



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



PUBLIC COPY

02

Date: JUL 12 2007

FILE: EAC 05 139 53145 Office: VERMONT SERVICE CENTER

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:

SELF-REPRESENTED

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 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 an information technology business that seeks to employ the beneficiary as a programmer analyst. 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 determining that the record failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the 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 programmer analyst. The petitioner indicated that the beneficiary is a qualified candidate for the job because she possesses a foreign bachelor's degree in mechanical engineering, and related employment experience.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, training, and employment experience did not qualify her for a programmer analyst position. On appeal, the petitioner's director states, in part, that the beneficiary is qualified for the position because, in addition to her foreign bachelor's degree, she has related computer training and more than three years of employment experience as a programmer analyst. He states further that the director has previously approved similar cases.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a computer-related field. The beneficiary holds a foreign bachelor's degree in mechanical engineering and two computer-training certificates. The record also contains a letter, dated July 1, 2002, from the beneficiary's foreign employer indicating that the beneficiary has worked as a "System Analyst/Programmer" from August 1, 1998 to the present. The beneficiary, however, does not hold a baccalaureate degree from an accredited U.S. college or university in a computer-related field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in a computer-related field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

The record contains the following documentation pertaining to the beneficiary's qualifications:

- Copies of the beneficiary's foreign Bachelor of Engineering degree in mechanical engineering, and transcripts;
- A credentials evaluation from [REDACTED] Services, Inc.), dated April 4, 2005, based on the beneficiary's foreign bachelor's degree, concluding that the beneficiary's foreign Bachelor of Engineering degree is equivalent to a U.S. Bachelor's of Engineering degree in mechanical engineering;
- A second credentials evaluation from [REDACTED], also dated April 4, 2005, based on the beneficiary's foreign education and computer training, concluding that the beneficiary holds the equivalent of a bachelor's degree in mechanical engineering with an additional concentration in computer programming, operations research, CAD/CAM, Design & Drawing, C, C++, Visual Basic, Oracle, MS Windows, Unix, Projects, FoxPro, and C-Programming;
- Two certificates for computer-related training completed by the beneficiary; and
- A letter, dated July 1, 2002, from an Indian business indicating that the beneficiary worked from August 1, 1998 to the present as a "System Analyst/Programmer."

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As discussed herein, the record contains two evaluations from [REDACTED]. Neither evaluation, however, indicates that the beneficiary holds the equivalent to a baccalaureate degree from a U.S. college or university in a computer-related field of study. Further, although the evaluator claims to be a professor of mathematics and computer science at Morehouse College, and an adjunct professor at Trinity College, South Dakota University, and Clark Atlanta University, the record does not contain evidence that these institutions are accredited and have a program for granting credit based on an individual's training and/or work experience, and that the professor/evaluator has authority to grant college-level credit for training and/or experience, such as a letter from the university provost. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. Where an evaluation 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).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains documentation, including an employment letter, indicating that the beneficiary has computer-related work experience. The record also contains two computer-related training certificates. The record, however, contains insufficient evidence that this documentation is equivalent to a baccalaureate degree in a computer-related field.

Upon review, the record does not evidence that the beneficiary's prior work experience included the theoretical and practical application of specialized knowledge required by the specialty. The employer did not include a comprehensive description of the beneficiary's duties. The AAO therefore cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge. Furthermore, the employer does not indicate that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. The record also contains no evidence of the recognition of expertise required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Likewise, the training certificates submitted are insufficient to establish that the beneficiary's training in computer-related seminars is comparable to academic courses taken at a four-year university that are a realistic prerequisite to attaining a bachelor's degree in a specific specialty in computer science or a related field. The record does not contain sufficient information regarding the beneficiary's additional one and one-half years of training to evaluate the training as more than vocational coursework that results in technical skill but does not include the theoretical knowledge attained through a bachelor's level course of study at an accredited university in the United States.

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner asserts on appeal that CIS has already determined that the beneficiary is qualified to perform the duties of a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases.

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). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other 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).

In short, the record provides no basis for disturbing the director's decision. The petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation according to the standards of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and thus has also failed to establish that the proffered position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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