

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

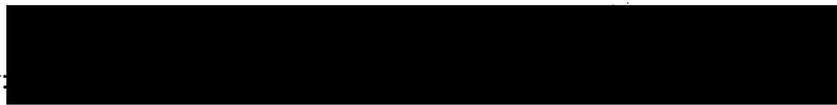
PUBLIC COPY



D 2

FILE: SRC 04 017 52128 Office: TEXAS SERVICE CENTER Date: **OCT 17 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:

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, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition, due to abandonment, on March 31, 2004. The director reopened the matter to consider additional information submitted by the petitioner and denied the petition, on the merits, on April 28, 2004. The petitioner also filed a motion to reopen to resubmit the additional evidence on April 23, 2004. The director dismissed this motion on May 12, 2004. The petitioner filed a second motion on June 15, 2004, which the director dismissed on July 8, 2004. 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 automobile maintenance and repair facility that seeks to employ the beneficiary as a computer information systems manager. 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 on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. The director also took issue with counsel's¹ attempt to materially alter the nature of the proposed position, and expressed concern that the petitioner was unaware it was required to file quarterly tax returns.

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 RFE response and supporting documentation; (4) the director's denial letter; (5) the director's letter reopening the matter and denying it on the merits; and (6) counsel's three Forms I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, an automobile maintenance and repair facility with six full-time employees and one part-time employee, was established in 2001 and has a gross annual income of approximately \$750,000. It proposes to hire the beneficiary as a computer information systems manager. The duties of the proposed position were set forth as follows in the initial submission:

1. Maintain all computers and supervise their maintenance, purchase, [and] installation and upgrade including wireless and network capabilities for the computers in the company;
2. Plan, direct, and coordinate all computer upgrades including wireless and wired networking and internet networking;
3. Plan[,] direct[,] and maintain [the beneficiary's] customer database, and vendor and other databases including supervising or actual data processing, data entry, and data analysis;
4. Design[,] plan[,] and implement any customized computer programs necessary for the operation of business including billing, accounts payable and receivable systems, customer marketing programs (mail lists and targeted mail lists); and

¹ Counsel has not submitted Form G-28, Notice of Entry of Appearance as Attorney or Representative, and is thus not an authorized representative. All representations will be considered; however, the decision will be sent to the petitioner only.

5. Create, plan, direct, install, implement, and maintain computerized bookkeeping and accounting systems.
6. Manage all employees of the company that implement these systems or install or repair computer equipment.

The director issued a request for evidence, requesting additional evidence to establish that the proposed position qualifies as a specialty occupation. In response, counsel submitted a new labor condition application (LCA) with a new job title. Counsel asked the director “to consider this an amendment” to the petition.

There is no provision in the regulations for acceptance of an amended LCA. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time a petition is filed.

The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change its title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Therefore, the AAO’s analysis of this issue will be based upon the job description and title submitted with the original petition.

Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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) 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 proposed position.

In determining whether a proposed 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 Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

Most of the duties of the proposed position are similar to those of a computer software engineer, as described in the *Handbook*. The *Handbook* reports that these professionals often coordinate the construction and maintenance of a company’s computer systems and plan for their future growth, analyze users’ needs and then design, construct, test, and maintain computer applications software or systems. Many of the duties of the proposed position, such as creating a computerized bookkeeping and accounting system, and maintaining a customer database, also accord with the *Handbook’s* description of the duties of financial clerks, specifically bookkeeping and accounting clerks.

In that the duties of the proposed position combine those of computer software engineers and financial clerks, the AAO next turns to the *Handbook’s* discussion of the educational qualifications necessary for entry into those occupations.

The *Handbook* provides the following information regarding the qualifications necessary for entry into the field of software engineering:

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.

A preference by most employers to hire candidates with a bachelor’s degree is not synonymous with the “normally required” standard imposed by the regulation. Moreover, the *Handbook* states that for jobs that place less emphasis on degrees, training programs leading to certification offered by software vendors such as Microsoft, Novell, and Oracle may suffice.

According to the *Handbook*, a two-year associate's degree in business or accounting is often required for bookkeeping and accounting clerk positions. A four-year bachelor's degree is not required for entry-level positions. The *Handbook* also indicates that many graduates of junior colleges and business and correspondence schools can obtain junior accounting positions.

A 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.² 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.

Since these positions do not require a baccalaureate degree or its equivalent in a specific specialty, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. No evidence has been presented to support the contention that the proposed position qualifies for classification as a specialty occupation under this prong.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as the duties of the proposed position are similar to those of software engineers and bookkeepers and accounting clerks, which do not require a four-year degree.

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past

² The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 in the specialty. As previously discussed, the AAO is not persuaded by the evidence of record, including the nature and scale of the petitioner's business operations, that the duties of the position exceed the occupational scope of software engineers and bookkeepers and accounting clerks, positions which do not require specialized knowledge at a baccalaureate level. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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 appeal is dismissed. The petition is denied.