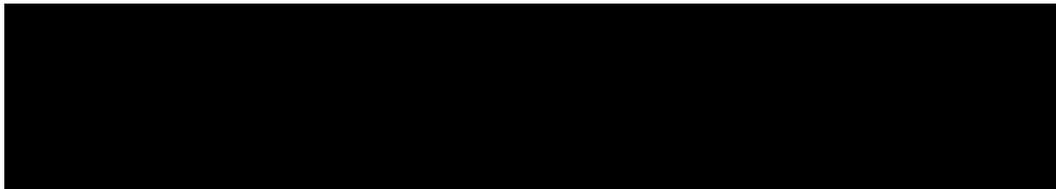


U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: EAC 03 098 53061 Office: VERMONT SERVICE CENTER

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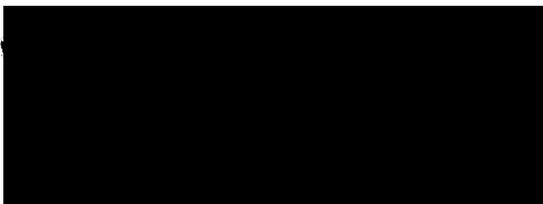
IN RE: Petitioner:

SEP 23 2004

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:



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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

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 describes itself as a manufacturer of water treatment chemicals established in 1989. It seeks to employ the beneficiary as a systems software engineer. The petitioner, therefore, 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).

The director denied the petition because he determined that the proffered position is not a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation and submits a statement.

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.

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 proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence, dated February 18, 2003; (4) the petitioner's letter that respond to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a software systems engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; the director's request for further evidence; and counsel's letter in response to the director's request for further evidence. According to the initial job description submitted by the petitioner, the beneficiary would be responsible for researching, designing, and developing computer software systems for the petitioner to help plan its future growth. The petitioner listed eight specific duties within the beneficiary's overall job description. Two of these duties involve writing and implementing software-programming applications, and programming and debugging software interfaces for computer hardware equipment such as voice mail systems, point of sale systems, and call accounting systems. The petitioner also stated that the beneficiary would consult with its engineering staff, and coordinate the maintenance of the petitioner's software systems with the data integration team. In its response to the director's request for further evidence, the petitioner identified a specific computer application program that the beneficiary would implement. The petitioner stated that the minimum qualification for the position would be a bachelor's degree in computer science or a related field.

The director found that the petitioner had not provided sufficient evidence that the beneficiary would be employed full-time for three years in the proffered position. The director determined that a letter submitted by the petitioner's business consultant, Ardent Solutions, identifying an existing software system that the beneficiary could fine tune and adjust for the petitioner's business operations, was not sufficient to answer the director's questions as to the actual need for the software systems engineer position.

The director also noted that a previous H-1B petition had been submitted for the beneficiary by a petitioner named Inn-Client Server Systems. The director noted that the previous petitioner had the same address and the same chairman and CEO as the current petitioner. The director finally determined that insufficient evidence had been placed on the record to establish that the petitioner, Somerville Acquisitions, Inc. d/b/a Summit Research Labs, would employ the beneficiary in the specialty occupation of systems software engineer.

On appeal, the petitioner asserts that the director did not consider all the duties of the proffered position as outlined in the initial petition. Based on the review of all job duties, counsel states that there would be a need for the beneficiary's services on an ongoing basis, not on a onetime basis. Counsel also states that there is sufficient work and resources for the beneficiary to perform duties in a specialty occupation.

With regard to the director's statement that the previous H-1B petition for the beneficiary appeared to be submitted by a company with the same address and company officers, counsel states that the distinction between the two companies can be blurry. Counsel states that the previous petitioner's address is actually 45 River Road, Suite 301, while the current petitioner's address is 4 [REDACTED]. Counsel states that the service center incorrectly asserted that the current petitioner had the same address as a previous petitioner, and that it had informed the Vermont Service Center with regard to the correct suite for the current petitioner. Counsel notes that the denial letter sent by the service center director noted the correct suite address for the petitioner. In addition counsel asserts that although the two companies have the same owner and neighboring offices, it would be incorrect for the service center to reject the beneficiary's petitions for this reason alone. Counsel asserts that the two companies have completely different businesses. Counsel also asserts that the instant petition cannot be denied just because another petitioning company, which is a separate legal person, had a prior petition for the same beneficiary that was denied. Counsel submits no further documentation.

