U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

D2

[redacted]

FILE: WAC 04 174 51768 Office: CALIFORNIA SERVICE CENTER Date: AUG 01 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
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 The director's decision will be withdrawn. The petition will be remanded for entry of a new decision.

The petitioner is a consumer electronics importer and wholesaler that seeks to employ the beneficiary as a part-time computer systems administrator. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 of his determination that the petitioner had provided fraudulent misrepresentations of material facts. Specifically, the director noted that the beneficiary had not been paid the salary proffered in the first I-129 petition[1] it filed for the beneficiary. On appeal, counsel contends that the director erred in denying the petition.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to the director, when the petitioner filed its first Form I-129 on behalf of the beneficiary, it stated that she would be paid a salary of $60,486 per year. According to the beneficiary's 2003 Form W-2, the beneficiary was paid $23,031.36 that year.

In his denial, the director noted that the petitioner did not file a "change in previously approved employment petition"; i.e. an amended petition. Noting the discrepancy between the $60,486 salary proposed by the petitioner in 2001 and approved by the legacy Immigration and Naturalization Service, and the salary that was actually paid ($23,031.36), the director stated that the petitioner had either (1) not compensated the beneficiary at the rate proposed on the Form I-129, or (2) not employed the beneficiary on a continual basis, pursuant to the hours specified on the Form I-129.

Finally, the director stated the following:

> As previously discussed, the petitioner seeks to secure the beneficiary's services as a part-time computer systems analyst [sic], however, given the misrepresentation shown by the petitioner, specifically, with regards to the wages actually paid by the petitioner [versus] what was stated and signed for on the I-129 petition. All the evidence provided by the petitioner is considered [u]ncredible and insufficient to establish that the petitioner has been, and will be actually employing, the beneficiary in the described position and pursuant to the terms stated in the I-129 petition.
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> Finally, as previously discussed, based upon the aforementioned inconsistencies the entire record of proceeding is lacking in credibility.
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> . . .
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> As such, the petitioner's statements and the evidence submitted are deemed not credible.

[1] Form I-129, WAC 02 022 51588, valid November 26, 2001 through October 1, 2004.

On appeal, counsel contends that the director erred in his understanding of the case, and that the petitioner has complied with all conditions of employment set forth in the previous I-129 petition. Counsel states that this is a petition for a part-time position, which would account for the lower figure on the Form W-2. Counsel also states that, while the beneficiary's Form W-2 from 2003 may reflect an income lower than the expected annual income based on the stated hourly rate, the discrepancy is reasonably attributed to unpaid sick and vacation leave.

The AAO finds counsel's assertion reasonable and withdraws the portion of the director's decision to the contrary. Beyond the decision of the director, the record as presently constituted does not demonstrate that the proposed position qualifies for classification as a specialty occupation.

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.

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

> [A]n 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.

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.

According to the petitioner's May 12, 2004 letter of support, the duties of the proposed position would continue to include establishing, implementing, and maintaining the petitioner's computer systems using different software and monitoring the systems' performance; designing logical and physical databases; reviewing descriptions of changes to database design so as to understand how data is stored in terms of physical characteristics such as location, amount of space, and access method; assisting users in debugging software and systems hardware; maintaining systems availability monitor so as to insure user access; designing a system that can be interfaced so that all information is available simultaneously at all locations where computer terminals are set up; training employees in utilization of the software system; and making any necessary corrections so as to facilitate ease of operations.

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 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The petitioner seeks to employ the beneficiary as a computer systems administrator. The 2006-2007 edition of the *Handbook*, at page 114, provides the following information regarding the duties of computer systems administrators:

> *Network administrators* and *computer systems administrators* design, install, and support an organization's local-area network (LAN), wide-area network (WAN), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments, including professional offices, small businesses, government, and large corporations. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. These workers gather data to identify customer needs and then use the information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.
>
> Systems administrators are the information technology employees responsible for the efficient use of networks by organizations. They ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Furthermore, they monitor and adjust the performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for enhancements in the implementation of future servers and networks.

