



U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 294 53770 Office: VERMONT SERVICE CENTER

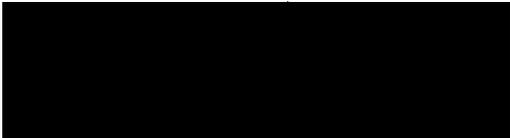
Date: DEC 10 2004

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:



**PUBLIC COPY**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**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 car rental company. It seeks to hire the beneficiary as a database administrator/web designer. The director denied the petition because he determined the petitioner had failed to establish that its proffered position qualified as a specialty occupation. On appeal, counsel submits a brief and documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with supporting evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issue to be discussed in this proceeding is whether the petitioner has established that its proffered position qualifies as a specialty occupation. To meet its burden of proof, the petitioner must establish its eligibility under the following statutory and regulatory requirements.

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 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, a petitioner must establish that its position meets one of four 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.

To determine whether the petitioner has met its burden of proof with regard to the above requirements, the AAO now turns to a review of the record before it.

The petitioner states that it seeks the beneficiary's services as a database administrator/web designer. Evidence regarding the proffered position is found in: the Form I-129; and counsel's response to the director's request for evidence.

On September 26, 2002, following his review of the petitioner's Form I-129 and supporting documentation, the director concluded that the petitioner had failed to provide adequate information concerning the duties of its proffered position and requested further evidence regarding it, including documentation that the petitioner or its industry normally required a baccalaureate degree in the specialty, a copy of the job posting or announcement for the proffered position, evidence of the complexity of the duties associated with the proffered position, evidence that the beneficiary would perform the duties of the position, and recent tax information. The director also requested additional evidence regarding the beneficiary's background and immigration status.

In response to the director's request for evidence, counsel to the petitioner provided the director with information regarding the beneficiary and the tax information related to the petitioner. Counsel did not, however, provide the director with additional information concerning the duties of the petitioner's proffered position, asserting that the complex nature of the position's duties marked it as a specialty occupation in accordance with statutory and regulatory requirements. Counsel further stated that Citizenship and Immigration Services (CIS) had already approved a petition filed by the petitioner for a similar position.

The director denied the petition on June 18, 2003, finding that the petitioner had not established that its position qualified as a specialty occupation. He noted the failure of the petitioner to provide a description of the duties associated with its position at the time of filing and its inadequate response to his request for additional evidence concerning the position. In response to counsel's assertion that CIS had previously approved a petition for the petitioner for a similar position, he cited *Matter of Khan*, 14 I&N Dec. 397 (BIA 1973) and noted that CIS was not required to approve applications or petitions where eligibility was not demonstrated simply because of a prior approval which may have been erroneous.

On appeal, counsel for the petitioner now submits a brief and documentation, including copies of several Internet job postings for web administrators/developers. In his brief, counsel asserts that the position of database administrator/web designer is a member of the H-1B professional category and that the requirement of a degree in computer science or its equivalent is an industry standard. Counsel's letter, however, references a [REDACTED]" and, at several points, refers to the beneficiary as "he." As the beneficiary is female and is named [REDACTED] it is unclear whether the brief submitted by counsel refers to the present case.

When determining whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 (5<sup>th</sup> 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.

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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

Based on the record before it, the AAO finds that the petitioner has provided no evidence about the specific duties of the proffered position that would allow the analysis required by the first criterion. In the absence of evidence, counsel has asserted that the proffered position is a specialty occupation and that a degree in computer science or its equivalent is the industry standard for web administrator/web designer positions. However, without supporting documentation, the assertions of counsel do not constitute evidence and do not, therefore, satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As a result, the AAO concludes that the petitioner has failed to establish that its position of web administrator/web designer meets the first criterion.

After reviewing the materials submitted by the petitioner, the AAO also concludes that the petitioner has failed to meet the requirements of the second criterion. The submitted job postings do not constitute evidence that firms of similar size and with similar operations require baccalaureate or higher degrees in parallel positions. Instead, the job postings reflect the employment needs of unidentified organizations and refer to positions that, in the absence of a description of the specific duties of the proffered position, cannot be identified as parallel to that of the petitioner. Further, the assertions of counsel stating that a baccalaureate degree in computer science or its equivalent is the industry standard for web administrator/web designer positions is not proof of the same for the reasons just noted.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position. In the present case, the director asked the petitioner to provide a copy of the job posting or announcement for the proffered position so that he could verify that it had sought candidates with a specific degree in order to fill the position. However, as the petitioner failed to provide this information in response to the director's request for evidence, the AAO concludes that the petitioner has not met the requirements of the third criterion.

Counsel's statement that CIS previously approved a petition for a similar position is not persuasive in establishing that the petitioner normally requires a degree or its equivalent for the proffered position, nor is it a basis for approving this petition. CIS is not bound to approve a petition where eligibility has not been demonstrated simply because it previously approved a petition for a similar position. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

The director's decision does not indicate whether he reviewed the prior approval of the nonimmigrant petition referenced by counsel. However if the previous nonimmigrant petition was approved based on the same minimal record and assertions contained in this proceeding, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248, F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a 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. While, on appeal, counsel emphasizes the complexity of the beneficiary's previous employment and considerable knowledge, his statements do not address the specialization and complexity of the duties of the petitioner's proffered position. The petitioner's failure to provide a description of the specific duties associated with its position precludes any consideration as to whether that position might qualify as a specialty occupation under the fourth criterion. Further, as previously noted, counsel's statements on appeal appear to refer to a Mr. Eisenberg and so call into question whether the background described is, in fact, that of the beneficiary, Ravit Winraob.

For the reasons already discussed, the petitioner has failed to establish that the proffered position meets any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial.

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.