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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 179 50467 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2006**

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.

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 imports and wholesales brushes, employs two personnel, and claims \$708,488 in gross annual income. It seeks to extend the employment of the beneficiary as a computer applications programmer/analyst. 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 June 9, 2004 Form I-129 with supporting documentation; (2) the director's August 13, 2004 denial letter; and (3) the Form I-290B, with counsel's brief and supporting documentation. 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:

- (I) 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 computer applications programmer/analyst. Evidence of the beneficiary's duties includes the petitioner's May 20, 2004 letter appended to the petition. The petitioner described the beneficiary's duties in the proffered position as:

He will continue to be responsible for providing technical support and development enhancements to our computer systems. The system implemented by [the beneficiary] enabled our company to communicate without paperwork with our suppliers and clients.

[The beneficiary] will continue to devise and design custom computer programs that will automate and enhance efficiency in our operations. He will continue to develop programs so as to keep records regarding various products, quarterly reports, accounting records, billing records, inventory, payroll etc. according to our specifications and standards for our computer system.

Moreover [the beneficiary] will continue to correct program errors that arise by alternating [sic] the program; maintain the integrity of the databases in the system along with all of the associate files; verify integrity of the network system; and maintain the computer hardware i.e. monitors, hard disk, mother board, printers, serial cards, [and] internal and external disk drives.

Likewise, [the beneficiary] will continue to design a system that can be interfaced so that all of the information is simultaneously available at all of the locations where a computer terminal is set up. [The beneficiary] will also continue to train employees in the utilization of the software system and make any necessary corrections to facilitate the ease of operation.

The director did not request further evidence in this matter and on August 13, 2004 determined that the description of duties provided by the petitioner aligned most closely with that of a computer programmer. The director determined: that it is insufficient for a petitioner to merely state that it will employ an individual

to perform duties that are characteristic of those found in a particular specialty occupation; that the petitioner did not present any documentary evidence that businesses similar to the petitioner required the services of individuals in parallel positions; and that the petitioner had not established that its organization had unique and specific needs for the services for the period of time in which they intended to employ the beneficiary. The director concluded that the petitioner had not demonstrated that it had a *bona fide* position that could be considered a specialty occupation.

On appeal, counsel for the petitioner observes that the beneficiary had previously been granted H-1B classification as a computer applications programmer/analyst and asserts that denying an extension request by the same petitioner for the same beneficiary is in error. Counsel cites an USCIS Interoffice Memorandum dated April 23, 2004 from William R. Yates, Associate Director for Operations in support of this assertion. Counsel also notes that CIS issued its denial of the petition without requesting further evidence, thus the petitioner was not provided an opportunity to submit evidence to supplement or explain the initial evidence given.

Counsel contends that the petitioner has shown that all four criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A) have been satisfied even though establishing just one of the criteria qualifies the position as a specialty occupation. Counsel claims that the position described in the instant petition resembles that of a systems analyst and requires a degree because of the complexity and in-depth knowledge of computer systems that is required. Counsel references the Department of Labor's *Occupational Outlook Handbook (Handbook)* to support his claim that the proffered position is more closely aligned with the position of systems analyst and that a systems analyst position requires a bachelor's degree to perform the duties of the position. Counsel provides seven job listings and asserts that the postings describe duties similar to the duties performed by the beneficiary and that the requirement to show that it is common in the industry to require a bachelor's degree for entry into the position is a "minimum realistic prerequisite" and does not relate to the size of a business or the type of a particular industry. Counsel observes that the beneficiary has worked at the petitioner's business since August of 2001 and that the petitioner required a bachelor's degree for the position in the past, thus the position is not a new position. Counsel also contends that it is the combination of tasks and the high level of responsibility involved that make the instant position so complex and unique that only a person with a degree can perform the tasks. Finally, counsel recites the description of the beneficiary's duties previously provided and asserts that only a person trained as a computer applications programmer/analyst can perform these duties, duties that are associated with the attainment of a bachelor's degree in a technical discipline.

