

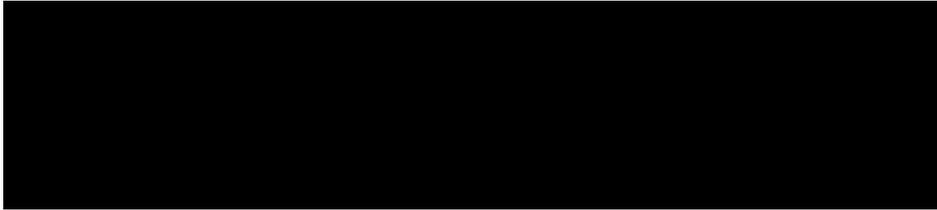
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U.S. Citizenship
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Services



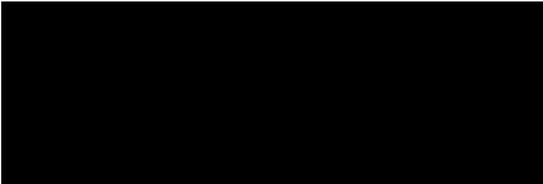
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FILE: WAC 04 081 53145 Office: CALIFORNIA SERVICE CENTER Date: JUN 09 2005

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 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 a physical rehabilitation provider that seeks to employ the beneficiary as a database administrator. 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 on the basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(1) of the Immigration and Nationality Act (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 proposed position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s RFE response and supporting documentation; (4) the director’s denial letter; and (5) the Form I-290B, appellate brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, a physical rehabilitation provider with two employees and a gross annual income of approximately \$250,000, proposes to hire the beneficiary as a database administrator. In the petitioner's letter of support, the duties of the position were listed as follows:

- ✓ Coordinates physical changes to computer databases.
- ✓ Codes, tests, and implements physical database.
- ✓ Designs logical and physical databases.
- ✓ Establishes physical database parameters.
- ✓ Codes database descriptions and specifies identifiers of database to database management system or directs others in coding database descriptions.
- ✓ Calculates optimum values for database parameters.
- ✓ Specifies user access level for each segment of one or more data items, such as insert, replace, retrieve, or delete data.
- ✓ Specifies which users can access databases and what data can be accessed by user.
- ✓ Tests and corrects errors, and refines changes to database.
- ✓ Monitors database performance.
- ✓ Reviews and corrects programs.
- ✓ Modifies database programs to increase processing performance.
- ✓ Other database administration and interface duties as may be required from time to time.

The petitioner stated that the proposed position required a bachelor's degree in computer science, management information systems, computer applications, or an equivalent.

The director denied the petition, finding "it cannot be concluded that there is a bona fide position which can be considered a specialty occupation." The director noted "[i]t is not sufficient for the petitioner to merely state that he will employ an individual to perform duties that are characteristic of those found in a particular specialty occupation." As such, the director found that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and had therefore not established the proposed position as a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts that the proposed position is in fact a specialty occupation, and that it qualifies for such classification under all four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.¹

¹ While not raised on appeal, the AAO notes that in his RFE response, counsel submitted the *Dictionary of Occupational Titles* (DOT) Standard Vocational Preparation (SVP) rating for the position as evidence that a baccalaureate or higher degree or its equivalent is required for entry into the position. The DOT is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not

The *Handbook* sets forth the following description regarding the duties of a database administrator:

With the Internet and electronic business generating large volumes of data, there is a growing need to be able to store, manage, and extract data effectively. *Database administrators* work with database management systems software and determine ways to organize and store data. They identify user requirements, set up computer databases, and test and coordinate modifications to the systems. An organization's database administrator ensures the performance of the system, understands the platform on which the database runs, and adds new users to the system. Because they also may design and implement system security, database administrators often plan and coordinate security measures. With the volume of sensitive data generated every second growing rapidly, data integrity, backup systems, and database security have become increasingly important aspects of the job of database administrators.

