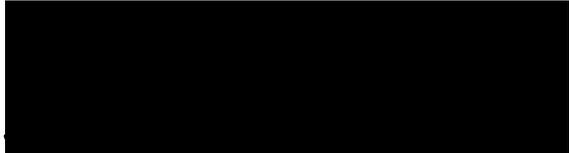




U.S. Citizenship
and Immigration
Services

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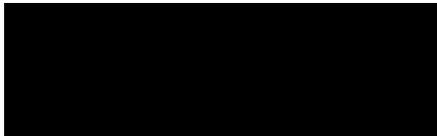
FILE: EAC 00 070 50672 Office: VERMONT SERVICE CENTER Date: 4

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director initially approved the petition for an extension of the beneficiary's H-1B visa status. Upon the receipt of adverse information, the director issued a notice of intent to revoke the petition and provided the petitioner 30 days to respond to the notice to revoke. On December 2, 2002, the director revoked the petition, stating that the petitioner had not responded to the notice of intent to revoke. On December 24, 2002, the petitioner submitted a timely appeal to the director's notice of revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

Pursuant to 8 C.F.R. § 214.2(h)(11)(i)(B), the director may revoke a petition at any time, even after the expiration of the petition. Furthermore, C.F.R. § 214.2(h)(11)(iii)(A) states that the director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B) provides that the notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and that the director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part.

The record of proceeding before the AAO contains: (1) Form I-797 Approval Notice dated August 21, 1998 that authorized H-1B visa status for the beneficiary with a petitioner named UTS from October 1, 1998 to March 1, 2001 (EAC 98 130 53214); 2) Form I-129 and supporting documentation for the beneficiary's new employment with the petitioner, indicating that the instant petition was approved on March 16, 2000; (3) the director's notice of intent to revoke the petition dated February 9, 2002; (4) the director's letter of revocation dated December 2, 2002; and (5) Form I-1290B and accompanying documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director in his notice of intent to revoke the petition stated that Citizenship and Immigration Services (CIS) was not convinced that the beneficiary's academic and work credentials were the equivalent of a U.S. baccalaureate degree in a specific specialty. Furthermore, the director stated that an investigative report received by CIS indicated that the beneficiary had been fired from UTS, the company that petitioned for the beneficiary's initial H-1B visa status on April 29, 2001 because the beneficiary had misrepresented his qualifications to perform the duties in a specialty occupation. The director stated that the investigative report was enclosed with the notice. The director then noted that the beneficiary had not received a degree in a field relevant to the job duties of the beneficiary's stated job, namely, computer programming, and that, based on the beneficiary's work experience, the beneficiary did not appear qualified to perform the duties of the proffered position. In the director's notice to revoke the petition, he stated that the petitioner had not submitted any evidence to overcome the grounds of revocation. The director revoked the petition, citing to *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

On appeal, counsel asserts that the petitioner had responded to the director's notice of intent to revoke the petition and submits copies of a UPS shipping document. Counsel also submits a copy of the correspondence that it claims was submitted to CIS in March of 2002, along with a copy of a G-28 form executed in March 2002. In this correspondence, the petitioner stated that there was no investigative report enclosed with either of the two letters it received from CIS in February 2002. Finally, counsel submits a new educational equivalency report for the beneficiary prepared by [REDACTED] Morningside Evaluations and Consulting, New York, New York. Counsel states that this document is submitted to correct the date of the beneficiary's graduation from his baccalaureate studies in India. Copies of certificates of the beneficiary's computer training in India and in the United States accompany this document. The petitioner also provides a letter from Rajesh Puri, President, UTS, Inc. This letter stated that the beneficiary worked for the company in the United States from January 1, 1999 and that he possessed good Oracle system analysis, design, programming and documentation skills. A copy of a letter from M.K. Mahindru, identified as Senior G.M., at INALSA, the beneficiary's former employer in India, also accompanies the educational evaluation document.

The AAO will consider the petitioner's submissions on appeal. The petitioner indicated that it did not receive an investigative report from CIS. The director issued the notice of intent to revoke based on correspondence received by CIS that he described as an investigative report. The record does not conclusively establish whether this correspondence was sent to the petitioner. Whether the correspondence was sent or not, it should be noted that such correspondence does not constitute an official CIS investigative report, and the AAO deliberations in these proceedings are not based on the correspondence mentioned in the director's notice of intent to revoke the petition. As related in the notice of intent to revoke, the petitioner was specifically apprised in the director's statement that the beneficiary, based on his field of university studies and work experience, was not qualified to perform the duties of the proffered position. Although the director did not state explicitly the regulatory standard for the revocation of the petition, the correct regulatory citation appears to be C.F.R. § 214.2(h)(11)(iii)(A)(5), namely, the approval of the petition violated section (h) of 8 C.F.R. § 214.2, or involved gross error.