Preliminarily, the AAO will address the issue of the beneficiary's past approval and the decision of the director to not request further evidence in the matter before rendering a decision. First, as counsel is aware, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same general description of the proffered position and similar evidence as submitted with this petition, the CIS would have materially erred in approving the previously filed petition. Such a general

description of the proffered position cannot support a conclusion that the proffered position is a specialty occupation. Moreover, the petitioner fails to discuss how the described duties relate specifically to the petitioner's two-person business. CIS 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). The AAO notes counsel's reference to the USCIS Interoffice Memorandum dated April 23, 2004 issued by William R. Yates, Associate Director for Operations and agrees that deference to prior adjudications is appropriate. However, when the previous error is material and involves the misapplication of an objective statutory or regulatory requirement to the facts at hand, denying the benefit sought is required. As detailed below, the petitioner has not established the proffered position is a specialty occupation.

Moreover, 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 had approved the nonimmigrant petitions on behalf of the beneficiary, 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).

Second, counsel complains that the petitioner was not given an opportunity to explain or supplement the initial evidence submitted. However, the regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *See* 8 C.F.R. § 103.2(b)(8). The director is not required to issue a request for further information in every potentially deniable case. Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record once again.

Turning to the merits of this proceeding, 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 (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. In this matter it does not.

The AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The dispute in this matter centers on whether the description of the duties of the proffered position corresponds more closely to that of a computer systems analyst or to that of a computer

programmer. The AAO finds that neither the director nor counsel have adequately articulated why the description of duties is that of a computer systems analyst as contended by counsel or is that of a computer programmer as noted by the director.

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 AAO fails to find language within the petitioner's description of the proffered position indicating that the beneficiary writes programs for the computers. The AAO declines to speculate on the general and vague reference to "devise and design custom computer programs," and whether this reference encompasses writing computer programs. The AAO also notes that the proffered description indicates that the beneficiary will continue to "develop programs so as to keep records regarding various products, quarterly reports, accounting records, billing records, inventory, payroll etc. according to our specifications and standards for our computer system." The AAO observes that the record does not reveal the extent of the petitioner's computer system, nor does the petitioner detail whether the individual in the proffered position will be creating programs 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 brush business.

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.

Again, the AAO fails to find unambiguous language in the description of the proffered position to substantiate that the beneficiary will be performing the duties of a systems analyst. The AAO observes that counsel focuses on the beneficiary's duties of devising, designing, implementing, and developing the system to support that the position is that of a systems analyst, to the exclusion of the remainder of the job description. The AAO acknowledges that the reference to designing a custom computer program to automate and enhance efficiency and developing a program for the petitioner's computer system suggests that the beneficiary may be performing some duties that resemble that of a systems analyst. However, even the *Handbook*, which presents general descriptions of occupations, provides more detail regarding the duties of a systems analyst than the petitioner in this matter. For example, the *Handbook*, as referenced above, reports that a systems analyst divides solutions into individual steps and procedures and uses structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan the system. The petitioner has provided no evidence to establish that the proffered position encompasses such duties, either in its description of the duties of the proffered position or in documentary evidence to demonstrate the performance of these duties. The record does not support that the proffered position is a systems analyst.

Upon review of the description of the duties of the proffered position, the AAO finds that the proffered position most closely resembles that of a computer support specialist or systems administrator. The *Handbook* indicates: "*computer support specialists* provide technical assistance, support, and advice to customers and other users." More specifically technical support specialists "install, modify, clean, and repair computer hardware and software," "may write training manuals and train computer users how to properly use new computer hardware and software," and "oversee the daily performance of their company's computer systems and evaluate software programs for usefulness." In addition, the *Handbook* indicates:

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 further 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.

The duties described in the *Handbook* for a computer support specialist/systems administrator and the duties described in the proffered position correspond. For example, the petitioner indicates that the beneficiary will

provide technical support and train employees in the utilization of software and maintain the computer hardware. These duties track those duties outlined in the *Handbook* for a computer support specialist who provides technical assistance, trains computer users how to properly use new computer hardware and software, and install, modify, clean, and repair computer hardware and software. Likewise, correcting program errors, maintaining the integrity of the databases, making corrections to facilitate operations, and developing enhancements to the computer system are duties that fall within the purview of a systems administrator. Moreover, designing a system that can interface with all terminals is a duty that parallels the duties of a network or systems administrator.

