

U.S. Department of Homeland Security

Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



OCT 23 2003

File: EAC 02 042 50290 Office: VERMONT SERVICE CENTER Date:

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)

IN 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 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 Director of the 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 a computer consultant business that employs 100 persons and has a gross annual income of \$10,000,000. It seeks to employ the beneficiary as a programmer analyst. The director denied the petition on the basis that the beneficiary is not qualified to work in that position.

On appeal, counsel submits a brief and additional evidence.

The director's denial letter explicitly concluded that the proffered position is a specialty occupation, and denied the petition because the beneficiary was not qualified to serve in the specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In denying the petition on the basis of the beneficiary's qualifications, the director stated, in part:

In response [to the director's request for additional evidence] the petitioner submitted an education evaluation, which states that that the beneficiary's education is equivalent to a Bachelor of Science degree in Mining Engineering. That was really not in question. The concern is whether that degree is closely related to the position of the programmer analyst. The petitioner has submitted no evidence, such as a college transcript, that could show the degree is related. The petitioner has stated that the beneficiary has completed a diploma course in computer programming. But there is no evidence of this nor can it be established that this one course plus an unrelated degree equates to a four-year baccalaureate degree in computer science or something closely related. Finally, the beneficiary [sic] notes that the beneficiary has many years of work experience. However, no employment letters were submitted with the petition or request for additional information. Also, this experience, as described by the petitioner, is not in the computer programming field. Rather, it is in the field of mining engineering. While the petitioner has established that the petitioner is qualified for a position in the "specialty occupation" of mining engineering, there is insufficient evidence to show that the beneficiary is qualified for the position of programmer/analyst.

In conclusion, the position of programmer/analyst generally qualifies as a "specialty occupation." The position requires a four-year baccalaureate in computer science or something closely related. The petitioner has also failed to establish that the degree of the beneficiary combined with his experience and supplemental coursework is equivalent to a four-year degree in computer science.

Counsel's brief on appeal maintains that, contrary to the director's decision, the beneficiary's engineering degree qualifies him for the proffered position.

Counsel asserts that the beneficiary will be working for an engineering firm and that, therefore, his engineering background will be necessary for the position and its critical requirement to

understand the client's needs, operations, and end purpose of operations. Counsel also asserts that engineering students and engineers work extensively with computers, "use advanced theoretical concepts in computer science as much as computer science professionals do," and "usually have to modify software or write their own software applications in order to receive specific results or ends."

Counsel provides lengthy descriptions (which need not be repeated here) of the work of programmer analysts in general and "process re-engineer" program analysts in particular. The point of the descriptions appears to be captured at the statement, at page 8 of the brief, that "it is imperative that the individual [in the proffered position] possess a thorough understanding of the theoretical knowledge" involved in the client's field, "in addition to substantial theoretical and practical knowledge of computer sciences."

Counsel further states that, whereas a "general programmer analyst" position with the petitioner requires a minimum of a "bachelor's degree in computer science with additional experience in practical application of theoretical knowledge of computer science or electrical or electronic engineering," a "programmer analyst (process re-engineering)" should have "a thorough background in certain disciplines of engineering that extensively involve production technologies, enterprise wide planning, enterprise wide systems and process implementation with training and/or experience in designing and implementing computer based models and solutions to practical and technical problems." Counsel added:

[Typically engineering fields such as Engineering or Mechanical Engineering would involve a study of enterprise level planning, production planning,, process engineering etc[.] (Note should be made of the fact that Electronics and[/]or Electrical Engineering are fields which include as a sub-set Computer Engineering or Science and hence should be clubbed together with Computer Science.) In either case, the minimum that we require is a Bachelor's Degree in Computer Science (with additional experience in process planning) or a Bachelor's in Mechanical or Chemical or (sic) Engineering with course work in subjects involving extensive application of principles of optimization: such as Mathematics, Theory of Structures, Limit States Design, Transportation Engineering, Water Resource

Management, Structural Analysis, Estimation and Specifications, etc.

Counsel then explains why the petitioner is of the opinion that "individuals with education in the fields of engineering identified above normally have such competence."

In support of his insistence that the beneficiary's engineering background is well suited for the proffered position, counsel groups the beneficiary's college engineering courses into three separate categories (18 credits in "Courses Directly related to Computer Science," 12 credits in "Pure Math Courses and Those Related to Computational Methodology," and 12 credits in "Courses in Which Computers and Principles of Optimization Were Used Extensively"). Counsel calculates those courses to amount to 43 credits "directly relevant for [the beneficiary's] work as a Programmer Analyst Re-engineering."

Counsel also maintains that the beneficiary's "substantial work experience also adds to the professional level theoretical and practical knowledge that the individual brings to the job," and, without submission of supporting documentation, states that two experts in the field of information systems and information technology unequivocally opined that persons with a bachelor's degree in engineering (1) are "eminently qualified to work as Programmer Analysts (Project Re-engineers) and (2) have a "far more appropriate" background than a mere bachelor's degree in computer science."

