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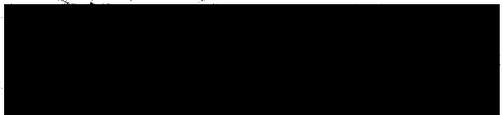
**FEB 26 2004**

FILE: WAC 02 206 54034 Office: CALIFORNIA 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)

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 an importer and distributor of plush toy animals. It seeks to employ the beneficiary as an applications programmer. The petitioner 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 submits a brief.

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.

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 an applications programmer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's May 28, 2002 letter in support of the petition;

and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: transforming software-based environments from "CLIPPER" to such "WINDOW"-based programs such as Visual C++, Visual Basic, and Gupta SQL Windows; designing software packages; monitoring the progress of the event-driven functions; remedying any bugs that surface during the testing, implementation, and use of various applications software; configuring and maintaining local area networks and backups to insure data integrity; and participating in the design and upkeep of the petitioner's communication protocols. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in a computer-related field for the proffered position.

The director found that the proffered position was not a specialty occupation because the job is an applications programmer for normal business applications rather than an applications programmer for scientific or engineering applications. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that both CIS and the DOL have determined that the position of an applications programmer is a specialty occupation. According to counsel, the proffered position is a category "5" occupation (referring to the DOL's *O\*Net*), which requires a degree. Counsel states further that the record contains additional evidence such as a CIS memorandum, an expert opinion, and various Internet job advertisements in support of his claim.

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 turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position requires a baccalaureate degree in a computer-related field. Although the petitioner indicated in its July 11, 2002 letter that it was planning to expand its operation throughout the United States and, therefore, needed the services of a "highly-qualified and degreed Applications Programmer," nothing was mentioned of such expansion in the petitioner's original letter of May 15, 2002, nor does counsel address any plans for expansion on appeal.

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 on 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).

Counsel's reference to and assertions about the relevance of information from *O\*Net* are not persuasive. Neither the *Dictionary of Occupational Titles'* SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

In its *Handbook*, 2002-2003 edition, at page 168, the DOL states, in part, as follows:

Employers using computers for scientific or engineering applications usually prefer college graduates [computer programmers] who have degrees in computer or information science, mathematics, engineering, or the physical sciences. . . . 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.

The petitioner, which is an importer and distributor of plush toy animals, has not demonstrated that it requires the services of a computer programmer for scientific or engineering applications or that the position requires an individual with a knowledge of sophisticated programming techniques normally associated with the duties of a programmer/analyst. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a computer programmer position as described by the petitioner.

Regarding parallel positions in the petitioner's industry, the record contains six Internet job postings for programmer positions from a search that reflected 19 matches. It is noted that one of the six job postings is for the petitioner. In view of the foregoing, the job postings do appear to be a random sampling of job postings for applications programmer positions. The record also contains an evaluation from Dr. [REDACTED] from International Credentials Evaluators, Inc., who asserts that positions such as the proffered position require a baccalaureate degree in a computer-related field. The evaluator, however, does not provide any evidence in support of his assertion. 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). Thus, the job postings and evaluation have little relevance.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past and because of a service center memorandum, dated December 22, 2000. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions was parallel to the proffered position. Furthermore, regarding the December 22, 2000 service center memorandum, the AAO notes that this memorandum refers to the internal operations of the Nebraska Service Center only. It is not binding precedent. See 8 C.F.R. § 103.3(c). In addition, the AAO is never bound to follow the directives of a service center. See *Louisiana Philharmonic*

*Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record contains copies of the petitioner's Internet job posting indicating that the proffered position requires a baccalaureate degree in a computer-related field. CIS, however, must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *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.<sup>1</sup> In this regard, the petitioner fails to establish that the applications programmer position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge. Furthermore, the record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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 the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

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<sup>1</sup> 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.