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FILE: EAC 02 280 50040 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

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 engaged in the import, wholesale distribution, and sale of perfumes. It seeks to employ the beneficiary as a systems analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and additional information, including copies of software projects and ongoing contracts that were requested by the director.

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. In his October 24, 2002 request for additional evidence, the director requested that the petitioner submit evidence that it had sufficient work and resources available for the beneficiary to perform services in a specialty occupation. The director also requested evidence that the beneficiary would be performing H-1B level duties in the capacity of a full-time systems analyst. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The AAO will first address the director's conclusion that the position is not 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.

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 director's request for additional evidence; (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.

The petitioner is seeking the beneficiary's services as a systems analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 6, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail:

- Confer with personnel of organizational units involved to analyze current operational procedures, identify problems, and learn specific input and output requirements, such as forms of data input, how data is to be summarized and format for reports;
- Install and maintain a networked system for our clients;
- Review computer systems capabilities, workflow, and scheduling limitations to determine if requested program or program change is possible within the existing system;
- Research, design and develop computer software systems, in conjunction with hardware choices, for medical, industrial, communications, scientific, engineering, commercial and financial applications which require use of advanced computational and quantitative methodologies;
- Apply principles and techniques of computer sciences and quantitative methodology & techniques to determine feasibility of design within time and cost constraints;
- Analyze the communications, informational, database and programming requirements of clients; plan, develop, design, test and implement software programs for engineering applications and highly sophisticated network systems;
- Review the existing computer systems to determine compatibility with projected or identified client needs; research and select appropriate system, including ensuring forward compatibility of existing systems;
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs; and

- Train clients on use of software applications and computer systems developed; provide trouble shooting and debugging support.

Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in a computer-related field for the proffered position.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex as to require a baccalaureate degree in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of an “enterprise resource planner,” one of the “sub-species” of programmer analysts. Counsel states further that the proposed duties require that the beneficiary possess theoretical and practical knowledge of computer sciences. Counsel cites to the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, 1994-1995 edition, as supporting evidence.

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 DOL’s *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 AAO does not concur with counsel that the proffered position is a specialty occupation or that a specialty occupation exists for the beneficiary. Although information on the petition reflects that the petitioner was established in 1992 and currently has seven employees, its 2001 federal income tax return reflects only \$24,960 in salaries and wages and \$36,000 in compensation of officers. Furthermore, although information on the petition, signed by the petitioner’s president on September 6, 2002, reflects a gross annual income of \$2 million, the petitioner’s 2001 federal income tax return reflects its gross annual income as \$792,926. In addition, upon review of the proposed duties, it is not clear how the beneficiary could realistically “confer with personnel of organizational units . . .” when the petitioner’s 2001 federal income tax return reflects only \$24,960 paid in salaries and wages. Accordingly, it is unclear with what “personnel in organizational units” the beneficiary will confer. The record contains no explanation for these inconsistencies. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In view

of the foregoing, the nature of the proffered position is unclear and, therefore, it cannot be concluded that the proffered position is a specialty occupation or that a specialty occupation exists for the beneficiary.

Although counsel observes in a letter dated January 17, 2003, that the AAO has held that the position of programmer analyst is a specialty occupation, such an observation has no relevance to these proceedings. The director did not state that the job of a programmer analyst is not a specialty occupation. The director concluded correctly that the petitioner had not demonstrated that the proffered position is so complex as to require a baccalaureate degree, or its equivalent, in a specific specialty.

Regarding parallel positions in the petitioner's industry, the petitioner submits letters from two individuals employed in the perfume industry. Both writers assert that positions such as the proffered position require a baccalaureate degree in a related field. Neither writer, however, provides any evidence in support of his assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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, therefore, has 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. As counsel does not address this issue on appeal, it will not be discussed further.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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, 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Regarding the beneficiary's qualifications, the director concluded, in part, as follows: "Since the actual job duties and responsibilities are unknown, it is not possible to say for certain whether the beneficiary would qualify if he had a bachelor's degree." As indicated in previous analysis, the nature of the proffered position is unclear. As such, the petitioner has not overcome the director's objection concerning the beneficiary's qualifications. For this additional reason, the petition may not be approved. 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.

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