The director determined that the beneficiary was not qualified to perform the duties of the position. 8 C.F.R. § 214.2(h)(4)(iii)(C) states that to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the

specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a specific specialty, namely, computer sciences. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. In addition, the record reflects that the beneficiary received a master of science degree from an Indian university in organic chemistry, a field not relevant to the proffered position. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

On appeal, the petitioner submits two educational equivalency documents written by Morningside Evaluations and Consulting (MEC), New York, New York. The MEC documents are identical except for the correction of the beneficiary's date of graduation from his university studies in India. The second evaluation states that the beneficiary graduated from Lucknow University in India in 1975. Both evaluation documents examined the beneficiary's university studies in organic chemistry and his eight years of work experience and then concluded that the beneficiary possesses the equivalent of a bachelor of science degree in computer information systems from an accredited U.S. college or university based on his university studies and eight years of progressively responsible work in the field. However, both evaluations are based upon the

beneficiary's education, training and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). In cases in which beneficiaries' education and work experience are evaluated, CIS may accept an evaluator's assessment of the beneficiary's university degrees, while discounting the evaluator's assessment of the beneficiary's work experience. However, in the instant petition, there is insufficient evidence in the record with regard to the beneficiary's university studies to establish that the beneficiary has the equivalent of a U.S. baccalaureate degree from an accredited university or college. For example, the record is devoid as to the actual number of years the beneficiary studied for his undergraduate degree, his course of studies, and whether Lucknow University had a three- or four-year undergraduate program in organic chemistry. Therefore, the evaluator's assessment of the beneficiary's university studies is also not given any weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

With regard to the beneficiary's specialized training or work experience in computer programming, the record contains two certificates from training that the beneficiary received prior to his admission into the United States in December 1998. The first certificate, from Informatics, a company in India, is dated July 30, 1998,

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

and states that the beneficiary completed a course in Oracle database management. The second certificate, dated November 5, 1998, is from the CMS Computer Institute in India. The document states that the beneficiary received a certificate of proficiency in RDBMS (Using Developer 2000) training. None of the computer training certificates indicates the length of training or the topics that the courses covered. In addition, the petitioner did not submit any independent evidence to illustrate how these training certificates relate to the completion of a baccalaureate degree in a computer-related field. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record also contains various certificates from the Oracle Corporation dated December 1999. These documents certify that the beneficiary is recognized as an Oracle certified internet application developer for two Oracle software programs. A form letter from [REDACTED] Senior Vice President, Oracle Corporation, also recognized the beneficiary's certification as an Oracle application developer. The record does not reflect the length of the Oracle training programs, although it does document the training as a certificate program.

In sum, the record is devoid of any information as to computer training undertaken by the beneficiary until 1998. The record then reflects that the beneficiary attended two courses in computer studies in 1998, shortly before his arrival in the United States. Finally, the record reflects that, following his entry into the United States, the beneficiary received training in specific Oracle products in 1999 and was certified as an Oracle application developer. Without more persuasive evidence, the beneficiary appears to only have minimal vocational training in computer studies or programming.

The AAO now turns to the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. The petitioner provided no documentation of any of the beneficiary's work experience from 1975 to his employment with the INALSA company in 1990. As stated previously, the record contains a letter from INALSA, the beneficiary's former employer in India. [REDACTED] identified as Senior G.M. at INALSA, stated that the beneficiary was employed as a divisional manager (auto ancillary division) for a software/marketing department from July 1990 to December 1998. The letter writer stated that the beneficiary, as a programmer/analyst, was involved in the development of an in-house payroll computer application using PL/SQL, Oracle forms and reports. The letter writer also indicated that the beneficiary was involved in the training of users and junior staff. Finally, [REDACTED] stated that the beneficiary's expertise in Oracle database, PL/SQL, SQL, Oracle Forms, and reports, allowed the beneficiary to play a leading role in the design and implementation of an order tracking system for automobile dealers.

[REDACTED] letter suggests that, following an absence of 15 years from any training or university-level studies, and with no documented evidence as to any familiarity or knowledge of computer sciences or programs, the beneficiary performed the duties of a expert computer programmer for some eight years. The letter writer provided no further documentation for any computer training received by the beneficiary during his eight years of employment to further substantiate his assertions with regard to the beneficiary's expertise. In addition, the INALSA letter provides no information on the beneficiary's daily activities either as division manager or computer programmer, or his level of responsibility with regard to the development of any computerized automotive order tracking system. It should also be noted that, despite the INALSA employer's description of the beneficiary's expertise in Oracle databases, forms, and reports, the beneficiary did not receive training in any Oracle product until he had worked for INALSA for eight years. The record also reflects that the beneficiary received only passing grades in the majority of his U.S.-based training in Oracle programs and reports in 1999. Without more persuasive evidence, [REDACTED] statements with regard to the beneficiary's computer expertise, are not persuasive.

Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in this case is computer programming. Furthermore, the INALSA letter did not indicate that the beneficiary's computer programming work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Based on the type of training that the beneficiary received at the end of his eight years of work experience with INALSA, the record suggests that any computer work performed by the beneficiary was not performed at the level of knowledge or specialization required by a specialty occupation. Finally, there is no evidence in the record that the beneficiary has recognition of expertise in the computer programming field.

No materials in the record document any substantial work experience in computer programming or training that can be utilized in establishing the regulatory criterion outlined at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The sum of the beneficiary's documented training or work experience would not be the equivalent of two years of university-level training in computer information services, as suggested by the MEC evaluators. In addition, Form I-129 Supplement H, Section I of the instant petition stated that the beneficiary is an Oracle and Microsoft certified programmer who has been working in the industry since July 1990. This statement contradicts the materials in the record. Furthermore, the beneficiary's Oracle training in 1999 calls into question whether the beneficiary was even minimally qualified to perform any computer programming duties upon entry into the United States in late 1998. Accordingly, the petitioner has not established that the beneficiary is qualified to perform the duties of the position.

Beyond the decision of the director, the petitioner did not establish that the position is 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.

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 petitioner sought the beneficiary’s services as a junior programmer. Evidence of the beneficiary’s duties includes: the I-129 petition, and the petitioner’s letter of support. According to the I-129 petition, the job would involve programming and maintaining computer software and databases, as well as analyzing requirements and proposing solutions to users’ needs based on existing and new software systems. In its letter of support, the petitioner stated that the beneficiary’s services were sought to perform analysis and development activities incorporating his “knowledge of programming and software development, UNIX operation systems, client/server data dispatch computing.” The petitioner stated that it requires a candidate for the position to have a bachelor’s degree and experience in a related field.

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 proffered position is identified in the instant petition as a junior programmer. With regard to computer programmers, the 2004-2005 edition of the *Handbook* states the following:

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.

Thus, while the *Handbook* indicates that employers hire persons with college degrees for computer programmers, there is no requirement to hire individuals with a baccalaureate degree in a specific specialty for such jobs. A combination of a baccalaureate degree with certification, or an associate degree with computer programming experience can be sufficient academic preparation for some employers. It should also be noted that the position of an entry-level junior programmer might require even less academic credentials than the positions described in the *Handbook*. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

Neither the petitioner nor counsel provided any further evidence to establish any of the remaining criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The record reflects no evidence to establish that parallel positions in similar software companies require a minimum of a baccalaureate degree for entry into the position, that the petitioner requires all its junior programmers to have baccalaureate degrees in specific specialties, or that the proffered position has duties so complex and specialized that a baccalaureate degree in a specific specialty is required. Without more persuasive evidence, the petitioner has not established that the proffered position is a specialty occupation.

As related in the discussion above, the petitioner has not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of the proffered position. With regard to the revocation of the instant petition, the director is correct in his decision to revoke the instant petition based on C.F.R. § 214.2 (h)(11)(iii)(A)(5). The record reflects that the petitioner submitted a false statement on the I-129 with regard to the beneficiary's qualifications.

In his decision, the director did not specifically refer to a particular section of the regulations pertinent to the revocation of the initial approval of the petition. However, any instance in which an error in the adjudication of a petition occurs, that, when corrected would cause the beneficiary to not have been eligible for the benefit sought in the first place, must be considered to be an error of sufficient proportion to qualify as "gross error." In *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968), the Board of Immigration Appeals specified that the burden remains with the petitioner in revocation proceedings to establish that the beneficiary qualifies for the benefit sought under the immigration laws, a principle which was reaffirmed in *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) and *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As stated in *Matter of Ho*, the approval of a visa petition vests no rights in the beneficiary of the petition. Rather, such approval may be revoked at any time for good cause shown. As there is no right or entitlement to be lost, the burden of proof in visa petition revocation proceedings properly rests with the petitioner, just as it does in visa petition proceedings.

Further, in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984), the court held that "a proceeding to revoke a visa petition, like the petition itself, is a part of the application process and falls under section 291 of the Act, 8 U.S.C. 1361." Section 291 of the Act, states, in pertinent part:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act [chapter], and, if an

alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

In *Matter of Ho*, it was also found that the mere realization by the director that he erred in approving the petition, however arrived at, may be good and sufficient cause for revoking his approval, provided the district director's revised opinion is supported by the record. The record as presently constituted, supports the director's decision that the beneficiary is not qualified to perform the duties of the position. Furthermore, the record also establishes that the proffered position is not a specialty occupation. Accordingly, the AAO shall not disturb the director's revocation 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 revoked.