

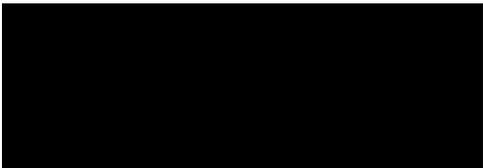
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
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Washington, DC 20536



NOV 19 2003

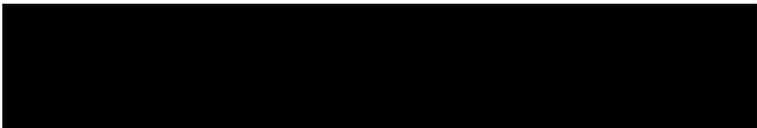
Date: NOV 19 2003

File: WAC 02 037 50693 Office: CALIFORNIA SERVICE CENTER

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Identifying data deleted to prevent identity and prevent invasion of personal privacy

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 Citizenship and Immigration Services (CIS) 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 is a medical group that consists of a medical office with two other affiliated businesses. It has 23 employees and a gross annual income of \$2,800,000. It seeks to temporarily employ the beneficiary as a computer programmer 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 proffered position is a specialty occupation. Counsel submits further evidence with regard to the petitioner's current staff and its business activities, and the academic qualifications for other computer programmers/applications programmers employed in similar jobs.

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. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 specialty occupation. In the original petition received by the California Service Center on November 8, 2001, the petitioner described the duties of the proffered position as follows:

1) Installs billing, invoicing and inventory software and tests, maintains, and modifies software.

2) Monitors loading and running instructions for system software, including task scheduling, memory management, computer file system, or controlling computer input and output, and loads tape into tape drive or transfers software to magnetic disk.

3) Conducts tests of system program and observes readout on monitor of computer system to detect errors or work stoppage. Enters code changes into computer system to correct errors. Designs systems to monitor cost improvements, inventory, cost and history of purchases, troubleshoots hardware configurations and software configurations.

4) Analyzes performance indicators, such as computer's response time, number of transactions per second, and number of programs being processed at once, to ensure that system is operating efficiently.

5) Changes system software so that system performance will meet objectives. Reviews computer system capabilities, workflow, and scheduling limitations to determine if requested changes to operating system are possible.

On January 24, 2002, the director requested further evidence. In particular, the director requested a detailed statement on the beneficiary's proposed duties and responsibilities and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested more evidence

with regard to types of employees being supervised, and the minimum education, training and experience necessary to do the job.

In response, the petitioner submitted the following breakdown of the beneficiary's responsibilities:

As [a] computer programmer, [the beneficiary] will be responsible for installing and modifying all software programs and databases, as well as training personnel in the use of programs, databases and upgrades.

[The beneficiary] will spend 40 [percent] of her time, or 16 hours per week, installing and programming the Object Database Connectivity (ODBC) [i]nterfaces, which integrates and makes available to all of our system users electronic medical records information, practice management [,] and billing information.

[The beneficiary] will spend an additional 40 [percent] of her time, 16 hours, making changes to system software to improve performance, and supervising and training users (including [p]hysicians, medical assistants, [n]urses and reception staff) of the electronic medical records system and other programs, as required.

[The beneficiary] will spend 10 [percent] of her time, or four hours per work, programming and maintaining all structured and query language databases, and another 10 [percent] of her time analyzing performance indicators and troubleshooting all workstations and servers to ensure that [the] system is operating efficiently.

The petitioner added the following statement:

Our computer programs and databases a[re] vital to the successful operation of our medical office, [as they] stor[e] information on thousands of patients' medical conditions, diagnoses, medicines, allergens and other information. We could not trust this important position to a person lacking a b]achelor's [d]egree in computer science, and we insist that this minimum educational requirement is usual and normal in the industry.

On May 8, 2002, the director denied the petition. The director cited to the computer programmer classification contained in the Department of Labor's (DOL) *Occupational Outlook Handbook* (Handbook), 2000-2001 edition, which stated, "to start as an applications programmer, an experienced person may not need a college degree," and "employers who use computers for business applications prefer to hire people who have had college courses in programming and business; however, all employers do not require a bachelor's degree." Based on these *Handbook* statements, and the fact that the petitioner had not submitted any additional

documentation to establish other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director denied the petition.

On appeal, counsel states that the 2000-2001 edition of the *Handbook* contains a limited discussion of the job duties of computer programmers. Counsel also states that the administrative case law explicitly states that, in given instances, occupations considered to be in transition from non-professional to professional status must be accorded H-1B visa status.

