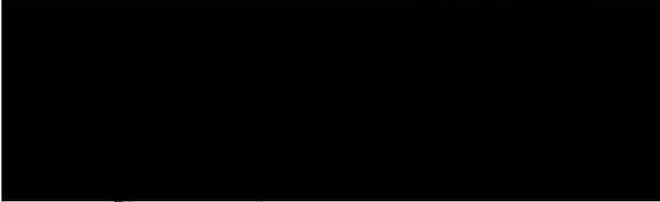


PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



D2

FILE: EAC 02 249 50135 Office: VERMONT SERVICE CENTER

Date: MAY 03 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

Mari Johnson

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 a corporation doing business in software development and computer consultancy. In order to employ the beneficiary, 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). As indicated below, while the Form I-129 identifies the proffered position as marketing analyst, the record contains conflicting information about the nature of the proposed duties.

The director denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the “beneficiary will be performing the duties of a ‘specialty occupation’” as defined at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

As discussed below, the director was correct in his decision that the petitioner had not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the director’s decision shall not be disturbed. Also, as the AAO’s decision on the specialty occupation issue is dispositive of the appeal, the AAO shall not address the second ground of the director’s denial.

The AAO based this decision upon its review of the entire record in this proceeding, including: (1) the petitioner’s Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, counsel’s brief, and the evidence submitted on appeal.

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:

[A]n 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.

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 director’s decision clearly communicates that he decided adversely on the specialty occupation issue because all of the duties enumerated and outlined in the petitioner’s letter of support, filed with the Form I-129, differed materially from the duties subsequently listed in the petitioner’s response to the RFE. The director noted, both in his decision and in the RFE, that the letter of support’s duties were taken directly from the description of the management analyst occupation in the Department of Labor’s *Dictionary of Occupational Titles*. In contrast, the RFE outlined these duties, of which none are similar to those originally listed:

- Conduct Market Research and analyze market data to determine [the] potential increase in computer consulting and off shore projects;
- Develop target selection criteria;
- Prepare reports and graphic illustrations;
- Serve as liaison between the company and its web developers to address, man[a]ge and resolved [sic] problems related to the companies [sic] web site in order to achieve new projects more efficiently;
- Update the web site with new products and modify the existing information;
- Participate in surveys, interviews, and other market research efforts and also man[a]ge and analyze the E-mail marketing strategies; and
- Research on price elasticity studies.

Obviously, the director was not persuaded by the RFE reply’s statement that these newly stated duties were “supplementing the duties mentioned in the original petition.”

In spite of the clear reason for the director's denial, counsel provides no adequate explanation for the wide divergence between the duties asserted at the filing of the petition and those described in the RFE – which also are the duties that the appeal urges as the basis for approval of the petition.

The stark difference between the two duty descriptions undermines the accuracy and reliability of the information offered in support of the petition. Of particular note is the fact that the letter of support not only presented duties exclusively in the operational management area, but also explicitly stated that at Unique Solutions and at IDG Management Services the beneficiary “has been performing the same duties, which we wish her to perform for our organization.” The record reveals that the Unique Solutions and IDG Management Services duties had nothing to do with the market research analysis and related duties identified in the RFE reply and discussed on appeal. In fact, the educational evaluation submitted into the record refers to the beneficiary's duties with the two aforementioned firms as follows:

The duties typically associated with the aforementioned positions include coordinating and administering employee benefits programs; developing HR policy manuals, employee handbooks, and compensation plans; implementing staff development programs; coordinating recruitment, benefits, payroll, worker's compensation, and corporate insurance administration; creating employee job descriptions, evaluations and safety incentive programs; resolving employee grievances; and overseeing payroll processing.

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).

As there is not a satisfactory explanation for the contradictory information about the work that the beneficiary would perform, the petition lacks reliable information to support it. Accordingly, there is not an evidentiary basis for recognizing a specialty occupation in accordance with any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.