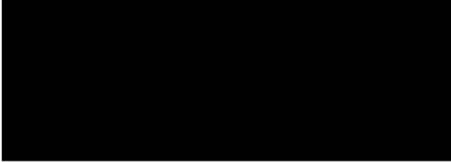


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FILE: WAC 07 131 51250 Office: CALIFORNIA SERVICE CENTER Date: **AUG 05 2008**

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.

*for Michael T. Kelly*  
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 is a web hosting services provider, employs 21 personnel, and claims \$2,800,000 in gross annual income. It seeks to employ the beneficiary as a programmer analyst - web. 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.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 2, 2007 with supporting documentation; (2) the director's April 14, 2007 request for further evidence (RFE); (3) the petitioner's April 21, 2007 response to the RFE; (4) the director's May 17, 2007 denial letter; and (5) the Form I-290B and the petitioner's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the 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 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:

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 programmer analyst - web. In an April 1, 2007 letter appended to the petition, the petitioner described the beneficiary's duties in the proffered position as:

- Develop Windows applications and web services using Microsoft.NET and VB.NET technologies for use within our company as well as for clients (20%).
- Conduct feasibility analysis on new applications based on time and cost constraints (20%).
- Maintain, enhance and document existing web applications such as the control panel, intranet applications and internal network management tools (15%).
- Provide technical support to clients regarding any programmatic issues with Windows web applications created by our company (15%).
- Conduct beta-testing on Microsoft's newest technologies for compatibility within a shared hosting environment (10%).
- Develop programming and systems documentation and standards (10%).
- Coordinate and confer with technology development activities to ensure efficient integration and interoperability among systems. Create and maintain documentation and user's guides for networks and network-driven websites (10%).

In response to the director's RFE, the petitioner provided the same job description depicted above and asserted that these job duties required the services of an individual who had a bachelor's degree in computer science, computer engineering, information systems or a related field. The petitioner stated: "the complexities of the above job duties necessitate that the individual be highly skilled and knowledgeable in defining, designing and programming web sites and the databases and enhancing the existing current web application." The petitioner also provided copies of three Internet job announcements for positions labeled programmer analyst that involved disparate duties and responsibilities from organizations that did not appear similar to the petitioner's organization. The petitioner further referenced the standard occupational classification code number for a programmer analyst and noted the standard vocational preparation (SVP) of 7.0 to 8.0 and a job zone rating of four for this occupation.

On May 17, 2007, the director denied the petition. The director determined that an analysis of the duties of the position reflected that the duties were those of an Internet Developer or Web Developer and Network Systems and Data Communication Analyst as listed under the title Computer Scientists and Database Administrators in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Upon review of the *Handbook's* discussion of educational requirements for the occupation of a computer scientist and database administrator, the director determined that the occupation does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. The director acknowledged the petitioner's reference to the Department of Labor's *O\*Net* classification system but observed that neither an SVP nor a Job Zone rating described how the post high school years were divided among training, formal education, and experience. The director also acknowledged the three Internet job announcements submitted but found that the listing advertisers were dissimilar to the petitioner's organization and that the descriptions of positions depicted in the job advertisements did not appear parallel to the proffered position.

On appeal, the petitioner does not challenge the director's determination regarding the job advertisements submitted or the deficiency of an *O\*Net* classification in establishing a specialty occupation. The petitioner bases the appeal on its belief that CIS misclassified the proffered position. To that end, the petitioner identifies particular skill sets for each of the previously identified duties of the position and identifies courses taken by the beneficiary when obtaining his master's degree in computer science. The petitioner asserts that the director misclassified the proffered position and misapplied the law.

The petitioner's assertion is not persuasive. The AAO observes that to determine whether a particular job qualifies as a specialty occupation, CIS does not 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 (5<sup>th</sup> 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. In this matter the record is insufficient to establish that the duties of the proffered position include duties that incorporate the duties of a specialty occupation.

Upon review of the director's decision and the petitioner's evidence on appeal, the AAO does not find the petitioner's description of duties demonstrates that the proffered position is a specialty occupation. The AAO finds that the petitioner has not adequately articulated why the description of duties provided is that of an occupation that normally requires the attainment of a bachelor's or higher degree in a specific discipline. The AAO does not dispute that the beneficiary's qualifications equip him to perform the duties of the proffered position. However, it is not the beneficiary's expertise that creates or endows a particular position with the attributes of a specialty occupation; rather, it is the actual daily duties of the position, detailed with specificity and in conjunction with the nature of the petitioner's business, that enable an analysis of the position and a determination of whether the position is a specialty occupation or not.

The *Handbook* provides general information regarding occupations that are associated with computers. The *Handbook* indicates:

Computer programmers write, test, and maintain the detailed instructions, called programs that computers must follow to perform their functions. Programmers also conceive, design and test logical structures for solving problems by computer.

