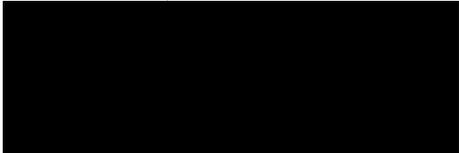


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U.S. Department of Homeland Security
Citizenship and Immigration Services

identifying data deleted to
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invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: WAC 02 126 53362 OFFICE: CALIFORNIA SERVICE CENTER

DATE: OCT 16 2003

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electronic assembly and testing services company that employs 20 persons and has a gross annual income of \$10,000,000. It seeks to employ the beneficiary as a computer support specialist. The director denied the petition because the position is not a specialty occupation.

On appeal, counsel submits a brief with copied excerpts from the 1998-1999 Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Counsel asserts that the position of computer support specialist involves complex job duties that can only be performed by an individual with a degree in the field.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

The petitioner asserts that the computer support specialist position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In its initial petition, the petitioner's support letter, dated February 27, 2002, detailed the job duties to be performed by the beneficiary as follows:

The computer support specialist will provide software systems technical support to staff. He is required to resolve user issues by testing products[;] troubleshoot[ing] problems[;] and determin[ing] resolutions through email or phone calls. He also needs to develop and coordinate projects and assignments[;] evaluate cost and time requirements[;] modify and test existing programs and vendor-supplied software packages[;] and develop and maintain databases.

The petitioner required a bachelor's degree in computer engineering or a related field.

Subsequent to the filing of the petition, the director requested from the petitioner a detailed job description; the percentage of time to be spent on each duty; the beneficiary's level of responsibility and hours per week of work; the types of employees supervised; the minimum education, training, and experience necessary to do the job; and an explanation why the work requires an individual with a college degree or higher in the occupational field. In response to this request, the petitioner provided the following job description:

The company is hiring [a] computer support specialist within [the] Department of Information Technology to provide software systems technical support to staff and customers. This is an entry-level position working 40 hours per week and has no supervisory responsibilities.

Specifically, the job duties and percentage of time spent on each duty are listed as the following:

- (1) Resolve user issues by testing products, troubleshooting problems and determin[ing] resolutions through email or phone calls (10%);
- (2) Via telephone or in person, confer with users having problems using computer software and hardware, or inquire[sic] about the use of specific software, including statistical graphics,

- database, printing, word processing, programming languages, electronic mail, and operating systems (25%);
- (3) Coordinate with software and hardware vendors concerning new products, updates, upgrades, technical support, and services for defective products (10%);
 - (4) Keep abreast of developments in computer technology (5%);
 - (5) Test software and hardware to evaluate ease of use and whether a product will aid users in performing work (15%);
 - (6) Write or revise user training manuals and procedures (5%);
 - (7) Develop and coordinate projects and assignments[;] evaluate cost and time requirements (10%);
 - (8) Design and develop a personal computer user support database to track all calls and contacts (10%); and
 - (9) Provide users with information on software/networking guidelines and follow the guidelines when installing hardware and software on the user's computer (10%).

Additionally, the petitioner quoted the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 1998 edition, under the section for "Computer Scientists, Computer Engineers, and Systems Analysts" at pages 109-112, to assert, "a bachelor's degree is virtually a prerequisite for most employers." Finally, the petitioner referenced prior approved petitions "filed by [sic] companies in [the] computer industry for similar positions requiring [a] bachelor degree in the field (Image Micro Technologies, WAC-01-269-58844; Maxspeed Corp., WAC-98-058-52677)."

The director denied the petition because the duties described by the petitioner in its proffered position were not complex. The director characterized the position as a programmer/analyst position and quoted the *Handbook*, 2000-2001 edition, as not requiring a college degree to enter into the field.

On appeal, counsel reiterates the description of duties in the proffered position and then states, "[w]hen executing the job, a competent worker needs to be familiar with systems and proficient in MS Window Server, JavaScript, UNIX, Visual Basic, SQL, ASP, HTML, and Database Management Systems that can only be obtained through formal education." The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence by the petitioner has been presented that the

position's duties include those asserted by counsel.

Additionally, counsel uses the 1998-1999 *Handbook* edition to reiterate the petitioner's prior statement that "a bachelor's degree is virtually a prerequisite for most employers." The AAO notes that counsel is relying upon an outdated version of the *Handbook*. The AAO relies upon the most recent version of the *Handbook*, particularly for occupations within the computer industry that may change.

The petitioner has not met any of the requirements to qualify the offered position as a specialty occupation. The position is most analogous to a computer support specialist position as delineated in the *Handbook*; however, a computer support specialist position is not a specialty occupation.

The *Handbook*, 2002-2003 edition, at page 172, describes the duties to be performed by a computer support specialist as follows:

Computer support specialists provide technical assistance, support, and advice to customers and other users. This group includes *technical support specialists* and *help-desk technicians*. These troubleshooters interpret problems and provide technical support for hardware, software, and systems. They answer phone calls, analyze problems using automated diagnostic programs, and resolve recurrent difficulties. Support specialists may work either within a company that uses computer systems or directly for a computer hardware or software vendor.

A review of the *Handbook*, at page 173, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a computer support specialist:

Due to the wide range of skills required, there are a multitude of ways workers can become a computer support specialist or a 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 degree.

The *Handbook* clearly shows that a computer support specialist does not require a bachelor's degree in a specific field of study to enter into the position. Instead of specifying a specific field of

study required to enter into the field, the *Handbook* delineates a multitude of educational backgrounds that could be preferred but not required by prospective employers. Additionally, an individual with a two-year post-secondary school degree could be accepted for a computer support specialist position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard include: whether the *Handbook* 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that computer support specialists require a degree. The record does not contain any evidence concerning an industry professional association or expert affidavits.

The petitioner and counsel referenced other approved petitions as evidence that a degree requirement is common to the industry in parallel positions among similar organizations. However, the AAO has not received any evidence concerning the description of duties within those petitions and the specific nature of operations of the petitioners. There is no evidence in the record to support that a degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. The petitioner offered no evidence concerning its past hiring practices for the proffered position. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties are usually associated with the attainment of a baccalaureate or higher degree. The position involves communicating with users to ascertain problems that are resolved over the phone or e-mail; gathering information about problems to store in a database; testing and troubleshooting software and hardware; redoing training manuals; and coordinating with vendors about new products and updates. These are not complex

duties that require the application of specialized and complex knowledge. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.