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FILE: EAC 06 151 50565 Office: VERMONT SERVICE CENTER Date: **SEP 07 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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 engaged in the pawning of jewelry and household goods. It seeks to employ the beneficiary as an application programmer and advertising manager. The petitioner endeavors to employ the beneficiary in the 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 June 15, 2006, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, received on April 26, 2006; (2) the director's request for additional evidence, dated May 3, 2006; (3) counsel's response to the director's request for evidence and supporting documentation, received on June 1, 2006; (3) the director's denial letter, dated June 15, 2006; and (4) the Form I-290B, received on July 13, 2006, and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as an application programmer and advertising manager. The petitioner submitted a letter, dated March 17, 2006, which described the beneficiary’s proposed duties as follows:

- Be able to communicate in both Spanish and English.
- Design a computer system that will produce accurate inventory controls for merchandise, pawned items, human resource records, vendor’s lists, client’s history, pawn deposits, overdue deposits and other reports that will facilitate the decision making process.
- Produce reports on a daily basis to be submitted to the Sheriff’s Department as well as making sure of investigating prospect [sic] employee with a background check. In addition, the security equipment such as, but not limited to, cameras, videos and video tapes, must be carefully maintained.
- Computer equipment is to be updated constantly to keep up with cutting edge technology.
- Supervise employees and maintain motivational incentive programs that will contribute to the development of a stable work place.

- Reach target sales goals and further advance marketing planning by targeting both the established and new residents to the area.

The petitioner indicated that it required a candidate with “at least 10 years of experience in the Data Management and Programming Industry.”

The director determined that the petitioner had submitted insufficient evidence to process the petition and requested that the petitioner submit additional information and documentation in support of the petition.

In response to the director’s request for evidence, the petitioner submitted an advisory opinion report from the Global Education Group stating that the proposed position would require an applicant to hold a minimum of a U.S. Bachelor’s Degree in Systems Engineering, Computer Engineering or a related field, awarded by a regionally accredited university in the United States or foreign equivalent.

In addition, the petitioner, in a letter dated May 17, 2006, provided a detailed list of duties and responsibilities for the proposed position as follows:

1. **Software Design**: The most important duty for the Applications Programmer’s position is to develop and design a software with a secure and reliable database, tailored to fit the needs of the business. In order to do so, [the beneficiary] must program as many tables, queries and macros as described below in the programming language of FRONTRAN IV, which is an unusual language. The purpose to use FRONTRAN IV is to ad[d] security to the data, since not many people are familiar with it. In addition, the Applications Programmer must then convert the records to a friendlier user program, MICROSOFT ACCESS in order to facilitate training to the end user, including but not limited to the sales associates. The tables must be linked [to] one another in order to make data storage and search easier and at the same time eliminating data re-entering. The Applications Programmer will also link the MICROSOFT ACCESS database to related programs such as MICROSOFT EXCELL and MICROSOFT WORD with the purpose of producing professional statistical reports as described below. The software design will take approximately 95% of [the beneficiary’s] time on the first stage, while the bulk of the software is designed. After, in the second stage, the software will need regular maintenance and updating in order to continue to adapt to the necessities of the business. 35% of the Programmer’s time will be required at this stage. On a third stage, training of the software will be mandatory for new employees, taking up to 50% of the Programmer’s time.

* * *

2. **Periodic Reports**

- a. **Sheriff Department**: reports with all pawn activity must be submitted on a daily basis to Catherine Sierra, assigned officer at the Winter Haven Sheriff’s Office. The amount of time dedicated to this task will be 5% unless special attention is

required to a specific issue, in which case the amount of time required will be higher.

- b. **Statistical Reports:** Collection of data from the software database will be detrimental to the proper administration of the Pawn Shop. Statistical reports will be necessary for the management decision making process in which [the beneficiary], as the manager of the store, will be involved. Since statistical reports are a vital part of the business, more time will be spent on their careful preparation. [The beneficiary] shall spend a total of 20% of his time on the report preparing task.
 1. **Marketing Decisions:** A meticulous study of the clientele will facilitate marketing decisions as to what specific markets to target and the proper media to be used in order to capture such market.
 2. **Merchandising:** Statistic reports will also indicate as to the kind of merchandise being pawned and sold and will allow important decision making. For example: the weekly statistical report will come in handy when purchasing items such as jewelry. It will indicate the amount of money that can be spent on each item as well as the estimate turn over time that will be expected. The turn over time will be important to determine the investment return ratios.
3. **Security Equipment:** Safety is a primary concern in our company; the Applications Programmer will be responsible for caring and maintaining all security equipment such as, but not limited to proper functioning of eight (8) security cameras. Verification of proper recordation of activity in the store, proper storage and maintenance of video tapes and back up drives. The amount of time dedicated to this task will be no more than 10%.
4. **Employee Supervision:** [The beneficiary] will be responsible for all the employees working in the store and is to report to the Board of Directors. As the Marketing Manager, [the beneficiary] will be in charge of motivating the sale force, and designing sales programs that will entice the abilities of his sales team. . . .
5. **Training:** As the manager, the applicant is required to train all new employees in the following fields: The amount of time required for this task will vary according to the number of new employees.
 - a. Software Usage
 - b. Store Procedures
 - c. Security Procedures
 - d. Customer Service
 - e. Pawn Shop Etiquette
 - f. Bank Deposits
 - g. Cash Handling
6. **Marketing:** Besides the statistical studies described above, the Marketing manager will also need to contact the local media to place the ads, and work closely to properly design market specific ads. [The petitioner] is located within a niche of immigrants and it is the Marketing Manager's responsibility to create appealing ads for this market using

programs such as PHOTOSHOP and MICROSOFT WORD PUBLISHER. In addition, as a marketing strategy, [the beneficiary] is to maintain good relations with the local Chamber of Commerce. [The petitioner] plans to select local teams and donate uniforms to become part of the community. . . .

