



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 252 54644 Office: VERMONT SERVICE CENTER

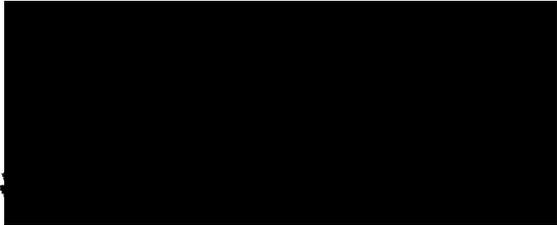
Date: **AUG 03 2004**

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.

Maia Johnson

to Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

Review
Entry not clearly unmarriageable
Investigation of personal history

DISCUSSION: The director of the 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 wholesaler and distributor of plastic products. It seeks to employ the beneficiary as a database administrator. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker 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 because the proffered position is not a specialty occupation. On appeal, counsel states that the proffered position qualifies as 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.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a database administrator. Evidence of the beneficiary's duties includes, in part: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail upgrading and integrating existing systems; developing, modifying, or adding new systems; analyzing business requirements for organizing and storing data; providing security to prevent unauthorized entry, hacking, and stealing of data; determining the requirements of employees using the systems; setting up the databases and writing code changes; and running tests. The petitioner stated that the beneficiary possesses the appropriate academic background: a master's degree in business administration with a major in computer information systems.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that the *Handbook* establishes that a database administrator is a professional; however, the director found that he was not convinced that the petitioner, a small and relatively new company that specializes in the wholesale and distribution of plastic containers, would require the duties of a *bona fide* database administrator. The director concluded that it was not clear from the evidence in the record that the specific nature of the duties that the beneficiary will perform qualify at the H-1B level or that the company routinely requires a bachelor's degree in a specific field of study as a prerequisite for the job offered.

On appeal, counsel submits printouts about the petitioner's customers, suppliers, and inventory, as well as a sample of the work product that the beneficiary will be expected to deliver in the Chinese and English languages. In a May 20, 2003 letter the petitioner states that the beneficiary must establish, upgrade, maintain, and debug its databases. According to the letter, this is a full-time position; the letter describes the time that would be spent performing each duty. The company's databases, counsel states, are crucial because the entire business operation, which exceeded \$10 million of gross sales, requires tracking customers, suppliers, and inventory. The petitioner's letter stresses that the beneficiary would also maintain a second database in the Chinese language.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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." See *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)).

In 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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A careful review of the *Handbook* discloses that the director concluded correctly that the duties of the proffered position are not performed by a database administrator. Instead, they are an amalgam of those performed by network and computer systems administrators and programmers. The petitioner stated that the beneficiary will "upgrade and integrate our existing systems" and "develop, modify[,] or add new systems of our operation and management" and will:

Apply theory and knowledge of business systems to efficiently administer the operation of our database business, accounting[,] and financial systems to improve functionality for management and operation of our company.

This is similar to an administrator who designs, installs, and supports an organization's LAN (local-area network), WAN (wide-area network), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments including professional offices and small businesses. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. They also ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Another similarity is that the beneficiary will "analyze our needs and write code necessary to adapt our systems to current and projected needs." Administrators gather data to identify customer needs and then use that information to identify, interpret, and evaluate system and network requirements. Yet another parallel is the beneficiary's duty of "providing for security [to prevent] unauthorized entry[,] hacking, and stealing of data"; administrators plan, coordinate, and implement network security measures.

The *Handbook* states that for administrator positions many employers seek applicants with bachelor's degrees, though not necessarily in a computer-related field.

On appeal, the petitioner elaborates on the beneficiary's duties and the time that would be spent performing each duty. For example, according to the petitioner, the beneficiary will conduct system and transaction back-ups; integrate, maintain, and troubleshoot new hardware and software and resolve desktop workstation issues; maintain, support, troubleshoot, and administer two separate database management systems; install software; and migrate data. As already discussed, administrators perform these duties.

The proffered position's duties of assigning, entering, and deleting item codes and setting up user accounts; verifying the consistency of information; setting up customer accounts and updating pricing are performed by programmers. Moreover, the printouts of the customer, supplier, and inventory databases as well as the sample of the expected work product evince that some the proffered positions duties entail applications programming.

The *Handbook* states the following about programmers:

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending upon the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on board an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas, whose solutions can only be approximated, or that draw data from many existing systems may require more than a year of work.

The *Handbook* continues:

Applications programmers write programs to handle a specific job, such as a program to track inventory within an organization. They may also revise existing packaged software or customize generic applications called middleware.

With respect to the qualifications required for a programmer position, the *Handbook states*:

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. The associate degree is an increasingly attractive entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

Employers are primarily interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to be placing more emphasis on previous experience.

Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, inventory control, or another area of business. As the level of education and training required by employers continues to rise, the proportion of programmers with a college degree should increase in the future. As indicated by the following tabulation, 65 percent of computer programmers had a bachelor's or higher degree in 2002.

The *Handbook* mentions:

Employers who use computers for business applications prefer to hire people who have had college courses in management information systems (MIS) and business and who possess strong programming skills.

According to the DOL, only 65 percent of computer programmers had a bachelor's or higher degree in 2002; of these, the DOL does not indicate that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into a programmer position. The *Handbook* explicitly states that employers who use computers for business applications prefer, but do not require, candidates who have had MIS coursework.

Based on the *Handbook's* information, the duties of the proffered position correspond to those performed by network and system administrators and programmers, positions that do not require a bachelor's degree in a specific specialty. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submits an advertisement that seeks an MIS support specialist for a garment company. This evidence does not establish the second criterion. The petitioner is dissimilar in nature from the garment company. In addition, the garment company requires a candidate to possess a bachelor's degree, though it need not be in a specific specialty. Consequently, the petitioner fails to demonstrate that a degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there sufficient 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 in a specific specialty for the position. In the January 30, 2003 letter, the petitioner stated that database administration had been handled by a former employee who held a bachelor's degree. The petitioner submitted payroll records to verify this.

Nonetheless, this evidence is insufficient to demonstrate that the petitioner normally requires a degree or its equivalent in a specific specialty for the position. There is no evidence in the record of the former employee's degree. Moreover, 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-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.

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. Evidence in the record, the printouts of the databases and sample work product, the advertisement, customer list, and tax records, do not portray the nature of the specific duties as so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As described by the petitioner, none of the responsibilities of the proffered position exceed the scope of those performed by an administrator and programmer. Thus, the petitioner fails to demonstrate the fourth criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is 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.

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.