In that the duties of a database administrator as discussed in the *Handbook* are closely aligned to those of the proposed position as set forth in the petition, the AAO next turns to the *Handbook's* discussion of the educational background required for entry into the field:

While there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, most employers place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree.

For systems analyst, programmer-analyst, and database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS).

Counsel cites the latter sentence in his appellate brief as evidence that database administrators are required to have the minimum of a baccalaureate or higher degree. However, the statement that "many employers" seek applicants with such degrees is not synonymous with the "normally required" standard imposed by the regulation. The *Handbook* does not establish a baccalaureate degree in a specific field as a minimum qualification for entry into the occupation. As such, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by the petitioner, which counsel contends establish the petitioner's degree requirement as the normal minimum entry into the position. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

None of the job postings involve parallel positions among similar organizations. None of the organizations appear to be physical rehabilitation providers, and none of the positions appear to be parallel to the position proposed in the petition.

The first three job postings submitted by the petitioner are from the Computer Sciences Corporation (CSC). According to CSC's website, the company has 79,000 employees (as noted previously, the petitioner has two employees) and \$14.1 billion in revenue (as opposed to the petitioner's \$250,000).² Moreover, the company does not appear to be engaged in any sort of physical rehabilitation services. According to its website, CSC has "core capabilities in the areas of IT outsourcing, systems integration and consulting, [and] CSC's business expertise spans a range of industries, solutions, and geographies. Hundreds of government agencies and more than one-third of the Global Fortune 500 depend on CSC for their success." This is not an organization that can realistically be considered to be similar to the petitioner.

Moreover, the positions at CSC are not parallel to the position proposed in the petition. For example, the first database administrator position at CSC would involve maintaining a production system that supports the United States "Intel mission." The AAO also notes that a successful candidate for the position would be required to be "on-call" during non-working hours (in addition to the regular work schedule), which indicates a more heightened level of responsibility than that of the proposed position, which is a 33-hour per week role only. Another database administrator position at CSC, which is located outside the United States, involves work in the aerospace industry.

Nor can the database administrator position at Ithaca Harbors, Inc. be considered a parallel position at a similar organization. According to the job posting, Ithaca Harbors, Inc. is a "not-for-profit organization dedicated to helping the scholarly community take full advantage of advances in information technology . . ."

Similarly, Yoh IT is a "leading provider of long- and short-term technology talent to knowledge-based companies. . ." It is not a physical rehabilitation services provider.

It is clear from the job posting from Computer Associates International, Inc., that the company is not similar to the petitioner. According to the posting, the company serves organizations in more than 100 locations. Moreover, it is not a physical rehabilitation services provider.

As indicated by its name, Eze Castle Software is a software company. It has 115 employees and 170 clients. However, this cannot be considered a parallel position at a similar organization. The company does not engage in physical rehabilitation services, and it is much larger than the petitioner; the two organizations are not similar.

Nor can the database administrator position at ManPower Professional be considered a parallel position at a similar organization. The job posting does not indicate the type of business in which the company engages, but there is no evidence that it engages in physical rehabilitation services. Moreover, the rate of pay offered is nearly twice that offered to the beneficiary in the proposed position.

² See Computer Sciences Corporation, <http://www.csc.com> (accessed May 27, 2005).

Thus, while relevant to this proceeding, these job postings submitted by the petitioner are insufficient to establish its degree requirement as an industry norm, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish the proposed position as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding.

Accordingly, the petitioner cannot establish its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

In the instant case, the petitioner has submitted no evidence of its recruiting and hiring history. The AAO is unable to ascertain from the record whether the petitioner has even employed a database administrator in the past or not.

Counsel states that the proposed position qualifies under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) on the basis of a sentence in the petitioner's letter of support, dated December 29, 2003, in which the petitioner stated that "[w]e require a baccalaureate or higher degree for this position because the nature of the specific duties is so specialized that and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree."

