



U.S. Citizenship
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Services

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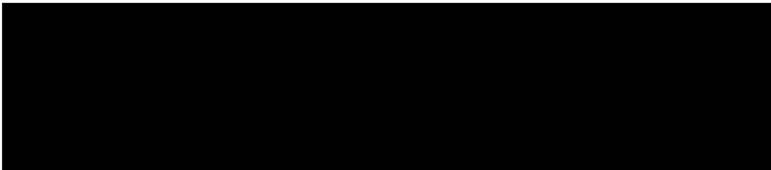
FILE: LIN 04 196 51388 Office: NEBRASKA SERVICE CENTER Date: FEB 21 2006

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.

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 an information technology consulting firm and seeks to employ the beneficiary as a programmer analyst. 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 petitioner has failed to establish that the beneficiary qualifies to perform services in 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 (RFE); (3) counsel's response to the RFE; (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 programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. The petitioner stated in its initial letter of support that the beneficiary would perform duties that entail conducting manual and interface testing of finance modules of Oracle Applications 11.5.9; conducting automated testing of finance modules of Oracle Applications 11.5.9; logging defects in System Problem Reporting; gathering automation requirements for the project; developing new test cases for testing new functionalities in test director 7.6; solving defects during testing and coordinating with the development team; modifying existing test scripts in Test Director 7.6; and performing project management related activities. The petitioner stated that the proffered position of programmer analyst requires a bachelor's degree either in computer science, engineering, mathematics or technology and experience in designing and developing computer software applications. The petitioner stated that the position was an entry-level position in the computer software field.

In the RFE, the director requested a complete, detailed description of the duties to be performed by the beneficiary. The director stated that if the beneficiary will be performing various duties, to indicate the percentage of time the beneficiary will spend performing each duty. The RFE noted that the petitioner required a "Bachelor's degree either in Computer Science, Engineering, Mathematics, or Technology and experience in designing and developing computer software applications," but that the beneficiary does not hold any those degree specialties. The director noted that the record shows that the beneficiary has earned the equivalent to that of a Bachelor of Business Administration degree. The director requested evidence that the beneficiary qualifies to perform services in the specialty occupation by meeting one of the four regulatory criteria.

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

- (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.

In the response to the RFE, the petitioner explained that the beneficiary's duties are very closely aligned with those of a business analyst. The petitioner stated that the position does not involve computer programming although it does involve systems analysis aimed at combining business processes with computer system functionality. The petitioner stated that although its original letter incorrectly indicated that the position

required a bachelor's degree in computer science, engineering, mathematics or technology they would like to amend the original filing to indicate that the functional nature of this position requires the incumbent to possess a bachelor's degree or its equivalent in accounting, finance, business management, or management information systems. The petitioner provided evidence establishing that the beneficiary is a chartered accountant in India. The petitioner asserted that the beneficiary is qualified to perform the services of the proffered position.

The director determined that the beneficiary holds the equivalent of a bachelor's degree in business administration. The director found that the petitioner has not demonstrated that the proposed duties require a specific degree in business administration or that the beneficiary has specialized in a specific field of study. The director found that the petitioner has not shown that the beneficiary qualifies to perform the duties of a specialty occupation. The director stated that even though accounting knowledge may be relevant to the position of programmer analyst, it does not qualify the beneficiary to perform the services of the proffered position. The director noted that that beneficiary does not have sufficient education or experience with computer systems to perform the duties as stated in the letter of support or in the response to the request for evidence. The director found that the evidence submitted does not establish that the beneficiary has the qualifications to perform duties in a specialty occupation as a programmer analyst.

On appeal, counsel asserts that CIS overlooked evidence presented in the petitioner's response to the request for evidence, which indicated that the beneficiary was improperly classified as a programmer analyst. Counsel asserts that the beneficiary is qualified to perform the services of the proffered position and that the position qualifies as a specialty occupation. Counsel explains that CIS should look not just at the job title but at the duties of the position and that the position is most similar to that of a business analyst. Counsel contends that the beneficiary's position entails substantial involvement in the functional testing of financial software. Counsel notes that the petitioner expanded its position description in response to the director's request. Counsel asserts that the petitioner demonstrated the relevance of the business administration degree to the specialty occupation and that the petitioner outlined the educational requirements of the position in its response to the director's request.

The AAO notes that in the initial letter of support the petitioner refers to the proffered position several times as a programmer analyst position. Also, the petitioner submitted a certified labor condition application that was for the position of a programmer analyst. The petitioner stated that the beneficiary is well qualified for the position of programmer analyst by "virtue of her education, computer training, and her experience in the computer industry." As noted by the director, the petitioner specifically stated that the position requires a bachelor's degree either in computer science, engineering, mathematics, or technology and experience in designing and developing computer software applications. In response to the request for evidence, the petitioner stated ". . . that this position does not involve computer programming." The petitioner's initial letter and its response to the request for evidence are contradictory. 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).

In its response to the director's request for further evidence, the petitioner changed the qualifications needed for the position to comply with the director's request. In sum, the initial position required a degree in computer engineering and experience in the computer field. The petitioner stated that the position is an entry-

level position in the computer software field. 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 change the degree required and change the field of study. If significant changes are made to the initial request for benefits, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not establish that the beneficiary is qualified to perform the services of the proffered position, but changed the requirements of the position to meet the beneficiary's qualifications. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The analysis of the beneficiary's qualifications will be based on the job description and the job requirements submitted with the initial petition.

The duties of the proffered position are similar to those of a systems analyst as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Systems analysts begin an assignment by discussing the systems problem with managers and users to determine its exact nature. They specify the inputs to be accessed by the system, design the processing steps, and format the output to meet users' needs. When a system is accepted, systems analysts determine what computer hardware and software will be needed to set the system up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then, they work with programmers to "debug," or eliminate, errors from the system. Systems analysts who do more in-depth testing of products may be referred to as software quality assurance analysts. In addition to running tests, these individuals diagnose problems, recommend solutions, and determine whether program requirements have been met. In some organizations, programmer-analysts design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas.

The *Handbook* states the following about the education and training requirements for the position of systems analyst or programmer analyst:

Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS). MIS programs usually are part of the business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration (MBA), with a concentration in information systems, as more firms move their business to the Internet.

As discussed above, the petitioner stated that the proffered position requires a bachelor's degree either in computer science, engineering, mathematics, or technology and experience in designing and developing computer software applications. The record reflects that the beneficiary has the equivalent of a bachelor's degree in business administration with a concentration in accounting. The beneficiary does not have a bachelor's degree in the field of computer science, information science or management information systems.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. 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.