The record is devoid of any materials to establish that the petitioner or a company with the same officers submitted a second petition for the beneficiary for the same position. Each petition has its own record of proceeding and the AAO will review this appeal based on the record of proceeding before it. The AAO notes discrepancies in the current record with respect to whether the suite address of the petitioner is 300 or 301.¹ Because the AAO finds that the petitioner has not established that the position is a specialty occupation; and because we do not have the additional record of proceeding, the credibility concerns of the director will not be addressed further.

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. With regard to the proffered position, the *Handbook* establishes that the position of software systems engineers is a specialty occupation. In the 2004-2005 edition of the *Handbook*, the job duties of software systems engineers are described in the following terms:

Computer systems software engineers coordinate the construction and maintenance of a company's computer systems and plan their future growth. Working with a company, they coordinate each department's computer needs-ordering, inventory, billing, and payroll recordkeeping, for example- and make suggestions about its technical direction. They also might set up the company's intranets-networks that link computers within the organization and ease communication among the various departments.

With regard to training and academic credentials, the *Handbook* states:

Most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. Usual

¹ The I-129 petition and the Form G-28 submitted with the petition indicate that the petitioner has its offices at [REDACTED] and the company brochure submitted by the petitioner to the record documents that the Summit Research Labs corporate office is at [REDACTED]. A final G-28 submitted apparently with the petitioner's appeal notes the petitioner's address, but provides no suite number.

degree concentrations for application software engineers are computer science or software engineering; for systems software engineers, usual concentrations are computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

What is not determined in the instant petition is whether the proffered position is that of a software systems engineer. According to its website, Summit Research Labs was founded in 1962 in Somerset, New Jersey. While initially a manufacturer of liquid antiperspirant products, in 1981, Summit expanded its product line into the water treatment industry. The website goes on to describe Summit Research Labs' acquisition of [REDACTED] state-of-the-art manufacturing facility in Huguenot, New York in 1992 which expanded its antiperspirant business with the addition of aluminum chlorohydrate and aluminum zirconium actives in powder form. The website states that Summit also acquired an experienced group of chemists, engineers, and operating personnel in its Corning acquisition. According to the website, the company then went on to add three other facilities, a factory in Phoenix, Arizona, a factory in Kandla, India, and the corporate headquarters in Flemington, New Jersey. Another page of the website states that the newest production facility in Flemington, New Jersey, with full-scale aluminum chlorohydrate and polyaluminum chloride manufacturing would be underway by December 15, 2002. http://www.summitresearchlabs.com/_company.htm (available as of July 28, 2004.) From this description, it is not clear whether the petitioner is the actual corporate headquarters for Summit Research Labs, is the new manufacturing facility for antiperspirant products scheduled to have opened in December 2002, or is an agent or distributor for the main company's line of water treatment products.

For example, the petitioner in its letter of support stated that it was established in 1989, as a manufacturer of an extensive line of high performance coagulants for the treatment of potable water, process water, industrial effluent, and municipal effluent, whereas the website for Summit Research Labs indicates that the corporate headquarters facility would be involved in the manufacture of other products. The tax documents submitted by the petitioner appear to support a manufacturing facility with expenses noted for factory rental. The petitioner makes no mention of the Huguenot, New York laboratory, and its relationship to the petitioner. The record as it is presently constituted, does not clearly establish for which part of the company the beneficiary would be working.

