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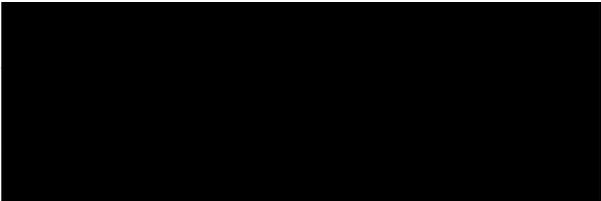
FILE: WAC 03 194 50237 Office: CALIFORNIA SERVICE CENTER Date: AUG 01 2005

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, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the 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 a manufacturer of jewelry and a diamond wholesaler. It seeks to employ the beneficiary as an applications 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 director denied the petition because the evidence of record does not establish that the job offered qualifies as a specialty occupation. On appeal, the petitioner submits a brief.

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.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a part-time applications programmer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company

support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail creating an application to trace orders, budget reports, time and expense reports, attendance reports, etc. and look over the specific diagrams on performance and productivity of the business, analyzing project work flow, staff, all levels of budgetary aspects, deadlines, clients' levels of satisfaction, company's development, etc.; developing computer software systems to keep track of inventories arriving from worldwide destinations on daily basis, as well as to allow the upgrade of systems in order to have access to up-to-date financial information in the form of immediate invoice referencing, account ledger accessing, formalized billing procedures, shipping tracking, and other accounting and record keeping necessities; creating a software system that can analyze databases of inventory records; developing other programs that will allow the beneficiary to keep track of all billing cycles as well as automated individual invoices to a particular client; responsible for remedying any programming bugs that may surface during the development of various application software; setting up back-ups as well as participating in the design and up keep of communication protocols to insure data integrity; developing programs to store extensive financial, shipping, invoice tracking, marketing, and other business-related information that will need to be accessed; utilizing: MS-SQL Server, ASP, JAVA, Java Script, HTML, DHTML, COM/DCOM, C ++, DELPHI and etc.; obtaining and modifying data from core databases into the petitioner's database, while ensuring the security of the servers; fulfilling specific orders and invoices from clients; eventually developing website where on-line purchasing will be available; providing integrated (networked) IT solutions; providing a turn-key solution including a full range of server, workstation and network hardware; setting up and maintaining Internet and WAN connectivity with vendors and manufacturers through Cisco Routers over ADSL connections, providing the security of Virtual Private Network together with the added functionality of state of the art IP technology; designing and maintaining the high speed voice and data networks that enables the sharing of broad band internet access as well as files printers and fax modems within the network; using wireless and wired Ethernet with transparent bridging and roaming capabilities; custom designing a WAN with business customers; creating an Intrusion Detection System with program/technologies such as C, VC, NDIS, Hook Driver, Sockets, TCP/IP and Firewall; further build a call center systems based on Oracle 8i database; programs/technology that will be used by the beneficiary includes: Oracle 8i, ODBC, TCP/IP, Java Script, HTML, C++, Delphi and VB; training staff to operate complex systems; designing each and every software/hardware so that any average person could easily access computer systems; working with company employees. The petitioner indicated that the position required an individual with a background in computer science, applied mathematics, engineering, statistics, chemistry and even business administration with computer applications. Additionally, the petitioner provided the basic breakdown of percentage of time spent on each duty:

- 30% - IT Solutions
- 25% - Network Programming & 10% Network Security
- 25% - Database Solutions
- 10% - training of our staff on using specific software and basic hardware.

The director issued a request for additional evidence. The director requested evidence that the position of applications programmer is a common position required by similarly sized jewelry companies with similar annual incomes. Additionally, the director requested information pertaining to the beneficiary's qualifications. The director requested evidence pertaining to the petitioner such as a computer hardware and software inventory and quarterly wage reports.

In response, the petitioner restated the previously provided duties and added that the company has two underused websites. Additionally, the beneficiary would further develop the websites.

The director also requested evidence of the existence of a computer system that would be utilized by the beneficiary. The petitioner indicated that it was submitting evidence of recent invoices documenting purchases that were made in 2003. Although not requested, the petitioner submitted a copy of its Federal Income Tax Return for tax year 2002 which indicated gross revenues of \$1.4 million.

The director determined that the petitioner had not established that there is a bona fide position in a specialty occupation. The director noted that the petitioner had three employees. The director referred to the description of applications programmers found in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*): The job description of an applications programmer is as follows:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. They also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmer* refers to individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a program to track inventory within an organization. They may also revise existing packaged software or customize generic applications called middleware. *Systems programmers*, on the other hand, write programs to maintain and control computer systems software, such as operating systems, networked systems, and database systems. These workers make changes in the sets of instructions that determine how the network, workstations, and central processing unit of the system handle the various jobs they have been given, and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers to determine the source of problems that may occur with their programs.

