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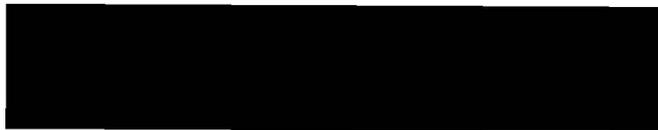
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FILE: WAC 04 171 50840 Office: CALIFORNIA SERVICE CENTER Date: NOV 28 2005

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides information technology services. It seeks to employ the beneficiary as a senior systems analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the position was not a specialty occupation and that the petitioner did not have a *bona fide* position for the beneficiary to fill. On appeal, counsel for the petitioner asserts that the director erred when making his determination.

The record of proceeding before the AAO includes: (1) the May 27, 2004 Form I-129 and supporting documents; (2) the director's August 2, 2004 request for evidence (RFE); (3) the petitioner's October 19, 2004 response to the RFE; (4) the director's December 6, 2004 RFE; (5) the petitioner's February 23, 2005 response to the RFE; (6) the director's April 13, 2005 RFE; (7) the petitioner's June 28, 2005 response to the RFE; (8) the director's August 30, 2005 denial decision; and (9) the Form I-290B and counsel's statement in support of the appeal.

Preliminarily, the AAO observes that according to pay stubs issued to the beneficiary from the petitioner, the petitioner began the beneficiary's employment May 15, 2004, 12 days prior to filing the petition on May 27, 2004. The portability provisions of INA 214(n)(1); 8 U.S.C. § 1184(n)(1), provide: "A nonimmigrant alien described in paragraph (2)<sup>1</sup> who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(B) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a)." The beneficiary's acceptance of the new petitioner's employment prior to the new employer filing the petition establishes that the beneficiary engaged in unauthorized employment on May 15, 2004. Thus, the beneficiary was not in valid status when the petition was filed on May 27, 2004. The AAO, however, will address the merits of the petitioner's proffered position, to discuss the deficiencies of the record regarding the qualification of the proffered position as a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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<sup>1</sup> INA § 214(n)(1)(2) requires, in part, that the nonimmigrant have been lawfully admitted into the United States, the employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized, and has not been employed without authorization subsequent to such lawful admission.

- (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services as a "senior system analyst." In a May 20, 2004 letter appended to the petition, the petitioner stated:

In this position, the candidate will, under supervision, provide support to restaurant management during the development and maintenance of customer order processing systems and databases while identifying problems and implementing cost-effective solutions. The beneficiary will analyze restaurant operation and develop data systems to streamline the order entry and processing flow. The candidate is required to have two years experience with POS development cycle and good analysis skills and team work to work under the stress of clients.

The petitioner also provided three form letters signed by three different pizza operations indicating that the pizza operation was pleased with the petitioner's set up and installation of a centralized call center phone order system using the petitioner's point of sales systems.

In an October 19, 2004 response to the director's August 2, 2004 RFE, the petitioner provided the same description and allocated 35 percent of the beneficiary's time to "provid[ing] support to restaurant management during the development and maintenance of customer order processing systems and databases;" 30 percent of the beneficiary's time to "identifying problems and implementing cost-effective solutions;" and 35 percent of the beneficiary's time to "analyz[ing] restaurant operation and develop[ing] data systems to streamline the order entry and processing flow." The petitioner also provided evidence that it had begun operations in April 2004 including its April 1, 2004 lease agreement, its April 1, 2004 operating agreement, and its May 1, 2004 California seller's permit.

In a February 23, 2005 response to the director's December 6, 2004 RFE, the petitioner noted that the beneficiary had previously been employed with Saytu, Inc. until May 15, 2004. The petitioner also provided copies of the beneficiary's pay stubs from his previous employer as well as the petitioner's pay stubs beginning May 15, 2004.

In a June 28, 2005 response to the director's April 13, 2005 RFE, the petitioner noted that the beneficiary would be working in-house and that it had ongoing projects for the beneficiary to manage until at least May 2007. The petitioner also attached its undated offer of employment to the beneficiary that indicated the beneficiary would devote 20 hours to the software development process, would have to meet with clients to discuss the objectives of their requirements, and would write programs and keep the backups in office computers. The petitioner also included additional undated letters from various pizza enterprises referring to the demonstration of the petitioner's call center model and confirming the installation of the product.

On August 30, 2005, the director denied the petition, determining that although the position of "system analyst" required some education, training and work experience, the education, training, and work experience depended a great deal on the needs of the employer. The director determined in this matter, that the description of the position's duties was not specialized or complex, such that a baccalaureate or higher degree would be required to perform the position. The director further determined that the petitioner had not established that it had required the services of an individual holding a baccalaureate degree for the proffered position in the past, that the petitioner had not submitted documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner, that the petitioner had not provided evidence that showed the position was unique or complex, and that the petitioner had not demonstrated that the duties were so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree or higher.