In addition, it is the duties of the position, rather than the title that are dispositive in the present proceedings. Upon review of the record, the duties of the position still lack specificity. They also have changed. The initial petition contained a job description with eight duties. One duty was to design, modify, develop, write and implement software-programming applications. Other duties mentioned work with a data integration team, as well as an engineering staff to evaluate interfaces between hardware and software systems, and the operational performance of the overall system. Some original duties appear to be generic and lacked specifics, while others mention personnel who are not identified anywhere else in the petition. For example, in the original job description, the beneficiary would be working with the data integration team, and consulting with the engineering staff. The record is devoid of any further information on either the data integration team, or the engineering staff, or any existing contracted or employed computer personnel. The original job description had an eighth duty that mentioned specific computer interfaces to be debugged such as PBXs,

voicemail systems, point of sale systems, and call accounting systems. This final duty was dropped in the second iteration of job duties done in the petitioner's response to the director's request for further evidence.

In addition, in its response to the director's request for further evidence, the petitioner submitted a letter from [REDACTED] Vice President, Business Development, of Arden Solutions, Mt. Laurel, New Jersey. The petitioner identified [REDACTED] as a business consultant. [REDACTED] stated in his letter that the petitioner should implement a computerized production management system. The letter also identified a chemical process manufacturing software system developed by MD Computech that could be customized to meet the petitioner's production management requirements, and suggested that the petitioner hire a full-time system software engineer to modify and maintain the pre-existing software system. This letter appears to be a proposal for the need for a software systems engineer, rather than an explanation of the initial job duties.

On appeal, counsel restates the job duties for the beneficiary. These are:

- Ensuring that the company's computer hardware and data networking systems are operating properly;
- Evaluating, recommending, implementing, and supporting business and office software systems;
- Evaluating, recommending, implementing, and supporting general business computer systems and networks;
- Providing expert advice regarding the use of computer technology to support all aspects of the petitioner's operations.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

A review of the record reveals that the director requested additional evidence because there was insufficient evidence that the proffered position was a specialty occupation. In response, the petitioner introduced a letter from a business consultant that primarily proposes the use of a software system engineer to adapt a pre-existing computer software system to the petitioner's chemical process manufacturing operations. The role of the beneficiary within the petitioner's business structure, any present computer personnel or existing computer business software or hardware programs are not identified. Counsel, in his statement, merely echoes the thoughts of the petitioner's business consultant with regard to the use of the pre-existing software program to fully computerize its business operations.

However, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, *id.* If significant changes are made to

the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

In response to the director's request for further evidence, the letter from the petitioner's business consultant proposes either new or further computerization of the petitioner, but omits any mention of collaboration with the petitioner's engineering or data integration staff. It provides no further details on where the beneficiary would work within the petitioner's business structures, the complexity, or the type of computer software adaptation work that would have to be done by the beneficiary in the proffered position.

In the final iteration of the job duties submitted on appeal, the duties appear to be more junior than the generic job responsibilities outlined in the original petition. The original petition suggested that the beneficiary would be consulting with other staff members on systems development, whereas the letter from the business consultant has the beneficiary adapting a pre-existing computer software system. In addition, with regard to the project of modifying and monitoring the pre-existing software developed by MD Computech, these appear to be duties not considered previously by the petitioner in its petition.

For purposes of these proceedings, only the original duties outlined in the petition are considered. As stated previously these duties are generic, and are not sufficient to establish that the proffered position requires a baccalaureate degree in a specific specialty.

With regard to parallel positions in similar manufacturing entities, the petitioner submitted five vacancy announcements for positions identified as systems software engineers. Two of the vacancy announcements are for the same position at Raytheon. The remainder are for corporations such as Independence Blue Cross, a health insurance company, a defense information infrastructure company, and an investment banking firm. None of these firms appear analogous to the petitioner in terms of business focus or operations. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner submitted no documentary evidence with regard to any current or previously employed software systems engineers. Although the petitioner mentioned staff with whom the beneficiary may work, such as engineers and data integration staff, the record is not clear as to whether these individuals have served as systems software engineers, or part of a systems engineering team. The petitioner provided no further information on the academic credentials of these individuals. Without more persuasive documentary evidence, the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. To the extent that they are depicted in the record, as previously stated, the duties of the position appear generic. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a software system engineer. Without more persuasive evidence, the petitioner has not established the fourth criterion of 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 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.