As further support, counsel cites to sections of the Department of Labor's *Occupational Outlook Handbook, 2000-2001 edition (Handbook)* for several propositions not material to the AAO's deliberations on the appeal.

The AAO will not disturb the director's determination, supported by the evidence presented in this particular proceeding, that the proffered position is a specialty occupation. As discussed below, the AAO upholds the denial of the petition because, as the director found, the evidence presented by the petitioner fails to establish that the beneficiary has the qualifications required for service in the 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 record as presently constituted contains insufficient evidence about

both the beneficiary's qualifications and how closely they relate to the duties of the proffered position.

The content of the beneficiary's coursework has not been adequately established.

Despite the petitioner's references to the contrary, the record contains no copies of any transcripts, course certifications, or diplomas.

It is noted that among the four enclosures listed at the end of the appellate brief, two are not enclosed: "Copies of the beneficiary's Educational Documentation" and "Software Certification." The appellate brief has no exhibits. The record contains neither the original nor any copy of a beneficiary transcript or resume. Yet a parenthetical at page 11 of the brief states that the beneficiary's original transcript "was submitted earlier to INS and a copy of the transcript is annexed hereto as Exhibit "B". Also, despite the absence of exhibits, page 13 of the brief references, as Exhibit "C", a detailed resume of the beneficiary's work and proof of the beneficiary's employment; and, a copy of a non-precedential administrative decision.

The original attorney submitted a letter with the brief, which stated that copies of the beneficiary's "Bachelor's Degree in Science" and resume were submitted with the brief. Yet, neither document appears in the record; the request for additional evidence specifically requested such documents; and, despite a statement in the original attorney's reply letter that he was enclosing "a copy of Resume and educational credentials of the beneficiary along with experience certificates," the continuing absence of such documents were noted in the excerpt quoted herein at pages 2 and 3.

The record contains no documentary foundation for counsel's enumeration of particular courses, for the credit hours ascribed to the courses, or for his assignment of them into the categories he used. Likewise, there is no documentary evidence to support counsel's claims (1) that the courses he enumerated and the 43 credits calculated were "directly relevant" to the proffered position and (2) that U.S. educational institutions grant a specialized degree for 30 undergraduate courses in an area of specialization. In addition there is no documentary support for statements about the beneficiary's experience. Also, the undocumented assertions about the opinion of experts in the field

of information systems and technology have no probative value. The same goes for any other propositions counsel makes that are not supported by documentary evidence. 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). 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

There are two "Foreign Academic Credentials Equivalency Evaluations" by the International Credentials Evaluation and Translation Service: the first determined a foreign degree to be equivalent to a bachelor of science degree in mining engineering; the second determined that a combination of the mining engineering degree and a computer programming degree were equivalent to a bachelor of science degree in engineering and computer science.

These evaluations have no persuasive weight. First, neither is accompanied by copies of whatever documents the evaluation service used. Second, neither described or even cited any specific documents. Especially noted is the absence of any mention about academic transcripts. For "credential(s) evaluated, the first evaluation only states "Bachelor of Science Degree (Mining Engineering) AWARDED BY: The Cebu Institute of Technology, Philippines, 1985)"; the second evaluation repeats the reference to the Cebu Institute of Technology degree and adds "Degree in Computer Programming AWARDED BY: AMA Computer College, Philippines, 1999.)

The Bureau uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

There is a material inconsistency in the presentation of the beneficiary's educational record. The letters submitted with the Form I-129 by the president of the petitioner company and the original attorney and the letter of the original attorney in reply to the request for additional evidence make no mention of the 1999 degree in computer programming from AMA College, Philippines, to which the appellate brief and the second educational evaluation refer. Furthermore, the company

president's letter and the original attorney's letters reference a "diploma course" in computer programming at the Asian College of Technology in 2001, a course which is not cited by either present counsel or the educational evaluations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

There is no documentary evidence in the record that substantiates counsel's statements to the effect that the beneficiary's educational background and work experience equipped him with a highly specialized body of knowledge necessary for the computer programmer position.

Likewise the paucity of documentary evidence in the record makes it impossible for an AAO determination, under 8 C.F.R. § 214.2(h)(4)(iii)(C) (4), that the beneficiary has the necessary combination of education, specialized training, and /or experience, plus recognition of expertise, to qualify for the specialty occupation.

Beyond the opinion of the director, the AAO should comment on counsel's redesignation of the title and duties of the proposed position from "programmer analyst" to "programmer analyst (process engineering)." On appeal, the AAO will not consider evidence to the extent that it is presented to support a beneficiary's qualifications for a position that, in duties and responsibilities, is materially different from the position designated in the petition. 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. See 8 C.F.R. 103.2(b)(12). During adjudication of a petition, a petitioner cannot materially change the proffered position's associated job responsibilities and level of authority to conform to statutory and regulatory requirements. The petitioner must establish that the position offered to the beneficiary when the I-129 petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As appeal is being dismissed on another ground, this issue need not be examined

further.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361, *supra*. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.