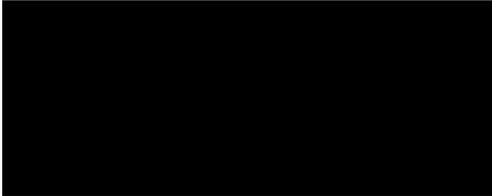




U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 176 50869 Office: CALIFORNIA SERVICE CENTER Date: APR 25 2006

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 of the service center 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 manufacturer and wholesaler of diamond jewelry. It seeks to employ the beneficiary as an applications programmer. 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 the proffered position is not a specialty occupation and because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

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 an applications programmer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail extensive design, maintenance, testing, programming, and configuring and maintaining local area networks and backups to ensure data integrity; implementing communication protocols for the petitioner; and developing storage capabilities. The petitioner categorized the proposed duties as entailing Internet technology solutions, network program and security, database solutions, and training staff on software and hardware. The petitioner seeks to hire the beneficiary based on her baccalaureate degree in computer science and prior work experience.

The director stated that the proposed duties resemble those of computer systems analysts, database administrators, and computer scientists as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* discloses that those occupations do not require a bachelor's degree in a specific specialty. The director found the letters from Professor Klinger and Professor Radhakrishan unpersuasive in establishing the proposed position as a specialty occupation. According to the director, the petitioner failed to submit requested evidence of software packages designed by the beneficiary. The director found discrepancies in the evidence relating to the beneficiary's transcript, and stated that the evidence indicated that the petitioner is not paying the beneficiary the wage as indicated in the Form I-129 petition.

On appeal, counsel states that the proposed position is a specialty occupation under the first and fourth criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel asserts that the proposed position is that of an applications programmer as that occupation is described in the *Handbook*, and that the *Handbook* and letters from Professors Klinger and Radhakrishan show that an applications engineer requires a bachelor's degree in computer science. Counsel discusses the beneficiary's educational documents, stating that the original documents that were ordered directly from Polytechnic University of the Philippines "are exact replicas of the documents that were submitted in 2001." Counsel asserts that the director should have properly considered the beneficiary's affidavit explaining the loss of the original documents. Counsel contends that the director misinterpreted the letters from Professors Klinger and Radhakrishan by stating that they claimed that the proffered position would require at least a bachelor's degree in marketing, when their letters had actually explained why a computer science or related degree would be appropriate for the proposed position.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific 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. Here, based on the petitioner's job description in the context of the petitioner's work environment, the proposed duties are specialized and complex, requiring knowledge that is usually associated with the attainment of a baccalaureate degree in computer science or a related academic discipline. As such, the petitioner satisfies this criterion.

The AAO will now consider the beneficiary's qualifications for the offered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States 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.

The proposed position requires a baccalaureate degree in computer science or a related academic discipline. In finding discrepancies in the evidence relating to the beneficiary's transcript, the director implicitly concluded that the beneficiary failed to qualify for the offered position. After carefully reviewing the evidence relating to the beneficiary's transcripts and baccalaureate degrees, the AAO agrees with the director that the transcripts have obvious inconsistencies, even though counsel maintains that the originals and their duplicates are identical. For example, the record contains two documents entitled "Official Transcript of Records." Although these documents should be identical, they are not. One of the transcript of records does not list a major or date of graduation; whereas the other transcript of record contains this information. The signature in the "Checked by" area in the transcript is not identical on the two documents, even though it should be. One transcript reflects that the beneficiary received five credits for the course entitled "Prin. Of Financial Accounting, P-2"; the other transcript indicates that six credits were received for this course. The

remarks section of the transcript is blank on one of the records of transcript; the other record of transcript has the remark "CLEARED OF ALL MONEY AND PROPERTY RESPONSIBILITIES."

The beneficiary's coursework does not support a major in computer science. The beneficiary took a total of two courses for 9 credit hours in computer science in a four-year program. The beneficiary's diploma and stated major are inconsistent with the coursework reflected on her transcripts.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record explains or resolves the discrepancies in the evidence. Counsel's contention on appeal that there are no discrepancies in the transcripts as the documents "are exact replicas of the documents that were submitted in 2001" is not persuasive as there are obvious inconsistencies in the transcripts. As such, the petitioner fails to establish the beneficiary's qualifications for the proposed position.

Counsel contends that CIS previously found the proposed position qualifies as a specialty occupation and that the beneficiary qualifies for the position. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO notes that the prior approval does not preclude CIS from denying an extension of the original visa based on a reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The director found that the petitioner had failed to pay the beneficiary the proffered wage during the previous H-1B status. The petitioner contends on appeal that the petitioner paid the beneficiary \$18.36 per hour for 20-30 hours work (\$19,094-\$28,642). The documentation of record does not establish that the petitioner paid the beneficiary the proffered wage. The beneficiary's W-2 reflects that she earned \$18,850.04 in 2002 and \$10,399.92 in 2003.¹ Both of these yearly earnings were below the proffered wage. It would be appropriate

¹ The petitioner's total wages paid in 2003 were \$23,120, with \$24,000 paid to officers. These wages do not correspond to the petitioner's statement on the Form I-129 that in 2001 it had five employees, or in 2004 that it had seven employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

for the director to refer the matter to the Secretary of Labor for investigation under the provisions of section 212(n) of the Act, 8 U.S.C. § 1182(n).

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.