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U.S. Citizenship and Immigration Services

[redacted]

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FILE: LIN 02 209 55840 Office: NEBRASKA SERVICE CENTER Date: MAY 06 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(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.

Marie Johnson

For Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 a corporation doing business as a motel. In order to employ the beneficiary as a programmer-analyst, the petitioner endeavors to classify him 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 director denied the petition because the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a brief and documentary evidence.

The AAO has determined that the director's decision to deny the petition was correct, because the petitioner has not presented an adequate evidentiary basis for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary evidence submitted with the brief.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

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 proffered position.

The issue on appeal is whether the proffered programmer-analyst position qualifies as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

This decision will first address some of counsel's specific contentions. Counsel correctly asserts several principles that the AAO recognizes and applied in reaching its decision. A petitioner's size should not be a factor in CIS specialty occupation decisions. Also, CIS regulations do not require that a petitioner have previously hired for the position that is the subject of the visa application. Furthermore, a particular petitioner may establish a particular position as a legitimate business requirement, and establish that position as a specialty occupation, even though the position may not be generally required in the petitioner's industry.

The AAO has accepted for consideration and reviewed the new information that the petitioner has presented to indicate that it has a computer system in place, which it is in the process of upgrading with the view towards hiring a programmer-analyst who would create a new computer program and database so that the petitioner may fully utilize a computer system for its business needs. Accordingly, the AAO recognizes that the petitioner has established that it has a legitimate need for a programmer analyst. Nevertheless, as discussed below, the petitioner has not satisfied any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*1*) is satisfied where the evidence establishes that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The proffered position comports with the programmer-analyst occupation as addressed in the *Handbook* sections on computer programmers and systems analysts. However, this authoritative source indicates that a bachelor's or higher degree in a specific specialty, or the equivalent, is not a normal minimum requirement for this type of position.

The AAO also considered the letter from the assistant professor of the Math, Science, and Technology at NOVA Southeastern University, which opined, in pertinent part, "Only a person with a Bachelor's degree in a relevant field has a necessary knowledge, specialization, and skills to held [sic] these [programmer analyst] positions." The AAO, however, accorded greater weight to the DOL assessments in the *Handbook.*

The publications listed on this expert's resume indicate special expertise in highly technical areas such as neural networks, robotics, and Bayesian probability theory. While asserting expertise in the "educational and background requirements for various computer positions including Programmer, Programmer/Analyst, Software Consultant or Software Engineer," the professor did not provide a specific factual basis for her claim to expertise in educational credential requirements other than "my educational, research, and professional background." Furthermore, the evidence of record does not establish why the professor's opinion should be given preeminence over the DOL information in the *Handbook.* CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in

accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Next, the petitioner has not presented evidence that would qualify the proffered position under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*).

The evidence of record has not satisfied the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*) by establishing that a degree requirement is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; 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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As just discussed, the *Handbook* does not report that the proffered position requires a degree in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

In addition, the advertisements from other firms are not relevant under the evidentiary standard expressed in this prong: none of them are from the motel industry, and the information in the advertisements does not indicate that the firms advertising are organizations similar to the petitioner, or that the positions are parallel to the one proffered here.

The AAO also found that the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*), which provides that "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." The evidence of record about the position and its requirements indicate a need for the type of knowledge associated with a programmer-analyst position, but it dose not indicate that the work, which centers on basic motel business requirements, would be either so unique or so technically demanding as to require a bachelor's or higher degree in a specific specialty.

Next, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position – is not a factor in this proceeding, as the position is being offered for the first time.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The proposed position would be oriented exclusively on hardware and software for a motel's business applications, and the evidence does not demonstrate that this work would be so complex and specialized as to be beyond the competence of a programmer-analyst with programming and systems knowledge that can be achieved without a baccalaureate degree in a specific specialty.

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), 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.