

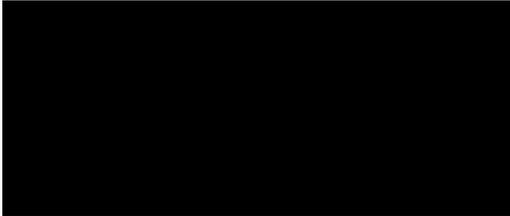
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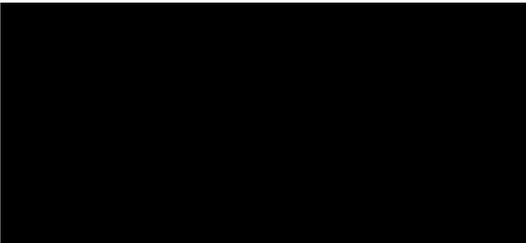


FILE: WAC 04 072 51073 Office: CALIFORNIA SERVICE CENTER Date: AUG 01 2005

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

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 jewelry wholesaler. It seeks to employ the beneficiary as a software engineer, applications. 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 and additional evidence.

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 software engineer, applications. 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 applying principles and techniques of computer

science to plan architecture for the company's web system and to design, develop and write customized web applications software; analyzing user needs and developing software solutions with the aim of optimizing operational efficiency for global business; utilizing knowledge of computer technology and languages, including PHP, JavaScript, HTML, Server and SQL for designing and developing; analyzing and designing database management software with integration into websystem; conducting software development, testing, debugging and troubleshooting of application by modifying and/or correcting program errors to meet specifications. The petitioner did not indicate the minimum qualifications for the proffered position.

The director issued a request for additional evidence. The director requested a more detailed description of the work done, including specific job duties and the percentage of time to be spent on each duty. The director also requested additional information about the petitioner such as federal income tax returns and quarterly wage reports.

In response, the petitioner stated that the duties and percentage of time to be spent on each duty are as follows:

- Apply principles and techniques of computer science to design and develop customized software applications for the company (100%);
- Planning architecture for company's web system and design, developing design, developing and writing customized web applications software (20%);
- Analyzing and designing database management software with integration into web system (20%);
- Analyzing user needs and developing software solutions with the aim of optimizing operational efficiency for global business (20%);
- Utilizing knowledge of computer technology and languages, including PHP, JavaScript, HTML, Server and SQL for designing and developing (15%);
- Conducting software development, testing, debugging and troubleshooting of application by modifying and/or correcting program errors to meet specifications (15%);
- Reporting or recommending resolution to the management (10%).

The petitioner indicated that the minimum education, training and experience necessary to do the proffered job of software engineer, applications requires a master's degree in computer science. The petitioner stated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position of software engineer and quoted sections from the occupation section of the Department of Labor *Occupational Outlook Handbook* (the *Handbook*): "most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge and experience with computer systems and technologies."

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 states that the director failed to consider relevant factors and ignored the petitioner's detailed explanation of its unique and specific needs. Counsel contends that the petitioner is a leader in the highly competitive Los Angeles jewelry market. Counsel asserts that the petitioner has about 5000 sales orders per week and a weekly inventory of 10,000

items. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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 explains that the petitioner needs a highly trained software engineer to design and implement such technologies to improve its competitive position.

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 software engineers, applications. The *Handbook* discloses that the duties of the proffered position are performed by computer applications software engineers. Like the beneficiary, who will analyze user needs and develop software solutions with the aim of optimizing operational efficiency for global business, the *Handbook* reports:

Computer applications software engineers analyze users' needs and design construct and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program. The programming languages often used are C, C++, and Java, with Fortran and COBOL used less commonly. Some software engineers develop both package systems and systems software or create customized applications.

The petitioner fails to establish the first criterion because although the *Handbook* states most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of and experience with a variety of computer systems and technologies, it is not a requirement for entry into the field. The *Handbook* specifically notes that for systems engineering jobs that place less emphasis on workers having a computer related degree, computer training programs leading to certification are offered by systems software vendors. 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.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

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 software company whose author indicates that he "highly recommend[s] [the petitioner] to hire a professional software engineer for the secured website programming in both languages." The author recommended hiring a professional software engineer with a minimum of a bachelor's degree. The petitioner has not related the listed duties to its business of importing and the distribution of jewelry. The petitioner has not provided evidence of the size and complexity of its business such as its 50 retail customers, and 5,000 sales orders per week, upon which the petitioner bases its need for a highly trained software engineer, with at least a bachelor's degree in a computer related field.

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 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 software engineer positions may be considered specialty occupations, the petitioner's description of the duties associated with this position did not demonstrate that the preponderance of the beneficiary's duties would be so complex that they would require a baccalaureate degree in a specialty.

Again, the *Handbook* reveals that the duties of the proffered position would be performed by a computer software engineer, an occupation that does not 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.