\* \* \*

Computer programs tell the computer what to do – which information to identify and access, how to process it, and what equipment to use.

\* \* \*

Programmers write programs according to the specifications determined primarily by computer software engineers and system analysts.

The *Handbook* indicates:

Computer system 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 systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most system 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.

\* \* \*

System analysts begin an assignment by discussing the systems problem with managers and user to determine its exact nature. Defining the goals of the system and dividing the solution into individual steps and separate procedures, systems analysts use techniques such as structures analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan the system. They specify the inputs to be accessed by the system, design the processing steps, and format the output to meet users' needs. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology will be financially feasible.

The *Handbook* discusses database administrators, Internet developers or Web developers as follows:

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 system. 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.

\* \* \*

The growth of the Internet and the expansion of the World Wide Web (the graphical portion of the Internet) have generated a variety of occupations related to the design, development, and maintenance of Web sites and their servers. For example, *webmasters* are responsible for all technical aspects of a Web site, including performance issues such as speed of access, and for approving the content of the site. *Internet developers* or *Web developers*, also called *Web designers*, are responsible for day-to-day site creation and design.

According to the *Handbook* there are many training paths for these occupations. For example, The *Handbook* reports that although bachelor's degrees are commonly required for some programmers, some programmers may qualify for certain jobs with 2-year degrees or certificates and that the associate degree is a widely used entry-level credential for prospective computer programmers. The *Handbook* also 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 occupation of a systems analyst.

The *Handbook* discusses the educational requirements for positions associated with the design and development of websites as:

For some network systems and data communication analysts, such as webmasters, an associate degree or certificate is sufficient, although more advanced positions might require a computer-related bachelor's degree.

\* \* \*

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment in these occupations. The level of education and the type of training that employers require depend on their needs.

\* \* \*

Most community colleges and many independent technical institutes and proprietary schools offer an associate's degree in computer science or a related information technology field. Many of the programs may be geared more toward meeting the needs of local businesses and

more occupation specific than are 4-year degree programs. Some jobs may be better suited to the level of training that such programs offer.

\* \* \*

Art or graphic design skills may be desirable for webmasters or Web developers.

Based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into a web developer/designer position; rather there are many avenues to obtaining employment as a website developer, including associate degrees, technical certificates, and general fields of study at the bachelor's level. The AAO observes that when a job, like that of a website developer, may be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Further, the fact that some employers prefer to hire individuals who have a bachelor's degrees as a website developer does not satisfy the degree requirement set forth in the first criterion. Employer preference is not synonymous with the "normally required" language of the criterion. The *Handbook* does not report that a bachelor's degree in a specific discipline is a requirement for the occupation of website developer.

The *Handbook* does not provide a definitive statement regarding the educational requirements for each of these positions, but rather recognizes that the educational requirement for a particular position is dependent on the nature of the employing organization and the particular projects planned. In this matter, the petitioner has failed to provide a concrete statement of particular duties that would require a degree in computer science, computer engineering, information systems or a related field. The petitioner indicates that the individual in the position must be proficient in standard programming languages, languages that are routinely taught in certification classes and in associate degree programs. The individual must have knowledge of web services/web applications, and the theoretical understanding of corresponding protocols. The AAO declines to speculate on the general statement regarding protocols and whether this reference incorporates duties that include a theoretical understanding of computer science. Without a detailed job description for the particular project(s) the beneficiary will be involved in and documentary evidence of particular project(s), the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty.

The record fails to provide sufficient information regarding the petitioner's web hosting services. The record does not reveal the extent of the petitioner's organization and a visit to the petitioner's web site does not provide any useful information regarding the level or scope of the petitioner's endeavors. The petitioner does not detail whether the individual in the proffered position will be creating programs and or will be installing pre-packaged programs. The record lacks clarity regarding the nature of these tasks and how the tasks relate specifically to the petitioner's web hosting business. 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)).

The petitioner has not provided sufficient evidence to establish that the proffered position is one that requires a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner has not depicted or otherwise identified an occupation that satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Likewise, the failure of the petitioner to provide a comprehensive description of the nature of the actual projects the beneficiary will engage in and an understandable discussion of the nature of the petitioner's business substantiated by documentary evidence, precludes a determination that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). In order to establish that 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, the petitioner must provide an in depth description of the duties of the position as they relate specifically to the petitioner's business. Reciting elements of computer occupations as discussed in the *O\*Net* and the *Handbook* without the accompanying explanations and detail of the actual projects and duties is insufficient. The petitioner has not provided substantiating evidence that the position, as described or its business requires the oversight or design application of an individual who has the specialized and complex knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific discipline. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(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.