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U.S. Citizenship
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Services

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FILE: EAC 04 267 52124 Office: VERMONT SERVICE CENTER

Date: **AUG 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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a real estate company. It seeks to employ the beneficiary as a web developer and 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 on the grounds that the record failed to establish that the proffered position qualifies as a specialty occupation and the petitioner failed to submit a valid LCA.

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.

As provided in 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 decision; and (3) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a real estate company, established in 1999, with six employees and gross annual income of \$500,000. It proposes to employ the beneficiary temporarily as a web developer at an

annual salary of \$34,000. In the Form I-129 and an accompanying letter the petitioner provided the following description of the job:

Responsible for managing and coordinating the development, design, content and promotion for company's web site as an informational and marketing tool. Provides essential leadership in the creation, development, maintenance and operation of the company's web site. The position requires creative and persuasive writer and editor who is experienced in electronic publishing, particularly as it pertains to web sites, has a general familiarity with the graphic design skills that determine a web site's look and feel, and [has] sufficient understanding of the technical aspects of web site development and operation to guide technical support staff in making it happen.

According to the petitioner, the minimum educational requirement for the proffered position is a bachelor's degree in computer science. The beneficiary is qualified for the job, the petitioner declares, by virtue of his bachelor of science degree, with a specialization in computer networks, which he received on June 16, 2003 from the Technical University of Szczecin, in Poland.

In his decision the director referred to information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* indicating that web developers do not normally require a baccalaureate degree in a specific specialty as a minimum educational requirement for entry into the occupation. The director found that the evidence of record failed to show that the proffered position requires a specialty degree, that a degree requirement is the industry standard for the position, that the petitioner normally requires a specialty degree for the position, or that the duties of the proffered position are so specialized and complex that baccalaureate level knowledge in a specific specialty is required to perform them. The director concluded that the record does not establish that the proffered position qualifies as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act. The director noted that the certification dates of the petitioner's labor condition application (LCA) had been altered, thereby negating its authenticity, and also found that the record failed to show that the beneficiary was in valid nonimmigrant status at the time the instant petition was filed.

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited 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." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

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 with new evidence.

On appeal counsel submits evidence to establish that the beneficiary was in valid nonimmigrant status, with a B2 visa, at the time the instant H-1B petition was filed. The change of status issue is not within the AAO's jurisdiction and will not be further addressed.

Counsel submits additional documentation on appeal which includes a letter from the petitioner describing the proffered position in greater detail and letters from two other realtors about their use of web developers and the educational requirements of the position. A new LCA has also been submitted. The letter from the petitioner describes the proffered position as follows:

[T]he position offered will require extensive specialized knowledge and training in web design and development. It requires a strong design background as well as substantial knowledge of HTML, DHTML, Java Script, CSS, XML, CVS, UNIX, and LINUX. The position demands that the specialist also be knowledge[able] in graphics design and illustration as well as advertising design.

In addition, the position requires a strong conceptual and technical knowledge in layout, typography, motion, usability, design, information and content design, and color theory as it applies to the web and design in general with expert-level experience in creating/debugging HTML, CSS, DHTML, JavaScript, and a working knowledge of JSP, ASP, MYSQL, PERL, JAVA, C, or C++ is a plus.

[T]he necessity of a competent computer specialist is dictated by the total reliance of the real estate industry on the Multiple Listing Service (MLS), an online property listing service, which serves as the primary marketing and communication tool available to a real estate firm.

[T]he duties . . . include maintaining an accurate property listing, creating and developing web banners, web pages, and web sites on various web browsers.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

Web developers are discussed in the *Handbook*, 2006-07 edition, as a subset of the occupational category of computer scientists and database administrators. The *Handbook's* occupational description reads as follows:

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.

Handbook, at 105 (emphases in the original). As for the educational requirements of the occupation, the *Handbook* states as follows:

[F]or 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 these programs may be geared more toward meeting the needs of local businesses and are more occupation specific than are four-year degree programs

Id. at 108-09. As the foregoing information indicates, a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into a web developer position. A two-year associate degree, a technical school certificate, or a baccalaureate degree in a field unrelated to computers, could be a suitable educational background for a given position. The AAO determines that the proffered position does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a position as a web developer.

With respect to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel has submitted a letter from the owner of another real estate company in the same geographical area as the petitioner, ██████████, who states that she employs a computer specialist with responsibility for maintaining and updating the company's web site. The letter does not state that the computer specialist has a baccalaureate degree of any kind, whether the employer requires a degree for the position, or whether a degree is required to perform the job duties. Thus, the letter from ██████████ does not demonstrate that a baccalaureate degree in a specific specialty is a common requirement in the petitioner's industry for parallel positions among similar organizations, as required for the petitioner's web developer to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel has also submitted a letter from ██████████ treasurer of the Berkshire Board of Realtors (also in the same geographical area as the petitioner), who states that real estate companies require a web developer or computer specialist because of the sophistication of the software used by the industry and the necessity of conducting business online. ██████████ declares that "this association will refer our members to computer specialists, if requested, and all the computer specialists utilized possess four-year BS degrees in computer science." According to ██████████, "across the membership four-year degrees in computer science are utilized [and] in light of the high level of technical expertise needed to work within the MLS . . . to utilize a computer worker with . . . less than a four-year college degree would be insufficient and, generally speaking, a risky business decision." The letter from ██████████ – which is written on her own letterhead, not the letterhead of the Berkshire Board of Realtors – provides no information about the size of the organization and its membership. ██████████ provides no information as to the number of its members the organization has and their scale of operations. There is no evidence in the record showing the length of

service on the board and her experience in the real estate industry, or establishing her qualifications to render an opinion about the hiring practices of the real estate industry. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion does not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the letter from [REDACTED] is not persuasive evidence that a degree requirement in computer science or a related specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the evidence of record show that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree. Neither the petitioner's description of the proffered position, nor any other documentation in the record, demonstrates that the web developer is a unique position, or that its complexity exceeds that of a typical web developer, which the *Handbook* indicates does not normally require a specialty degree. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the proffered position is newly created and the petitioner has no hiring history for it. Accordingly, the petitioner cannot demonstrate that it normally requires its web developer to have a degree in a computer-related specialty or its equivalent, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that knowledge usually associated with a baccalaureate or higher degree is required to perform them. The job duties do not appear to be more specialized or complex than those of a typical web developer. The evidence of record does not establish a complexity of duties that would require a four-year degree in a computer-related specialty. Accordingly, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

As previously noted, the director also determined that the petitioner failed to submit a valid certified LCA. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) provides as follows:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The LCA submitted with the petition requested a two-year period of employment, but was certified by DOL for a three-year period of employment in which two of the numerals in the starting and end dates appear to

have been written by pen. The director noted this apparent alteration in his decision. On appeal counsel has submitted a new LCA that requests only a one-year period of employment and has not been certified by the DOL. The new LCA is not valid because it postdates the filing of the petition by more than six months and is not certified. Nor has the petitioner cleared up the discrepancy in the initial LCA. Since the petitioner has failed to establish the authenticity of its certified LCA, the petition must be denied for this additional reason as well.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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