The AAO now turns to the *Handbook* for the educational requirements for a computer support specialist or systems administrator. The *Handbook* reports:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist or systems administrator. While there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; however, other jobs may require only a computer-related associate's degree. For system administrators, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field.

The *Handbook* also indicates: "Due to the demand for computer support specialists and systems administrators over the next decade, those who have strong computer skills, but do not have a bachelor's degree, should continue to qualify for some entry-level positions. However, certifications and practical experience are essential for persons without degrees." 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 particular position. The petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into a systems analyst or a computer support specialist's position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). On appeal, counsel provides seven job listings and asserts that the postings describe duties similar to the duties performed by the beneficiary and that the requirement to show that it is common in the industry to require a bachelor's degree for entry into the position is a "minimum realistic prerequisite" and does not relate to the size of a business or the type of a particular industry.

A review of the job announcements finds: (1) a job announcement from Blue Shield of California for a "systems analyst III with a bachelor's degree in an unspecified discipline;" (2) a job announcement from Countrywide Home Loans for a senior software systems analyst with an undergraduate degree in business or information technology; (3) a job announcement for a consulting systems analyst with a bachelor's degree in an unspecified discipline; (4) a job announcement for an SAP-FICO systems analyst with a bachelor's degree or equivalent in SAP/FICO; (5) a job announcement for a systems analyst with a bachelor or master's of science in computer science; (6) a job announcement from a college of design for a systems analyst with a bachelor's degree in an unspecified discipline; and (7) a job announcement for a programmer-analyst with a bachelor's of science degree in computer science or equivalent programming experience. The job duties for each of the seven positions contained detailed descriptions that more closely paralleled a description for a systems analyst and not the description of the proffered position. Moreover, the advertising firms are not similar to the petitioner's wholesale brush business. Moreover, the petitioner has not provided documentary evidence that its computer system corresponds to the computer systems of the advertising entities. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not offered other letters or affidavits from firms or individuals within the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." The petitioner has not offered evidence to establish that only individuals with a degree in a specific discipline are hired for positions similar to the proffered position even if the position is a position within a different type of industry. The record does not support a conclusion that the petitioner has satisfied the first prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Neither has the petitioner offered evidence that the nature of the specific duties of the proposed position is more specialized and complex than that of a computer support specialist/systems administrator or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in computer science or a related field. Going on the 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 190 (Reg. Comm. 1972)). The petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Counsel in this matter references the petitioner's hiring of the beneficiary for this position as evidence that the petitioner requires the services of an individual with a bachelor's degree in a specific field for this position. However, as observed above, if the prior record described the duties of the proffered position in the same manner as submitted with this petition, the director's approval would have been material error. In addition, counsel seems to suggest on appeal that the petitioner desires to hire this particular beneficiary, based on his experience and his work for the petitioner while in the Philippines. However, the petitioner's desire to hire a specific individual who has a bachelor's degree in a specific discipline and experience does not establish that the proffered position is a specialty occupation. The actual work to be performed for the proffered position is the factor to consider when determining whether the position is a specialty occupation. In this matter, the petitioner has not established that the duties of the proffered position are synonymous with the duties of an occupation requiring the attainment of bachelor's or higher degree. Moreover, the AAO notes that while a petitioner may believe that a

proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In this matter, the petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of a typical computer support specialist or systems administrator. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a computer support specialist or systems administrator. The petitioner has not provided substantiating documentary evidence that its business or its computer system requires the oversight or design application of an individual who has attained a baccalaureate or equivalent degree in a specific discipline. The evidence of record does not contain evidence to demonstrate that the duties of the proffered position are usually associated with the attainment of a bachelor's or higher degree in computer science or a related field. 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.