



U.S. Citizenship  
and Immigration  
Services

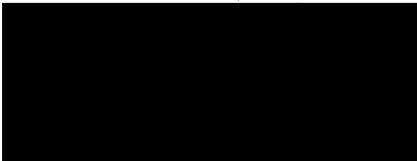


FILE: EAC 03 012 52885 Office: VERMONT SERVICE CENTER Date: **OCT 22 2004**

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:



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

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prevent disclosure of unwarranted  
invasion of personal privacy

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**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 Internet based e-commerce company specializing in sales of Southeast Asia artistic woodwork furniture and handicrafts. It seeks to employ the beneficiary as a computer programmer analyst and endeavors to classify him 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 on the basis that the offered position was not a specialty occupation, and that the petitioner had not established that it would be able to employ the beneficiary in a full-time specialty occupation for the requested period. On appeal, counsel submits a brief stating that the proffered position qualifies as a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

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 are 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 proceedings 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) the Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer programmer analyst. Evidence of the beneficiary's duties was included with the I-129 petition and in response to the director's request for evidence. According to the evidence the beneficiary would: utilize knowledge of programming and software options to develop custom programs written in languages such as Perl, C, C++, Java, ASP, Visual Basic and XML to enhance user appeal, utility, and the overall effectiveness of corporate Web sites; develop and implement complex Internet and Intranet applications to support corporate Web sites including new functionality and enhancement of existing applications; assist in development of an e-commerce catalog, using MS commerce server 3.0; create a Web front-end user interface to new or existing databases using a combination of HTML and SQL, C, Visual Basic or other languages to make business applications Web accessible; manage database coordination with online catalog and content management system; and assist in the development, maintenance, and enforcement of system quality assurance, security policy and standards. The petitioner asserts that the minimum requirement for entry into the position is a bachelor's degree in computer science, computer engineering, or a related field.

The director found that the offered position did not qualify as a specialty occupation, and that the petitioner had failed to establish that it was an established business with sufficient work available for an H-1B employee. On appeal, counsel indicates that the offered position is a specialty occupation and satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). In support of that assertion counsel submits a brief.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those provided by computer applications software engineers in that the duties of the position involve the development of custom computer programs and applications. The duties are highly sophisticated. The *Handbook* notes that most employers prefer to hire persons for these positions who have at least a bachelor's degree and broad knowledge and experience with computer systems and technologies. Usual degree requirements are in computer science or software engineering. The petitioner has, therefore, established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher

degree is normally the minimum requirement for entry into the offered position. Accordingly, the position qualifies as a specialty occupation.

It should further be noted, however, that the director found that the petitioner had not established that it would be able to employ the beneficiary in a full-time specialty occupation for the requested period.

An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case the petitioning entity stated on the Form I-129 that it is an internet-based e-commerce company with four "current" employees, and that has a gross annual income of \$400,000. The petitioner claimed on the certified Labor Condition Application (LCA) and the Form I-129 that it will employ the beneficiary as a full-time programmer analyst/web development engineer at a salary of \$50,000 per year.

The service center requested that the petitioner submit evidence that it has sufficient work and resources to provide employment to the beneficiary in the specialty occupation for the requested period of employment. In response, the petitioner explained that is a family-owned business and that it had gross sales in "FY 2002" of \$30,000, only 60 percent of the beneficiary's proposed salary. There is no evidence that this business actually has four employees rather than four family members who work without salary on behalf of their own business. In addition, the petitioner provided no Forms W-2, Federal Income Tax Returns, or other evidence to show that it has four employees or gross sales of \$400,000. Simply going on the 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).

Further, it is noted that the petitioner claimed on the Form I-129, filed on October 15, 2002, that it had a gross annual income of \$400,000; however, in response to the RFE the petitioner stated that it had sales of only \$30,000. This discrepancy has not been explained. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on this conflicting information, the petitioner has failed to establish that it will be able to employ the beneficiary as a full-time web programmer and that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B).

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 failed to sustain that burden.

**ORDER:** The appeal is dismissed. The petition is denied.