again, the AAO observes that the

petitioner's description of the duties of the proffered position as those duties relate to the petitioner's specific requirements and business needs do not reveal any specialized or unique component that would elevate the proffered position to that of a specialty occupation. The petitioner has not satisfied the requirement of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. It is not possible to conclude from the evidence in the record regarding the proffered position as it relates to the petitioner's business that the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO has determined that the proffered position is not 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.