

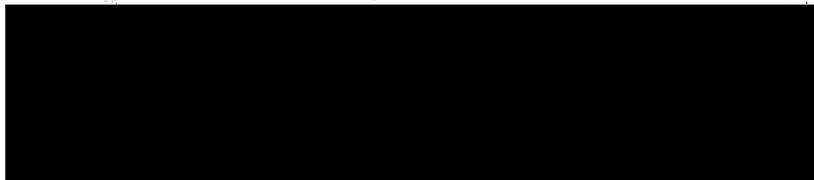
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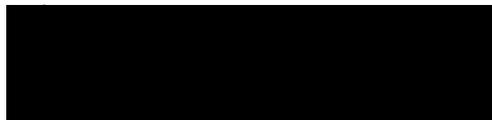
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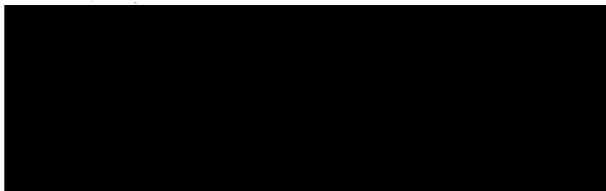
FILE: WAC 04 079 52766 Office: CALIFORNIA SERVICE CENTER Date: DEC 13 2005

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 California 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 international recruitment and placement company that provides career opportunities to foreign nurses and other allied health professionals, with eight employees. It seeks to employ the beneficiary as a computer software engineer 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 he determined the petitioner had failed to establish its proffered position as a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 one that requires:

- (1) the theoretical and practical application of a body of highly specialized knowledge, and
- (2) 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, a 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.

The term "degree" in the above criteria is interpreted by CIS 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 (5<sup>th</sup> 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 states that it is seeking the beneficiary's services as a computer software engineer. Evidence of the beneficiary's duties includes: the Form I-129; a January 21, 2004 letter of support from the petitioner accompanying the Form I-129; and the petitioner's May 7, 2004 response to the director's request for evidence.

At the time of filing, the petitioner stated the proffered position would require the beneficiary to:

- Design, write and test new software programs;
- Be responsible for the petitioner's database system, including providing accurate design specifications and time assessments for software modifications, as requested by clients and the petitioner; analyzing, troubleshooting and resolving programming defects with respect to the system, related products, services and third-party software interfaces; and thoroughly test software modifications;
- Network the petitioner's two subsidiaries;
- Perform installations, modifications, cleaning and repair of computer hardware and software; perform troubleshooting jobs and interpret problems and provide technical guidance to management, sales, and marketing; provide technical design documents; and support project development using information technology and various application services, databases and operating systems;
- Apply mathematical concepts and technical implementation in support of daily operations and business goals; and participate in all software development projects of the petitioner;
- Support day-to-day operations of enterprise optimization and scheduling software by operating software on Linux and Windows services; respond to server and software

failures; and support promotion of new software developments into production use; and

- Develop and execute tests to validate that developed software adheres to requirements; understand the concept of statistics, linear mathematics, and calculus and design code in support of those concepts; provide unique statistical and data analysis to aid in the development of requirements design; provide technical support in database and code implementation; make changes to system software to correct errors in the original implementation and create extensions to existing programs to add new features or performance improvements.

To determine whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director, referencing the 2004-2005 edition of *Handbook*, identified the duties of the proffered position as those of a database administrator, employment that, he found, imposed a degree requirement when it involved scientific or engineering applications. However, as the petitioner is a staffing agency, the director determined an individual with less than a four-year degree would be capable of performing the duties of the proffered position. On appeal, counsel accepts the director's characterization of the proffered position as that of a database administrator and points to the director's statements regarding the degree requirement identified by the *Handbook* as proof that the petitioner has established the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). He contends that the director erred in determining that the nature of the petitioner's business is not within a field that would require its database administrator to hold a baccalaureate degree.

The AAO's review of the duties of the proffered position finds them to require the combined skills of a programmer/analyst and a database administrator, employment covered under the occupational title of computer systems analysts, database administrators, and computer scientists at pages 105-106 of the 2004-2005 edition of the *Handbook*. However, while the AAO shares the director's view regarding the nature of the proffered position, it does not agree with his reading of the degree requirements attached to this employment.

As discussed by the *Handbook* at pages 107-108:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, most employers place a premium on some

formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

For systems analyst, programmer-analyst and database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS) . . . . Employers are increasingly seeking individuals with a master's degree in business administration (MBA), with a concentration in information systems, as more firms move their business to the Internet . . . .

Despite employer's preference for those with technical degrees, persons with degrees in a variety of majors find employment in these computer occupations. The level of education and type of training that employers require depend on their needs . . . .

