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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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DA

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, NW
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



FILE: WAC 01 271 55577 Office: CALIFORNIA SERVICE CENTER

Date: *AUG 05 2003*

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner stated in the documents submitted with the I-129 petition that it is a group health care provider, which provides health care services for various patients. In its response to the director's request for evidence, the petitioner stated that it is a management and collection agency representing doctors in worker's compensation claims. In the I-129 petition, the petitioner stated that the current number of employees was zero. In the response to the request for evidence, the petitioner stated that it had three employees. Its gross annual income is \$250,000. It seeks to temporarily employ the beneficiary as a software engineer for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the Bureau erred in determining that the position is not a specialty occupation.

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 8 C.F.R. § 14.2(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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a bona fide position in a specialty occupation. In the original petition received by the California Service Center on August 23, 2001, the petitioner described the duties of the proffered position as follows:

[D]esign, develop and maintain [the] computer software system using principles and techniques of computer science, engineering, and mathematical analysis. [The beneficiary] will consult with [the] hardware engineers to evaluate interface between software and hardware. He will also be responsible for setting-up [sic] our company web-page [sic] on the Internet and maintaining it as well.

On October 27, 2001, the director requested additional evidence, specifically that the petitioner:

Provide a detailed description of the work done, including specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, types of employees supervised, and the minimum education, training, and experience necessary to do the job. Also, explain why the work done requires

the services of a person who has a college degree or its equivalent in the occupational field.

In its response to the director's request for evidence, the petitioner did not expand on the specific job duties or provide a detailed description of the work to be done. The response restated the previous position description and then added the following:

[I]t is extremely difficult to give the percentage of time to be spent on each of the above functions, except to state that each function must be performed each week, but with the percentage of time changing for each individual function each week. It should also be noted that previously above it has been explained why the work described above to done [sic] requires the services of a person who has a college degree. Further the beneficiary will not be supervising anyone.

The information which the petitioner refers to as having been used to explain the need for a college degree in this position includes references to the Department of Labor's *Dictionary of Occupational Titles* for the position of software engineer.

The Bureau does not dispute that a bona fide position of software engineer requires a beneficiary to have a baccalaureate degree. It is not clear in this case, however, that there is a bona fide position. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The actual duties, rather than a position title, determine whether a position is a specialty occupation. The petitioner has not submitted enough information to make an affirmative determination. The position description is almost directly from the Department of Labor's *Occupational Outlook Handbook (Handbook)*. There is no detail about the actual day-to-day duties and responsibilities of the position. The petitioner did not provide in depth information as to how this business would utilize a software engineer. Without this information, most of which was previously requested by the director, the petitioner has not met its burden of proving that there is a bona fide position. As a result, it is not possible to apply the criteria from 8 C.F.R. § 214.2(h)(4)(iii)(A) to assess whether the position qualifies as a specialty occupation.

The Bureau also notes several inconsistencies in the petitioner's statements. The petitioner described its business in a letter from the treasurer, [REDACTED] D.C., dated August 16, 2001 and submitted as part of the original petition, as "a group health care provider which provides health care services for our various patients." In a letter from the same person, dated February 4, 2002, as part of the response to the director's request for evidence, the business is described as "a management and collection agency representing doctors in worker's compensation claims. In addition, it is involved with software development with regards to management and collection of such claims" These are two very different businesses, one allegedly providing direct health care and the other a collection agency for doctors. The petitioner never addresses the change of business purpose.

In addition, in the original petition received by the California Service Center on August 23, 2001, the number of employees of the company is listed as zero. In the February 4, 2002 letter, Dr. Taghavi states that the company has three employees. Again, the discrepancy is never addressed.

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). In this case, the petitioner did not make any attempt to resolve the inconsistencies.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.