The director denied the petition on June 15, 2006, concluding that the proffered position is not a specialty occupation.

On appeal, counsel states the petitioner has overcome the objections of CIS. According to counsel, the proposed position is complex and it requires a person with a bachelor's degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO finds that the proffered position is not a specialty occupation.

As a preliminary matter, the AAO notes that the petitioner added additional duties to its job description for the position in its May 17, 2006 response to the director's request for additional evidence. While the initial job description focused on designing a "computer system that will produce accurate inventory controls for merchandise, pawned items, human resource records, vendor's lists, client's history, pawn deposits, overdue deposits and other reports that will facilitate the decision making process," and marketing, the new job description set forth in the response added significant new duties. For example, under the new job description, the beneficiary is indicated as the store manager, marketing manager and the applications programmer. The job description further stated that the beneficiary will be responsible for "all the employees working in the store." The beneficiary will also train all new employees in "software usage, store procedures, and security procedures." Thus, it appears from the response to the director's request for evidence, that the beneficiary will be the computer programmer, marketing manager and store manager. The AAO finds that these changes were not mere clarification but rather constituted a material alteration of the petition as originally filed.

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 offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, 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 clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will not consider the managerial duties added in response to the director's request for evidence.

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. In reviewing the 2006-2007 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry of (1) computer systems analysts, and (2) advertising, marketing, promotions, public relations and sales managers as discussed below.

In its discussion of the duties of computer systems analyst, the 2006-2007 edition of the *Handbook* states the following:

All organizations rely on computer and information technology to conduct business and operate more efficiently. The rapid spread of technology across all industries has generated a need for highly trained workers to help organizations incorporate new technologies. The tasks performed by workers known as computer systems analysts evolve rapidly, reflecting new areas of specialization or changes in technology, as well as the preferences and practices of employers.

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems—for example, business, accounting, or financial systems, or scientific and engineering systems—that vary with the kind of organization. Some systems analysts also are known as *systems developers* or *systems architects*.

The *Handbook's* discussion regarding the duties of advertising, marketing, promotions, public relations, and sales managers also relates to the proposed position, as follows:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

* * *

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its

competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

Therefore, based upon its reading of the *Handbook*, the AAO concludes that the duties of the proposed position, as described by the petitioner in its letter of support, combines the duties of two occupational groupings, described in the *Handbook*: (1) computer systems analysts, and (2) advertising, marketing, promotions, public relations and sales managers. The majority of the duties proposed for the beneficiary are encompassed within these two groupings. Having made such a determination, the AAO next turns to the *Handbook* to determine whether these occupations normally require applicants for employment to have the minimum of a baccalaureate or higher degree, or its equivalent, in a specific field.

The *Handbook* reports the educational requirements for the position of computer systems analyst as follows: “while there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education.” The fact that employers are placing a “premium” on obtaining a bachelor's degree is not synonymous with the standard imposed by the regulation of normally requiring a bachelor's degree, or its equivalent.

With respect to the training required for the marketing duties, the *Handbook* states, “a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background.” The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions “are filled by promoting experienced staff or related professional personnel”). Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion's standard of employers normally requiring at least a bachelor's degree or its equivalent in a specific specialty. As such, marketing managers do not qualify as specialty occupations under the first criterion.

For these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not 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. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

The petitioner submitted an advisory opinion report from the Global Education Group indicating that the proposed position would require an applicant to hold a minimum of a U.S. Bachelor's Degree in Systems Engineering, Computer Engineering or a related field, awarded by a regionally accredited university in the United States or foreign equivalent.

While the individual authorizing the opinion letter contends that the duties of the proposed position require the beneficiary to possess a bachelor's degree, an inadequate foundation to support this opinion has been established. The author does not establish her expertise in computer technology or marketing, but cites her academic background in business and international studies and 10 years work experience in providing evaluations. The author does not indicate whether she reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. She does not cite industry surveys, trade data or other sources to substantiate her conclusion, which differs from that outlined in the *Handbook*. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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 AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. There has been no demonstration that the proposed position is more complex or unique than the general range of duties performed by computer system analysts, or marketing managers, in other, similar organizations, which would not normally require a degreed individual. The *Handbook* indicates that such positions generally do not require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of duties for such positions.

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, this is a newly-established company, thus the proposed position is a new position, which precludes approval under the

third criterion. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 of the 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.

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 more specialized and complex than those of the corresponding positions as set forth in the *Handbook*. The AAO finds nothing in the record to indicate that the beneficiary, in his role as an applications programmer and advertising manager, at the petitioner's place of business, would perform duties or face challenges any more specialized and complex than those outlined in the *Handbook*. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As the *Handbook* reveals, such organizations do not normally impose a bachelor's. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. As the proposed position in this petition is not a specialty occupation, the beneficiary's qualifications to perform its duties are inconsequential.¹ Accordingly, the AAO will 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.

¹ The AAO notes that the educational credential evaluation submitted with the petition is deficient in that it does not attach copies of the beneficiary's transcripts and degree.