



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 02 142 50487 Office: CALIFORNIA SERVICE CENTER Date: JAN 23 2007

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:  
[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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or consider. The motion will be granted. The petition will be denied.

The petitioner is a jewelry store with five employees and gross annual income of \$980,000. It seeks to employ the beneficiary as a systems analyst/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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received at the service center on March 21, 2002; (2) the director's October 29, 2002 request for additional evidence; (3) the petitioner's January 10, 2003 response to the director's request; (4) the director's January 27, 2004 denial letter; (5) the Form I-290B, received at the service center on February 26, 2004; (6) the AAO's August 11, 2004 summary dismissal of the appeal; and (7) the petitioner's September 7, 2004 motion to reopen or reconsider and supporting documentation, including a March 24, 2004 appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

The AAO summarily dismissed the appeal on August 11, 2004, citing 8 C.F.R. § 103.5(a)(1)(v), which states that an appeal shall be summarily dismissed if the party fails to specifically identify any erroneous conclusion of law or statement of fact for the appeal. The AAO noted that the record contained no appellate brief or any other additional evidence. As such, the AAO found that counsel had failed to specifically identify any erroneous conclusion of law or statement of fact and summarily dismissed the appeal.

On motion, counsel submits a copy of the brief he sent to the California Service Center, along with tracking information from California Overnight to confirm that the service center received it on March 25, 2004. The AAO accepts counsel's submission and will adjudicate the petition on its merits.

The director denied the petition on the basis of his determination that the petitioner had failed to establish 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.

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.

Counsel’s March 24, 2004 appellate brief states that the duties of the proposed position would consist of the following duties: developing customized programs so as to keep records regarding various designs, annual and quarterly reports, accounting records, billing records, inventory, and payroll; correcting program errors that arise by altering the program; designing systems that can be interfaced so that all the information is simultaneously available at all locations; evaluating the work load and capacity of the system; and recommending and reviewing equipment preparation in terms of configuration and assuring that all the components are in good working order.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the proposed 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 duties of the proposed position fall within those noted for computer systems analysts, database administrators, and computer scientists, as the *Handbook* places the position of systems analyst within that occupational grouping.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor’s degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers seek applicants who have a bachelor’s degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a 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 with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. Therefore, 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 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 is common in the petitioner's industry in positions that are parallel to the proposed position and found in organizations similar to the petitioner.

There is no evidence in the record to demonstrate that any of the companies that issued the job postings are similar to the petitioner, a jewelry store with five employees and gross annual income of \$980,000, in size, scope, or scale of operations. 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).

GMAC Mortgage is a mortgage company. [REDACTED], Inc. is a project management and information technology services firm supporting automotive, manufacturing, and industrial clients. Imperial Capital Bank is a bank. The Massachusetts Turnpike Authority is a governmental organization. The unnamed company advertising its vacancy through Monster.com directly is a proprietary futures trading firm.

No information is submitted regarding the unnamed company advertising its vacancy through Manpower Professional Recruiters, and the only information provided regarding the business activities of Consultis of Tampa is that it is in the financial industry.

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. 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).

Counsel contends in his response to the director's request for additional evidence that proving that the petitioner's degree requirement is common to the industry in parallel positions among similar organizations does not require a showing that the degree requirement is common to the petitioner's industry. However, such a demonstration is clearly required in order to establish eligibility under the first prong of the second criterion.

The second prong of the second criterion will be discussed later in this decision.

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.

However, no such evidence has been presented, and counsel conceded in his response to the director's request for evidence that this is a newly-created position, which precludes approval under this criterion. Thus, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

Finally, the duties to be performed by the beneficiary do not appear so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can only be performed by an individual with a degree in a specific specialty.

The AAO finds that the duties proposed by the petitioner involve primarily administrative functions rather than analytical or programming ones. With ten workstations, the petitioner's local area network (LAN) has not been shown to be particularly complex. The software applications with which the beneficiary would work are primarily commercial, off-the-shelf programs and are not unique or complex. For example, the operating systems used on the petitioner's workstations, Windows 2000 and Windows 98 SE, are neither complex nor even the most recent editions. Proseller 4.0 and Quickbooks Pro 2002 are commercial, off-the-shelf programs and do not require a bachelor's degree for installation, usage, or maintenance. Nor do the petitioner's programming languages, Visual Basic 6.0 C++ for example, require a degree to be used. Nor do other programs and applications, such as Adobe Photoshop, Microsoft Outlook 2002, Norton Anti-Virus 2002, Microsoft Excel, and Microsoft Office, require a bachelor's degree in a computer-related field.

As previously noted, not all systems analyst positions require a bachelor's degree, as some require only a two-year degree. Neither the petitioner's job description nor any other evidence of record develops the position or the nature of its duties in sufficient detail to establish either that the position is unique from or more complex than systems analysis positions not requiring at least a bachelor's degree in a specific specialty, or that its specific duties are more specialized and complex than systems analyst positions not requiring a degree in a specific specialty. Thus, the proposed position does not qualify as a specialty occupation under the second prong of the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), nor does it qualify under the fourth criterion of that regulation.

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 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).

Finally, the AAO notes counsel's citation of an unpublished AAO decision from 1993.<sup>1</sup> While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, counsel has not established that the underlying fact patterns of the two cases are similar.

The proposed position does not qualify 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, the AAO will not disturb the director's denial of the petition. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial.

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 motion is dismissed. The petition is denied.

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<sup>1</sup> See EAC 92 202 51006. The decision was not designated as a precedent.