In his November 2, 2004 response to the director's request for additional evidence, counsel stated that the duties of the proposed position are "identical, and even go beyond" those of a database administrator. The *Handbook*, at page 108, states the following with regard to the duties of database administrators:

> 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 computer database 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.

The AAO finds that the duties of the proposed position combine those of computer systems administrators and database administrators. Accordingly, it next turns to the *Handbook's* discussion of the educational qualifications necessary for entry into these fields.

The *Handbook* indicates that for computer systems administrator positions many employers seek applicants with bachelor's degrees, though not necessarily in a computer-related field.

For database administrators, the *Handbook* states the following:

> While there is no universally accepted way to prepare for a job as a network 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 database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS) . . . Employers increasingly seek individuals with a master's degree in business administration (MBA). . . .

These findings do not support a conclusion that a bachelor's degree in a specific field, or its equivalent, is the normal minimum requirement for entry into these positions. The fact that "many" employers seek applicants with bachelor's degrees for computer systems administrator positions is not synonymous with the "normally required" standard imposed by the regulation. While many database administrator positions require candidates to possess bachelor's degrees, others require only a 2-year degree.

Accordingly, the proposed position does not qualify for classification 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 counsel. 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.

There is no information in the record to demonstrate that the companies advertising these positions are similar in size or scope of operations to the petitioner. Going on record without supporting documentary evidence is not sufficient for 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted previously, the petitioner is a consumer electronics importer and wholesaler. According to its advertisement, Hilo Hattie's is a "one stop Hawaiian shopping experience [that] offers residents and visitors the largest selection of Hawaiian gifts, fashions, souvenirs, gourmet foods, T-shirts, and island jewelry." Save-A-Lot and Deal$ are grocery stores. The petitioner submits no information regarding the business operations Pictage, Inc., or of the unnamed companies located in Parsippany, New Jersey and Tuscaloosa, Alabama advertising their vacancies through Monster.com.

The AAO, therefore, has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner in size, scope, and scale of operations. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, the AAO finds that such a demonstration has not been made. As noted by the *Handbook*, similar positions do not normally require, at minimum, a bachelor's degree or its equivalent in a specific field of study, and the AAO finds no evidence that the duties of the proposed position are any more complex or unique than those of the positions set forth in the *Handbook*.

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence has been submitted. In his response to the director's request for evidence, counsel stated that the petitioner had previously required individuals seeking to fill this position to possess, at minimum, a bachelor's degree. No evidence to document this assertion was presented. Again, simply going on record without supporting documentary evidence is not sufficient for 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)). Without documentary evidence to

support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also pointed to the beneficiary's previously-accorded H-1B status as evidence that the proposed position qualifies for classification as a specialty occupation under this criterion. However, as noted *infra*, the AAO finds that, if the previous approval was based upon the same evidence contained in this record, the director committed error in approving the petition.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Finally, the AAO notes that one previous hire for a company established in 1992 does not establish a pattern of normally requiring applicants for the position to possess a bachelor's degree, or its equivalent.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

The fourth criterion requires the petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. However, such a demonstration has not been made. Again, the AAO refers to the *Handbook* excerpts quoted previously in this decision, which state that a bachelor's degree in a specific specialty is not the normal minimum entry requirement for positions such as the one proposed here. The duties of the proposed position do not appear any more specialized and complex than those set forth in the *Handbook*. The AAO finds nothing in the record to indicate that the beneficiary, in her role as a computer systems administrator at the petitioner's place of business, would face duties or challenges any more specialized and complex than those outlined by the *Handbook*. As a result, the record fails to establish that the proffered position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Finally, the AAO notes that the beneficiary is currently in H-1B status. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors

as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Accordingly, the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*), (*2*), (*3*), and (*4*).

Accordingly, while the petitioner has overcome the grounds of the director's denial, the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation. As the director did not address this issue in his decision, his decision will be withdrawn and the petition remanded to the director for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proposed position qualifies for classification as a specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's February 15, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.