

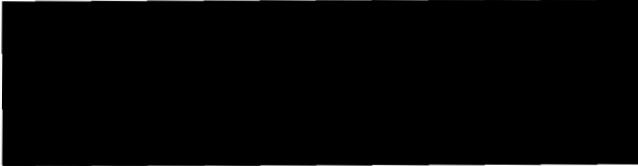
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U.S. Citizenship
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FILE: WAC 07 052 50550 Office: CALIFORNIA SERVICE CENTER Date: **MAY 30 2008**

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 E. 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 a wholesaler and retailer of leather and textile products. It seeks to employ the beneficiary as a programmer/analyst – web developer. 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 petitioner had not demonstrated that a reasonable and credible offer of employment exists.

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

The issue before the AAO is whether a specialty occupation is available for the beneficiary. 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:

- (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) consistently 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.

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 (5th Cir. 2000).

The petitioner seeks the beneficiary’s services as a programmer/analyst – web developer. Evidence of the beneficiary’s duties includes: the petitioner’s December 6, 2006 letter in support of the petition and the petitioner’s March 21, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

- Plan, develop, test and document computer programs in Graphical User Interface (GUI) based windows programming using Oracle, Sybase, Dbase, Power Builder and other tools; evaluate user requests for new or modified programs, such as financial systems, management information systems, and clinical research trial results;
- Consult with user to identify current operation procedures to clarify program objectives; formulate plan-outlining steps required to develop program, using structural analysis and design;
- Prepare flowcharts and diagrams to illustrate sequence of steps that the program must follow and to describe program development, logic, coding and corrections;
- Oversee installation of hardware and software, and monitor performance of program after implementation; conduct user training, perform periodic system updates, and interact with users for future enhancements;

- Resolve software application problems; assist with systems management and general network maintenance; perform related duties as assigned;
- Design and develop E-commerce application front-end using programming tools like Java, Java script and the oracle as data base with Unix as an operating system;
- Develop reports, switchboard and navigation screens; write complicated queries and macros in Oracle and VB; test and implement the new system and user support; use SQL Loader to load the existing data from a flat file;
- Use VB Script to validate user input from web pages;
- Develop HTML (web) pages to serve as data entry screens; create database tables, enforce referential integrity, and prepare user administration;
- Design and implement follow-up on the inventory system;
- Create all the different interfaces for the predefined and pre-designed database in SQL Server; load the data;
- Create GUI design and writing program specifications to design, code, and test;
- Create the user defined components such as ActiveX controls and ActiveX DLLs to maintain the components in the MTS server;
- Implement the critical modules using the C++; integrate the software modules;
- Program the small application for the end users in order to enhance the flow of information;
- Transfer database from the old system into new systems using database script for ERP systems like Oracle finance; and
- Support the network administration with the NT Server and NT workstations.

The director found that the petitioner had not demonstrated that a reasonable and credible offer of employment exists.

On appeal, the petitioner states, in part, that the proffered position is essential for merchandising the petitioner's wares on the Internet. The petitioner also states that the beneficiary was originally hired to replace an H-1B employee for the same position and thus the director had already determined that the proffered position is a specialty occupation. As supporting documentation, the petitioner submits the H-1B approval

notice for another employee, the petitioner's federal income tax returns for 2003, 2004, and 2005, Internet job postings for web developer positions, and excerpts from the petitioner's website.

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 turns first to 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is a specialty occupation. A review of the Computer Scientists and Database Administrators occupation category in the *Handbook*, 2006-07 edition, finds a discussion of various computer positions including Internet/Web developers. Regarding the training requirements for these positions, the DOL states, in part: "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 more geared toward meeting the needs of local businesses and are more occupation specific than are 4-year programs." The DOL indicates that for some webmasters, an associate's degree or certificate is sufficient. The *Handbook* does not report that a baccalaureate or higher degree, or its equivalent, is required for a web developer job. In addition, the *Handbook* reports that certain programming positions require only a two-year degree or certificate and that an associate degree is a widely used entry-level credential for prospective computer programmers. *See Training, Other Qualifications, and Advancement for computer programmers in the Handbook*, 2006-07 edition.