However, contrary to counsel's assertion that this sentence satisfies the third criterion, it does not establish that the petitioner normally requires a degree or its equivalent for this position in the absence of supporting documentation. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a 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. A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than normally expected of database administrators in other, similar organizations.

In the portion of the appellate brief discussing this criterion, counsel states the following in support of his contention that the proposed position qualifies under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4):

Moreover, with the prevalence of viruses, worms, Trojan horses, hackers[,] and other threats to data, the database administrator's duties become all the more complex, as she is

responsible for the security of the data. She must ensure that the proper security policies and permissions are in place. She must ensure that the data is replicated appropriately. She must ensure some degree of redundancy in the data. She must establish backup and restore procedures and policies and must enforce the same. She must understand all the various means by which the data can be attacked and compromised.

While such threats to computer security would certainly pose challenges to the beneficiary in the proposed position, it is not clear to the AAO why a database administrator at any company would not face such threats. As such, these threats to computer security do not elevate the proposed position to such a level so as to render it more specialized and complex than database administrators at similar organizations. Therefore, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4).

Counsel asserts that the director conceded that the proposed position is in fact a specialty occupation. In the denial, the director stated the following:

The Service agrees that a database administrator involving scientific or engineering applications would normally require an individual with a degree in computer science or a related field. However, for businesses such as a physical rehabilitation center with 2 employees, an individual with less than a 4-year college degree is quite capable of performing the services required to support normal business operations.

Counsel's citation of *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989) in the appellate brief is misplaced, as the petition was not denied due to the petitioner's size.

While the size of a company does not, in and of itself, determine its need for a given position, its income level and scale of operations do have a direct and substantial bearing on the scope of the duties the beneficiary would perform in the proposed position, and therefore counsel's assertions that the director inappropriately considered the size of the petitioner are misplaced. In making the statement above, the director simply stated that if the duties of the proposed position involved scientific or engineering applications, then a degree would be required. However, there has been no demonstration that the proposed position would involve scientific or engineering applications.³ Had there been such a demonstration, the position may have qualified as a specialty occupation under the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) (i.e., a showing that the beneficiary is required to possess a higher degree of knowledge and skill than normally expected of database administrators in other, similar organizations). However, such an assertion was not made, so there is no need for the AAO to enter into such an analysis at this time.

Counsel's contention that the director imposed a new requirement without notice is unpersuasive as well. The director's phrase "reasonable and credible offer of employment" was not an imposition of a new requirement. The statute and regulations require that the petitioner prove the alien 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)(1).

³ The AAO notes that in the appellate brief, counsel eliminated the director's crucial phrase "involving scientific or engineering applications" and replaced that clause with an ellipsis.

Counsel devotes several pages of the appellate brief to general statements regarding CIS and its operations, management, the two changes in the agency's name after the legacy Immigration and Naturalization Service's reorganization, and its authority to regulate business. For example, counsel states that CIS possesses neither IT nor physical rehabilitation expertise. Counsel's complaints regarding CIS and its operations, management, and changes to the agency's name are misplaced; the AAO is not the proper forum for resolving counsel's frustrations on these issues.

Counsel's assertion that the AAO has no authority to analyze the business needs of a petitioner is not persuasive. The AAO must analyze the duties of the proposed position in the context of the petitioner's business to determine whether the position is a specialty occupation within the meaning of the regulations. If the AAO were to take counsel's assertions in this portion of the appellate brief to their logical conclusions, CIS would be required to approve nearly any visa petition filed by a United States employer, based simply on the assertions made in the petition.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE), and applications for S nonimmigrant status under § 214.2(t) are now the responsibility of the Fraud Detection and National Security (FDNS) office of CIS.

Finally, counsel suggests that the director's adjudication of the petition was unfair. However, counsel has demonstrated no error by the director in conducting his review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. See *Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975). As discussed previously, the petitioner has not met its burden of proof, and the denial was the proper result under the regulation.

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO will 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.