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U.S. Citizenship  
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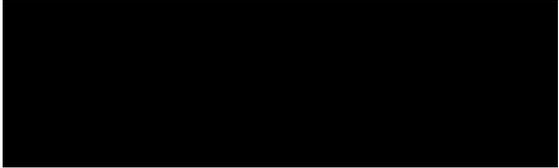


FILE: EAC 02 283 50664 Office: VERMONT SERVICE CENTER Date: **SEP 01 2004**

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.

*Maui Johnson*

*RP* 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 E-commerce and web based software development company. It seeks to employ the beneficiary as a computer programmer, 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, finding that because of conflicting information in the record of proceeding that was unresolved by the petitioner, the petitioner had not established that the job offer was bona fide or that the proffered position was a specialty occupation. On appeal, counsel submits a brief and additional information.

The 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 field 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.

In the I-129 petition, the petitioner notes that it has 16 employees, a gross annual income of \$1,000,000, and a net annual income of \$250,000. Upon receipt of the aforementioned petition, the director requested additional evidence from the petitioner. Specifically, the director asked that the petitioner provide: the job titles of all employees; a brief and general description of the formal education credentials of all employees; and a copy of the petitioner's most recent federal income tax return. In response to that request for evidence, the petitioner noted that: it had only three employees; its gross sales for the preceding year were \$198,437; and that the company's ordinary income for the year was a negative \$125. Based upon the unexplained discrepancies between the number of employees and profitability of the company noted initially in the I-129 petition, and thereafter in the petitioner's response to the director's request for evidence, the director denied the petition stating that it could not be determined that the petitioner was making a bona fide offer of employment or that the proffered position required a minimum of a bachelor's degree. On appeal, counsel submitted a brief but did not address the discrepancies. 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. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The conflicting evidence is material to the claim in that it brings into question the nature of the petitioner's business, whether in fact it operates a business for which H-1B employment classification is warranted, and whether the proffered employment, if existing, is in fact a specialty occupation. As such, the petitioner has not established any of the regulatory criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A), and the petition must be denied.

It should be further noted that the director also took issue with the salary level offered to the beneficiary, noting that the salary was "modest". On appeal, counsel states that wage determinations and the enforcement of their payment with respect to H-1B classification is the sole responsibility of the Department of Labor, not Citizenship and Immigration Services (CIS). The AAO agrees with counsel's assertions in this regard. The level of salary paid to a beneficiary is not determinative of whether the petition offered qualifies as a specialty occupation as neither salary level nor the ability to pay the salary is a regulatory criteria for determining specialty occupation qualification. 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is bona fide and is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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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 and the appeal shall accordingly be dismissed.

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