The petitioner has not provided a definitive statement of duties associated with the proposed position that substantiates the incumbent in the position must possess a bachelor's degree in a specific discipline. As the proposed duties are described in general terms, the AAO is unable to determine whether the position encompasses the duties primarily of a web developer, a computer programmer or some type of computer analyst. Moreover, as referenced above, these occupations may or may not require a bachelor's degree in a specific discipline, depending in large part upon the nature of the petitioner's business and its projects. As the record does not contain detail regarding the daily duties associated with particular projects, the AAO is unable to find that the position requires the services of an individual with a bachelor's degree or higher in a specific discipline. Of further note, information on the petition that was signed on December 6, 2006, reflects that the petitioner was established in 1983, has seven employees and a projected gross annual income of \$2 million. The petitioner's federal income tax returns for 2003, 2004, and 2005 reflect gross receipts or sales of

\$1,052,097, \$1,022,061.00, and \$1,109,669.00, respectively, compensation of officers in the amounts of \$62,185.00, \$52,000.00, and \$52,000.00, respectively, and salaries and wages paid in the amounts of \$74,638.00, \$49,630.00, and \$65,327.00, respectively. The information reflected on these returns does not support the petitioner's claims on the petition that it has seven employees and a projected gross annual income of \$2 million. Going on record without supporting documentary evidence is not sufficient for the purpose 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)). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, the petitioner submits Internet job postings for web developers. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. The businesses described in the advertisements are not similar to the petitioner's leather and textile products wholesale and retail business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Moreover, the majority of the advertisements do not stipulate the requirement of a bachelor's degree, thus confirming the position of the DOL in its *Handbook*, namely that there is no requirement of a baccalaureate degree in a specific specialty for a programmer/analyst – web developer position. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner states on appeal that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding, however, does not contain all of the supporting evidence submitted to CIS in the prior case. In the absence of all of the corroborating evidence contained in other record of proceeding, the information submitted by the petitioner is not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition. 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition 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).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from

similar but non-degreed employment as a web developer. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As discussed above, the petitioner states that the beneficiary was originally hired to replace an H-1B employee for the same position. Again, this record of proceeding does not contain all of the supporting evidence submitted to CIS in the prior case. 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. at 165. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. 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.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

The petitioner states, on appeal, that excerpts from its website show the nature of the complexities inherent in the proposed duties. The petitioner, however, has not established that the proposed duties exceed in scope, specialization, or complexity those usually performed by a web developer, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. As noted in the *Handbook*, while some computer-related positions may qualify as specialty occupations, others require an associate's degree, computer training, or work experience. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is coming to the United States to perform services in a specialty

occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b). For these reasons, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation. The petitioner has provided an evaluation from university professor based on both the beneficiary's U.S. computer-related training and her foreign work experience. 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. While the AAO will accept the evaluator's opinion regarding the beneficiary's U.S. computer training as equivalent to one year of academic studies leading to a bachelor's degree at an accredited U.S. college or university, the record does not include sufficient evidence in support of the evaluator's conclusion that the beneficiary has attained the equivalent of a Bachelor of Science degree in Digital Communications Design from an accredited institution of higher learning in the United States based on her U.S. computer-related training and her "approximately" nine years of foreign work experience and training in digital communications design and related areas. It is noted that the dates of the beneficiary's employment, as reflected in the employment letters from the foreign businesses *Kadir Yildiz* and *Genteks Print Tekstil*, "March 1989 to December 1993" and "February 1994 to April 1998," do not total nine years. Moreover, the foreign employers' descriptions of the beneficiary's duties do not clearly demonstrate that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation, that her experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that she has recognition of expertise, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

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.

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.