The director also found that the petitioner had not established the existence of the proffered position. The director noted that the petitioner had not provided contracts, work orders and job duties from the petitioner's clients so that CIS could analyze the length of time needed to complete the duties as well as the complexity of the position. The director noted further that the letters from the petitioner's clients indicated only that the

clients were pleased with the service provided but did not indicate that further service would be required. The director concluded that the petitioner had not established that a specialty occupation existed for the beneficiary.

On appeal, counsel for the petitioner referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* and noted that the proffered position is a position for a system analyst, not for a network systems analyst or a data communication analyst, or a webmaster, and that a bachelor's degree is required for the proffered position. Counsel, on appeal, submits fifteen job announcements to demonstrate that almost all positions for systems analyst specifically require a bachelor's degree. Counsel reiterates that the petitioner requires a bachelor's degree for its systems analyst position and that the pay rate of \$35 per hour should serve as evidence of its degree requirement. Counsel also asserts that the position is complex and specialized and repeats portions of the *Handbook* to substantiate that the position is a typical systems analyst position. Counsel contends that the petitioner is offering a *bona fide* position and even though it is a new company it has developed over 30 clients and made approximately \$150,000 in gross income within the past fifteen months.

The AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* indicates: "*Computer systems analysts* solve computer problems and apply computer technology to meet the individual needs of an organization," "[s]ystems analysts may plan or help develop new systems or devise ways to apply existing systems' resources to additional operations," and "[t]hey may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power." Although the petitioner repeats portions of the *Handbook's* description for a systems analyst, when establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. A generalized description, such as those contained in the *Handbook*, is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. The petitioner in this matter has not provided a sufficiently detailed description of the actual work to be performed for this position.

Moreover, the *Handbook* indicates that there is no universally accepted way to prepare for the position of a systems analyst and that although a bachelor's degree is a prerequisite for many jobs some jobs may require only a two-year degree. Based on the *Handbook* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the particular position. Neither do the duties related to the work systems analysts normally perform require a four-year degree. The petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into a systems analyst position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO acknowledges counsel's October 19, 2004 submission of an excerpt from the *Dictionary of Occupational Titles (DOT)* regarding the occupation of a systems analyst. However, the AAO does not consider the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a

baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not 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. Therefore, the *DOT* does not establish a systems analyst position as a specialty occupation.

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

To establish the degree requirement as the norm within the information technology industry, counsel submitted fifteen Internet job postings on appeal. The job postings included positions for: a customer support analyst for a company providing enterprise applications for the hospitality and retail industries; a systems trainer/systems analyst II for a technical services provider; a supply chain business systems analyst/Sr for a major retailer; a systems analyst for a marketer of cleaning solutions and systems; a business systems analyst 3 for a major software services provider; a staff business systems analyst for an undefined organization; a lead business systems analyst/Teradata for a major insurance company; a senior systems analyst /manufacturing lead for a major technology company; a senior systems analyst for a health insurance company; a senior systems analyst for a drugstore chain; a systems analyst for a non-profit health organization; a technical business systems analyst for an undefined company; an ETL systems analyst for a cosmetic retail organization; a senior systems analyst for an undefined company; and an information technology associate/information technology business/systems analyst for an undefined company.

The AAO has reviewed the fifteen job announcements submitted and finds that the description of the duties of each of the positions listed varies greatly, some providing intricate details of the necessary systems knowledge the successful applicant would have and some providing only a brief two or three sentence job description. Upon review of each of the advertised positions, the AAO does not find that the jobs advertised are parallel to the proffered position. First, the petitioner has provided only a general description of the duties of the proffered position. The petitioner has not detailed the necessary tasks associated with the position's technical support during the development and maintenance of processing systems and databases, identification of problems and solutions, and development of data systems, such that the AAO may compare the proffered job position to those jobs advertised. Second, the petitioner has not provided evidence that its business is similar to any of the fifteen organizations advertising for the fifteen disparate positions. Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may submit evidence under the second criterion to establish that the duties of the proffered position are more specialized and complex than those of a typical systems analyst. In this matter, the petitioner has not provided such evidence. In the petitioner's June 28, 2005 response to the director's RFE, the petitioner provided an undated offer of employment to the beneficiary that indicated that the beneficiary would devote 20 hours to the software development process, would have to meet with clients to discuss the objectives of their requirements, and would write programs and keep the backups in office computers. This description, again, does not provide the level of detail required to establish that the duties of the proffered position are so specialized and complex that only an individual with a bachelor's degree or higher in a particular discipline would be able to perform the duties.

The petitioner has not established that the proffered position qualifies as a specialty occupation pursuant to either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO observes that the petitioner is a newly established company and that it does not present evidence that it has previously hired a systems analyst. As such, it is not possible to confirm that the petitioner has previously required a degree or its equivalent for the position. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Again, the AAO observes that the petitioner's description of the duties of the proffered position as those duties relate to the petitioner's specific requirements and business needs is not sufficiently defined. Absent a specific listing of the proffered position's duties, the petitioner has not satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. It is not possible to conclude from the evidence in the record regarding the proffered position as it relates to the petitioner's business that the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO has determined that the proffered position is not 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.