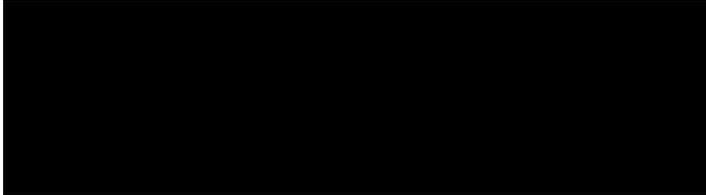




U.S. Citizenship
and Immigration
Services

DQ



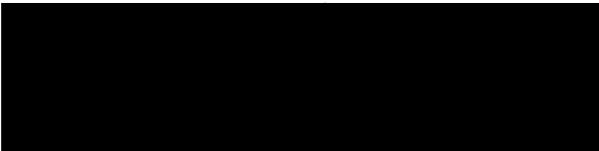
FILE: LIN 03 222 52501 Office: NEBRASKA SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: 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 wholesale and retail supplier of imported beauty products who seeks to employ the beneficiary as a computer programmer and systems analyst to develop business application software for its business. The main company, which had gross sales of about \$200,000 in 2002, has two employees but a total of eight employees counting two other nearby affiliated companies, which the petitioner asserts would also benefit from the improvements it expects from hiring the beneficiary. The stores opened for business between December 2000 and August 2002.

According to the Form I-129, the petitioner would employ the beneficiary between August 2003 and March 2005 to custom-make systems for processing customer orders, for its own accounting and billing systems, for a bar coded product inventory, and storage, for market forecasting, for "South Koreanization" of programs and for general office automation. Counsel asserts that the petitioner has previously hired contractors for this work "and would like to save some money" by hiring the beneficiary, which would free him to "concentrate on expanding his business."

The director denied the petition because the petitioner's description of the position's job duties did not persuade him the petitioner's business operations or the intended job were so complex or specialized as to require someone with a bachelor's or higher-level degree. The director, moreover, discounted the petitioner's assessment of its own hiring needs under the existing circumstances and because of the likelihood of the existence of suitable software commercially.

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

Along with filing a Form I-290B counsel has also submitted a motion for reconsideration with attached exhibits, including a 2002 income tax return, accounting report, trade magazines and help wanted ads from other companies seeking computer programmers and system analysts. The AAO notes that the director specifically requested evidence that a degree requirement is common in the industry in the RFE. The purpose of a Request for Evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The trade magazines and help wanted ads will not be considered on appeal.

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.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, March 2004, 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.Minn. 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. According to the *Handbook*, it is commonplace for employers to hire computer specialists on a temporary basis for jobs lasting from several months to two years, which gives context to the petitioner's objective of hiring the beneficiary for about 18 months. The *Handbook* also makes clear that it is common for systems analysts to plan and develop entirely new computer systems while the same is true for devising new applications for existing systems, in companies with few existing computer workers. Perhaps most critical to the petitioner's success on appeal is the *Handbook's* description of educational requirements for entry-level systems analysts. Thus, while most employers prefer hiring systems analysts with some formal college education, "some jobs may require only a two-year degree." *Id.* at 107. Most community colleges offer an associate's degree in computer science. "Many of these programs may be more geared toward meeting the needs of local businesses and are more occupation specific than are four-years degree programs.... For jobs in a business environment, employers usually want system analysts to have business management or closely related skills, while a background in the physical sciences, applied mathematics or

engineer is preferred for work in scientifically oriented organizations.” *Id.* at 108. It is clear from the above discussion that the proffered position does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which states that the position must require at minimum a bachelor’s degree or its equivalent.

As to the second criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the discussion also shows that such a degree requirement is neither common in the industry nor unique. The petitioner is a small, beauty-products imports business seeking a connection to the computer industry to help streamline its business operations to devote maximum energy to business expansion. It does not have a ready platoon of computer workers on staff to benefit from having a highly educated systems analyst come on board. The *Handbook* says for business applications, systems analysts typically need less education. For all the difficulty of finding factory-made business applications for its business, the petitioner has not shown the task of customizing its business needs are so complex or unique only an analyst who has a four-year degree could perform it. 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. Thus, the petitioner has not shown the position satisfies either the second criterion or that of the fourth. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4).

The AAO notes that the 2002 tax returns do not reflect that salaries were paid to any employees. While the petitioner has stated that it has eight employees at its three affiliated stores, the evidence of record does not support this 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).

The petitioner is a new business and thus has not shown it meets the third criteria, that it is a company that normally requires a degree or its equivalent for such a position. Thus, the petitioner does not claim to satisfy, nor does it satisfy, the third criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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.