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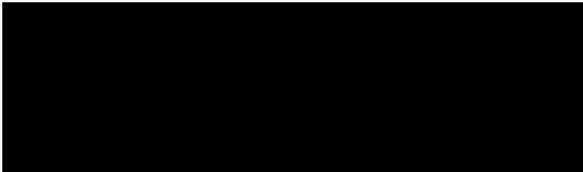
FILE: WAC 02 234 53647 Office: CALIFORNIA SERVICE CENTER Date: **AUG 16 2005**

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 dental clinic. In order to employ the beneficiary as a programmer, the petitioner 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 on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); the materials submitted in response to the RFE; (3) the director's notice of intent to deny (NOID); (4) the materials submitted in response to the NOID; (5) the director's denial letter; and (6) the Form I-290B, and counsel's appellate brief and attached exhibits, numbered 1 through 10.

The specialty occupation issue will be addressed first.

On appeal, counsel presents several bases for his argument that the director erred in his determination that the proffered position is not a specialty occupation, including: the opinion of the president of Global Education Group, Inc. (GEC), expressed in her March 25, 2003 "Advisory Opinion Report," that the proffered position requires the services of a person with at least a U.S. bachelor's degree in Computer Information Services or a related field; *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988) for noting that, in counsel's words, "computer programming appears to be an occupation that is in transition from non-professional to professional status"; recognition in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* that, in counsel's words, "the many technological innovations in programming have redefined the role of the programmer and led to new skill requirements, leading to the finding of more programming positions as specialty occupations"; and reference to three AAO decisions (from 1995 and 1996) that found that particular programmer jobs qualified as specialty occupation positions.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On the Form I-129 (Petition for Nonimmigrant Worker), the petitioner described the proposed duties as “Will design website, link databases for the company’s three offices, office networking and connection, and set and maintain the office’s intelligent telephone system.”

On appeal, counsel summarizes the proposed duties as follows:

The position requires the following job duties: 1) Networking, linking and administration of databases, 2) networking of office computers, 3) implementing of firewall, 4) allowing for access and operation of all x-ray scanners from all office computers, 5) adapting software for all electronic devices to existing programs, 6) writing of software programs to provide capability of existing programs to operate with other peripherals, 7) setting up of virtual private network (VPN) to allow each doctor the access of patient information over the internet, (8) adapting of patient education software to office management software, 9) regular programming of office database in Microsoft Access, and the creating of the website for the dental offices These duties are computer-related tasks that would require university level computer knowledge acquired through four years of academic study towards the U.S. Bachelor’s degree in Computer Information Systems or related field awarded by a regionally accredited university in the United States or [a] foreign equivalent.

On the basis of the aforementioned “Advisory Opinion Report” from the president of GEC, counsel states:

Furthermore, the successful completion of the job duties would require university level computer information systems courses including, but not limited to: Introduction to Computer Information Systems; Business Programming Languages; Introduction to Programming; Microcomputer Business Applications; Microcomputer Assembly Language Programming; Analysis of Information Systems; Data Base Management Systems; Design of Information Systems; System Software Concepts; Telecommunications: Introduction and Fundamentals; Applied Software Project Development; Topics in Computer Information Systems; Computer and Network Security; Fundamentals of Information Technology Project Management These are standard courses encompassed in four-year under [sic] undergraduate degree programs in Computer Information Systems offered by regionally accredited universities in the United States Therefore, it is clear that the position of Programmer at [the petitioner] would require the applicant to hold a minimum of a U.S. Bachelor’s degree in Computer Information Systems or related field awarded by a regionally accredited university in the United States or [a] foreign equivalent.

For the following reasons, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor’s degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The opinion of the GEC president about the educational requirements of the proffered position is not probative, and the AAO therefore accords it no evidentiary weight with regard to any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). According to the GEC document about the background of its officers, the GEC president

does not possess a degree in the specialty area upon which she opines, namely, Computer Information Systems. The record contains no evidence that she has any experience or conducted studies in this specialty, and there is no evidence that she has been recognized as an authority in this field by any professional association, academic institution, court, or administrative body. This person seeks deference to her opinion on the basis of an inadequate foundation for recognition as an expert on the educational requirements of the proffered position, namely, her “academic qualifications and professional experience in the field of international education, including transfer credit assessment and foreign credential evaluation.” Another, independent reason that the AAO discounts the GEC president’s opinion is that it provides no analysis to support her opinion: the “Advisory Opinion Report” consists only of (1) a general statement to the effect that its author president is qualified to opine on the job requirements because of her “academic qualifications and professional experience in the field of international education”; (2) a list of the proposed duties; and (3) the president’s unexplained conclusion that the duties equate to the need for a certain degree and certain courses. 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*.

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.¹ Because the petitioner identifies computer programming as the primary activity proposed for the petitioner, the proffered position comports with the computer programmer occupational category as addressed in the 2004-2005 edition of the *Handbook*.² As indicated in the following excerpt from page 98 of its 2004-2005 edition, the *Handbook* does not report that at least a bachelor’s degree, or the equivalent, in a specific specialty is the normal entry-level requirement for computer programmers:

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. Bachelor’s degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. 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.

Employers are primarily interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/.

² At page 96, the *Handbook* states that “computer programmer” refers to “individuals whose main job is programming; this group has a wide range of responsibilities and educational backgrounds.”

programmers with a degree, employers appear to be placing more emphasis on previous experience.

Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, inventory control, or another area of business. As the level of education and training required by employers continues to rise, the proportion of programmers with a college degree should increase in the future. As indicated by the following tabulation, 65 percent of computer programmers had a bachelor's or higher degree in 2002.

	Percent
High school graduate or equivalent or less	7.7
Some college, no degree	15.2
Associate degree	11.6
Bachelor's degree	48.6
Graduate degree	16.7

The evidence of record does not rebut or refute the DOL information.

The AAO notes that although the petitioner indicates that programming is the primary work in which the beneficiary would be engaged, the proffered position also appears to involve some aspects of systems analysis, systems administration, and database administration as those occupational functions are discussed in related sections of the *Handbook's* treatment of computer-based occupations (*see* pages 96-110 of the 2004-2005 edition of the *Handbook*). However, the petitioner has not demonstrated that the total combination of duties elevates the position to the level of one for which the normal minimum educational requirement is a bachelor's degree or its equivalent in a specific specialty.

Neither counsel nor the petitioner provides sufficient evidence to substantiate the claim that the proffered position is one for which the minimal entry-level requirement is at least a bachelor's degree in a specific specialty. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's references to AAO non-precedent decisions are not persuasive. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a

separate record. *See* 8 C.F.R. § 103.8(d). In 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), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted attestations from other persons, firms, or a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty.

As the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Such uniqueness, complexity, or specialization is not evident in the duties as described in the record, and, as already discussed, the AAO does not accord any weight to the opinion of the president of GEC to the effect that the proffered position requires at least a bachelor's degree in computer information systems or a related specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

As the finding that the petitioner has not established that the proffered position is a specialty occupation, the beneficiary's qualifications are inconsequential to the outcome of this case and will not be addressed.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.