The director noted that because the job description of the proffered position refers to many sophisticated types of software and hardware, the director requested evidence verifying the existence of the computer system referenced in the letter of support. The petitioner submitted proof of purchase for one desktop computer, one laptop computer and one PDA. The director found that the evidence of hardware provided by the petitioner did not support the networking, server and database functions described by the petitioner. The director noted that in response to the request for additional information about the position, the petitioner indicated that it had two underused web sites that the beneficiary would develop. The director determined that the beneficiary would be performing web development based on the evidence provided. The director noted that the *Handbook* stated:

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 design and creation.

Furthermore, the director referenced the training qualifications noted in the *Handbook*:

For some network systems and data communication analysts, such as webmasters, an associate's degree or certificate is sufficient, although more advanced positions might require a computer-related bachelor's degree. For computer and information scientists, a doctoral degree generally is required due to the highly technical nature of their work.

The director determined the record did not contain sufficient evidence demonstrating that a degree requirement is the industry standard for this position, or that the beneficiary's duties are so unique that they can only be performed by an individual with abilities beyond the industry standard. Additionally, the director determined that the petitioner has not demonstrated a bachelor's degree is required because the job duties are so complex that someone may not perform them with the minimum educational background gained through a bachelor's degree program. Thus, the director determined that the proffered position was not a specialty occupation.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that the petitioner has met the first of the four criteria in establishing that the proffered position is a specialty occupation. Counsel also contends that the petitioner has met the fourth criterion in that the nature of the duties is so specialized that knowledge associated with the attainment of a bachelor's degree is needed.

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 proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel states that the duties of the proffered position are performed by applications engineers. As discussed by the director, the *Handbook* discloses that many of duties of the proffered position are performed by computer programmers. The *Handbook* indicates that while there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising, due to the growing number of qualified applicants and the specialization involved with most programming tasks. The *Handbook* states that bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The *Handbook* further indicates that the associate degree is an increasingly attractive entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

The petitioner fails to establish the first criterion because, although the *Handbook* states bachelor's degrees are commonly required, some programmers may qualify for certain jobs with 2-year degrees or certificates. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on submitted internet job postings from a wide variety of companies which include engineering, communications, securities, hospital and manufacturing companies.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Some postings state that the positions require a bachelor's degree and other postings indicate that a master's degree is required. One posting simply states a degree is required and does not reference whether it is referring to a two or four year degree. Another deficiency in the postings is that the companies are either obviously dissimilar to the petitioner or their nature is undisclosed. For example, UNC Healthcare, is a provider of healthcare services; and The PennySaver is a communications company. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

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.

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. Once again, the *Handbook* indicates that some employers prefer to hire persons who have at least a bachelor's degree but that it is not a requirement for an entry-level position in the field. The petitioner submits a letter from a company specializing in credential evaluations. The author of the letter indicated he is a professor in Computer Science. The author stated that he reviewed the job description for the proffered position and stated that only those persons who hold a bachelor's degree in such fields as Computer Science, Management Information Systems, Computer Engineering or related fields. The petitioner did not submit a copy of the author's resume.

The petitioner has not related the listed duties to its business of manufacturing jewelry and wholesaling diamonds. The petitioner indicated that it had three employees and indicated in its response to the request for evidence that according to its most recent Form DE-6 that it had nine employees, including the beneficiary. The petitioner contends that the beneficiary will configure and maintain LAN and WAN networks and back ups to insure data integrity, yet in response to the director's request for evidence the petitioner indicated that it

has one desktop, one laptop and one PDA. The petitioner has not provided any evidence of the volume and complexity of its business such as its nationwide customer orders, and inventories arriving from worldwide destinations on a daily basis to be tracked, upon which the petitioner bases its need for an applications programmer. 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)). As the duties of the position have not been substantiated by the facts of record, the AAO will accord less weight to the testimony of the expert submitted by the petitioner. 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).

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 (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. The petitioner has not shown, in relation to its business, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Although some computer programming positions may be specialty occupations, the petitioner's description of the duties associated with this position in relation to its business do not demonstrate that the preponderance of the beneficiary's duties would be so complex that they would require a baccalaureate degree in a specialty as a minimum requirement.

Again, the *Handbook* reveals that the duties of the proffered position would be performed by an applications programmer, an occupation that does not, without a description of a more advanced position in relation to one's business, require a specific baccalaureate degree. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on the ground that the proffered position does not qualify as a specialty occupation.

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.