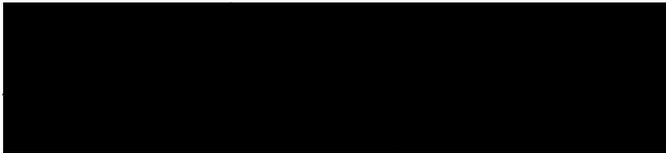


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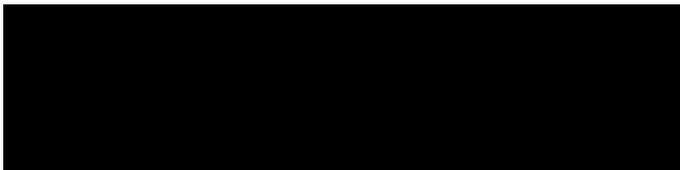
DR

FILE: WAC 04 082 52185 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 a language school, with more than 50 employees. It seeks to employ the beneficiary as an electronics/communications 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 two requests for evidence; (3) counsel's responses to those requests; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief. 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 (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 states that it is seeking the beneficiary's services as an electronics/communications engineer. Evidence of the beneficiary's duties includes: the Form I-129; a January 27, 2004 letter of support from the petitioner accompanying the Form I-129; and counsel's April 14 and July 15, 2004 responses to the director's requests for evidence.

As stated by the petitioner at the time of filing, and expanded upon by counsel, the petitioner requires the beneficiary's services to establish a communications network connecting its four campuses to allow for the direct exchange of information, as well as to research and develop computer systems to support individual campus operations. His specific duties would require him to:

- Maintain, control, and remotely control the computer based TOEFL/Listening Room and Language Lab, using the IMPERIUM 200 H system to wirelessly control all the equipment in the lab;
- Maintain and control all network and communication equipment within the petitioner's communication network;
- Plan, troubleshoot, upgrade and manage rotations of all electronic equipment in the office and classrooms, such as projectors, photocopy machines, fax machines, printers, televisions, tape recorders, etc.; and
- Plan, troubleshoot, and upgrade all computer, telephone systems, and network equipment in the office and classroom, which involves fixing, maintaining and upgrading computer hardware, laptops, and servers; fixing, maintaining and upgrading telephone systems, including telephone wiring management; and installing computer network wiring, and installing and maintaining network equipment.

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, relying on the 2004-2005 edition of the *Handbook* found the proffered position of electrical/communications engineer to reflect the employment of network or computer systems administrators, as described under the occupational title of computer support specialists and systems administrators. The AAO agrees.

As described by the petitioner, the duties of the proffered position do not encompass the type of work performed by computer hardware engineers who research, design develop and test computer hardware and supervise its manufacture and installation (*Handbook*, page 133). Nor do they describe the work of electrical and electronics engineers, who design, develop, test and supervise the manufacture of electrical and electronic equipment. (*Handbook* pages 133-134). Instead, the duties of the proffered position are closely aligned to those performed by network or computer systems administrators, as described at page 103 of the *Handbook*:

Network or computer systems administrators design, install, and support an organization's LAN (local-area network), WAN (wide-area network), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments, including professional offices, small businesses, government, and large corporations. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. These workers gather data to identify customer needs and then use that information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

Systems administrators are the information technology employees responsible for the efficient use of networks by organizations. They ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Furthermore, they monitor and adjust performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also trouble-shoot problems as reported by users and automated network monitoring systems and make recommendations for enhancements in the implementation of future servers and networks.

The educational requirements imposed on individuals seeking employment as network or computer systems administrators are found at page 104:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist or systems administrator. While there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with

some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; however, other jobs may require only a computer-related associate degree. For systems administrators, many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field.

Many companies are becoming more flexible about requiring a college degree for support positions because of the explosive demand for specialists. However, certification and practical experience demonstrating these skills will be essential for applicants without a degree. Completion of a certification training program, offered by a variety of vendors and product makers, may help some people to qualify for entry-level positions. Relevant computer experience may substitute for formal education.

Based on the above language, the AAO finds no specific degree requirement to be attached to employment as a network or computer systems administrator. Although the *Handbook* states that many 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 the *Handbook* also indicates that many employers prefer applicants with degrees, 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 performance of the duties of the proffered position normally require 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).

On appeal, counsel contends that the proffered position is not that of a technician, that the beneficiary would be required to create a computer network while a technician would only troubleshoot and maintain such a system. She also asserts that a new computer system would require adjustment and maintenance to keep pace with the growth and development of the petitioner's operations and that a technician would not be qualified to perform such adjustments. However, the AAO finds the *Handbook's* description of the work performed by network or computer systems administrators to address counsel's concerns. It specifically states that network or computer systems administrators both design computer networks for their employers and adapt such networks to respond to the changing employer needs. Accordingly, the duties of the proffered position noted by counsel on appeal do not distinguish it from the employment of network/computer systems administrators.

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. In the instant case, the petitioner has submitted no documentation to establish the proffered position as a specialty occupation under the criterion's first prong and the record does not establish that it may be distinguished from similar non-degreed employment based on its unique nature or complexity. Therefore, the petitioner has not qualified 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 her April 14, 2004 response to the director's first request for evidence, counsel 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 normal 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 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 a network or computer systems administrator. 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 other than those possessed by a network or computer systems 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).

In his denial, the director noted that the petitioner appeared to have provided conflicting information regarding its need for the beneficiary's services, stating both that it had no computer system in place and that the problems of its existing computer system required constant attention. Accordingly, he concluded that the petitioner had failed to establish it would employ the beneficiary in the proffered position. The AAO agrees, although for different reasons.

While the petitioner has provided a somewhat confused description of its current computer operations, that description does not contradict its discussion of the proffered position. The petitioner has indicated that it currently has ad hoc computer operations at each of its four campuses and that it seeks the beneficiary's services to improve and support these operations, as well as to establish a computer network through which its campuses may communicate electronically. Therefore, the AAO does not find the petitioner to have provided misleading information regarding the duties of the proffered position. However, it does conclude that the petitioner has failed to establish that it has the computer operations that it states require the beneficiary's services.

In its January 27, 2004 letter of support, the petitioner indicated that each of its four campuses had numerous computer and electronic systems. In her April 14, 2004 response to the director's first request for evidence, counsel also asserted that the petitioner was constantly acquiring and operating laptops and multi-media equipment at each of its campuses. On appeal, she states that the petitioner has described the current status of its four campuses with regard to their communications systems. However, going on record without supporting documentation is not sufficient to meet 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)).

The AAO notes that the petitioner failed to provide documentation of the purchase, installation or maintenance of any type of computer hardware, as requested by the director's second request for evidence. It also finds the 2001 federal depreciation schedule submitted by the petitioner to indicate no significant

expenditure on computer or computer-related equipment. While the petitioner has submitted diagrams of the work to be performed by the beneficiary in establishing its new computer systems, these diagrams are not proof of the petitioner's existing computer operations. Accordingly, the record does not support the petitioner's statements regarding its current computer operations.

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 prove 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.

As the record does not indicate that the petitioner operates a language school with computer operations at four locations, it does not establish that the operations the beneficiary would perform require a baccalaureate degree in a computer related specialty. Therefore, the petitioner has not established that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Accordingly, the proffered position, even its duties satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), may not be classified as a specialty occupation.

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) or 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.