Based on the above language, the AAO finds no specific degree requirement to be attached to employment as a programmer/analyst or database administrator. Although the *Handbook* states that most employers require some type of formal college education, it does not indicate that this education must, at a minimum, be a baccalaureate degree or its equivalent in a directly related field. Further, although many employers are identified as preferring applicants with computer-related baccalaureate degrees or master's degrees in business administration with concentrations in information systems, employer preference is not synonymous with the normally required language of the first criterion. It indicates only that employers find such degrees desirable, not that they require them. Accordingly, the record does not establish that the proffered position of programmer/analyst and database administrator normally requires those seeking employment to hold the minimum of a baccalaureate degree or its equivalent, as required to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that the quotations used by the director to support his findings regarding the degree requirements for database administrators are not found in the 2004-2005 *Handbook's* discussion of the occupation of computer systems analysts, database administrators, and computer scientists. This language, once again, indicates only that employers using computers for scientific or engineering applications prefer college graduates with technical degrees, not that they require such degrees. Accordingly, the *Handbook* does not provide a basis for the director's finding that database administrators working in businesses using scientific or engineering applications are required to hold a college degree in computer science or a related field. The director's finding in this regard is withdrawn.

On appeal, counsel questions CIS' authority to be the "arbiter of what professional any business can employ in H-1B status." He contends that having found the duties of the proffered position to be those of a database administrator and the occupation to impose a degree requirement, the director exceeded law and regulation in determining that the proffered position did not require the beneficiary to hold a four-year degree in a computer-related field.

Although the director's finding that employers engaged in scientific or engineering operations impose a degree requirement on database administrators has been withdrawn, the AAO will, nevertheless, respond to counsel's contention that CIS may not consider a petitioner's business operations when adjudicating H-1B nonimmigrant visa petitions. Counsel also asserts that CIS may not deny an H-1B petition if a proffered position is found to be a specialty occupation and the beneficiary is qualified to perform the duties of that position.

Section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b), requires that an H-1B alien be coming temporarily to the United States to perform services in a specialty occupation. Therefore, to establish a proffered position as a specialty occupation, a petitioner must establish not only that the duties of the proffered position are those of a specialty occupation, but also that it will employ the beneficiary in the position described upon his or her arrival in the United States. To determine whether a petitioner has met its burden of proof in this regard, the AAO appropriately considers the nature of a petitioner's business and whether the proffered position is consistent with its operations, although it does not normally take into account the size of those operations. Were CIS limited solely to reviewing the duties of a proffered position and the beneficiary's qualifications, employers could bring any individual to the United States as an H-1B worker, as long as that individual held a degree required by a specialty occupation and the petitioning employer described the duties of a specialty occupation requiring the degree.

In the instant case, the AAO notes that the petitioner in its May 7, 2004 response to the director's request for evidence indicated that it required the beneficiary's services because of an unexpected increase in business. However, the record does not discuss the nature of this increase in the petitioner's business, nor provide evidence to document it, e.g., bank statements, accounting records, financial audits, or newly-acquired business contracts. Accordingly, even if the record established that the occupation of database administrator imposed a degree requirement, the petitioner's failure to provide evidence of its stated need for the beneficiary's services would undermine its ability to prove that it would employ the beneficiary as a database administrator upon her arrival in the United States pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner's failure to provide any information regarding its existing computer system(s) in response to the director's March 17, 2004 request for evidence also raises questions in this regard. Going on record without supporting documentary evidence is not sufficient for the 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)).

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish the petitioner's degree requirement as an industry norm, the petitioner, at the time of filing and in response to the director's request for evidence, submitted a total of eight Internet job advertisements for software engineers. These announcements do not, however, satisfy the requirements of the criterion's first prong.

Of the eight advertisements, none can be established as similar to the petitioner, a recruitment and placement agency. Instead, five announcements come from organizations with entirely different business operations – an Internet company, a software business, an information technology firm, and a pharmaceutical business. Two announcements are published by firms that do not identify their operations. The eighth advertisement, although it is published by what appears to a firm providing staffing services to the computer software industry, offers no description of those services and thus provides no indication as to whether they are similar to the petitioner's. Further, none of announcements advertise employment that is parallel to the proffered position. Either they provide no meaningful description of the positions advertised or they identify duties unlike those listed by the petitioner.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. The AAO finds no evidence in the record that would distinguish the proffered position from similar non-degreed employment. Therefore, the petitioner also cannot establish the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In its May 7, 2004 response to the director's request for evidence, the petitioner indicated that the proffered position is newly created. Accordingly, the proffered position cannot be established as a specialty occupation on the basis of the petitioner's hiring practices.

In assessing whether the petitioner has met its burden with regard to the fourth criterion – the nature of the specific duties is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree – the AAO has again reviewed the duties of the proffered position and the evidence of record. It finds nothing in the record that would indicate that the tasks to be performed by the beneficiary would require the beneficiary to have greater knowledge or skill than that normally needed by programmer/analysts and database administrators. Nor does the record establish that the proffered position represents a combination of jobs that would require the beneficiary to have a unique set of skills not normally possessed by a programmer/analyst or database administrator. Accordingly, the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirement for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO shall not disturb the director's denial of the petition.

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 decision of the AAO is affirmed. The petition is denied.