Counsel submits two letters from individuals with regard to the academic credentials required for the proffered position. The first letter is written by [REDACTED] President, Topnotch International Services, Inc., a job placement agency. The second letter was written by [REDACTED] identified as a PhD in computer science, and also, director, International Credential Evaluators, in Norman, Oklahoma. Dr. [REDACTED] stated that he reviewed the job duties for the proffered position. He then stated that, aside from persons with years of programming experience who entered the information technology industry at its inception, the only people who would be able to perform the duties of the proffered position would be holders of baccalaureate degrees in fields such as computer science, management information systems, and computer engineering.

Counsel also submits the State of California, Employment Development Department, description of the computer programmer classification. This document states:

The majority of computer programmers have a bachelor's degree in computer science, mathematics, or information systems. Because programming tasks are becoming more complex, employers are beginning to require programmers to have a four-year degree. . . . Companies that use their systems for business applications favor college graduates with a concentration in management information systems (MIS), or business.

In addition, counsel states that the petitioner has employed [REDACTED] a computer programmer with a bachelor of science degree in computer science, for the past seven to eight years. Counsel submits a copy of Mr [REDACTED] baccalaureate diploma and states: "[T]he services of [the] beneficiary is [sic] necessary in order to assist our [s]enior [p]rogrammer[.]" Finally, counsel submits over twenty job vacancy announcements taken from the Internet for positions ranging from senior programmer to applications programmer to webmaster. The majority of job positions require a bachelor of science degree in computer science or a closely related field or substantive years of experience in particular computer-based office applications with coursework in computer science.

In a separate letter, the petitioner provides the following explanation of the complexity of its present business operation:

There are two separate entities that are affiliated with the Stewart Medical Group. Stewart Medical Group is a professional corporation with a medical practice of over 10,000 patients.

Advanced Primary Care Network, an Independent Physician Association, is a separate corporation that processes the claims and billings on behalf of 20-25 other doctors utilizing our comprehensive billings and claims system. As such, more doctors are wishing to access our state-of-the-art networking system on their behalf.

Stewart & Stewart Management is a separate entity whose main functions are processing claims, utilizations and contracts management.

The petitioner also provides an expanded description of the proffered position that contains new job responsibilities in the area of computer program development. For example, the petitioner states that the beneficiary would be developing programs, using, among other programming tools, Visual C++, Visual Basic, JAVA, Linus, Soap software (for electronic medical records and charting systems), Lytech 2000 (for patient accounting and billing purposes), PDR (for patients' education/recommendation/therapy record keeping), as well as other comprehensive programs designed to facilitate program interface and data transferring on an as-needed basis. The petitioner also mentions that the beneficiary would be equally responsible for developing programs that allow the petitioner to properly access extensive financial, insurance, medical, patient, invoice tracking, marketing and other business related information that would need to be reviewed at any given time.

Finally the petitioner states that a non-degreed person would have enormous difficulty in carrying out the many duties of the job, and the employment of such a person could prove disastrous to the many medical practitioners who have retained the petitioner to carry out their own billing systems for their particular offices.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), namely that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the applications or computer programmer positions, on page 167, the 2002-2003 edition of the *Handbook* states the following with regard to educational requirements for applications programmers:

While 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. . . . In absence of a degree, substantial specialized experience or expertise may be needed. Even with a degree, employers appear to be placing more emphasis on previous experience, for all types of programmers.

The record is not clear as to whether the proffered position is that of a computer programmer or applications programmer position as described in the *Handbook*. The original petition submitted by the petitioner outlined job duties primarily in software maintenance. This position would not necessarily be considered a specialty occupation. On appeal, the petitioner submitted a significantly expanded job description that contained new duties involving computer program development indicating much more senior responsibilities.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(12). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. For this reason, only the job description submitted in the original petition is examined in this proceeding.

Upon examination of this original job description, the proffered position, which primarily focuses on maintenance of software systems and already existing computer programs, does not appear to be a specialty occupation. Without more persuasive evidence, the petitioner has not established the first criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). In addition, the vacancy announcements submitted by the petitioner on appeal appear to be for much more senior job positions that would not be considered parallel positions to the proffered position. Thus the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that documentary evidence submitted by the petitioner describes the proffered position as a job subordinate to the present senior programmer position within the petitioner's business, the petitioner also has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Based on the petitioner's initial description of its business activities as a medical office, and on the fact that the petitioner provided no further information as to the complexity of its business operations in the original petition, it also has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As stated previously, CIS regulations affirmatively require a petitioner to

establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(12). Without more persuasive testimony, the petitioner has not established that the proffered position is a specialty occupation.

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.