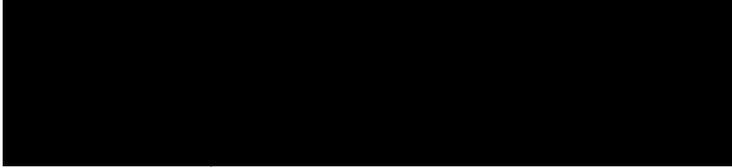




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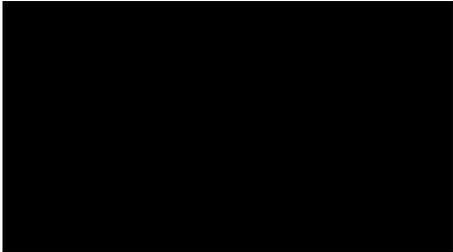


FILE: WAC 03 211 50164 Office: CALIFORNIA SERVICE CENTER Date: OCT 21 2005

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 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 engaged in the business of manufacturing and distributing reconditioned fitness equipment. It seeks to employ the beneficiary as a software engineer. 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. Additionally, the director found that the beneficiary was not qualified for 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 software engineer. 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 development and testing of new programs and the implementation and testing of bug fixes; performing management and maintenance of existing XML, C++, ASP and Visual Basic programs, the configuration of web servers including Internet Information Services (II) and Application Servers including Microsoft Transaction Server (MTS); assisting in the review and acceptance testing of software programs that the company acquires; managing all aspects of third party software project development as well as a review of existing Global Fitness software products and any products acquired; working with design and implementation of software for the company's website; consulting with hardware engineers and other engineering staff to evaluate interface between hardware and software and the operational and performance requirements of the overall systems; working with technical team to finalize the technical design of the program; applying principles and techniques of computer science, engineering, and mathematical analysis; analyzing software requirements to determine feasibility of design within time and costs constraints; formulating and designing software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design; and using flowchart design and code generation in each stage of development. The petitioner indicated that the proffered position requires at least a bachelor's degree or its equivalent in computer science, mathematics or engineering.

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. Additionally, the director requested evidence to establish that the petitioner has had a past practice of hiring persons with a baccalaureate degree to perform the duties of the proffered position. The director requested evidence of the beneficiary's qualifications. The director also requested additional information about the petitioner including a company profile, federal income tax returns, quarterly wage reports, and an organizational chart.

In response, the petitioner augmented the job description and indicated the percentage of time to be spent on each duty as follows:

- Research, analysis and development of systems 40% of time;
- Management and maintenance of systems 20% of time;
- Review and acceptance testing of third party software 15% of time;
- Website development 20% of time;
- Other technical work 5% of time.

The petitioner indicated that this is a new position that was created because of the growth in the company's business. The petitioner stated that it entered into a contract with the world's largest manufacturer of commercial grade exercise equipment which involved remanufacturing their equipment on a volume scale for both domestic and international export purposes. The petitioner stated that it is required to make improvements that are manufacturing, computer systems and administration oriented. The petitioner explained that it needed a new computer system to assist with the inventory, tracking and sales of new equipment. The petitioner also stated that it needed a website developed for the sole purpose of fitness equipment distribution, based on its new contract.

The petitioner submitted the beneficiary's transcripts and an academic and experiential evaluation of the credentials and work experience attained by the beneficiary. This evaluation was prepared by Morningside evaluation and written by Dr. Jonatan Jelen who indicated that he had authority to grant college level credit

for training, and/or courses taken at other U.S. or international universities. This evaluation indicated that the beneficiary has achieved the equivalence of a bachelor of science in computer information systems based on his completed university coursework and eight years of work experience. The petitioner submitted an affidavit from the beneficiary's prior employer and letters of reference from the beneficiary's professors at Santa Monica college. The petitioner submitted a copy of its organizational chart which included the proffered position. The petitioner submitted the requested tax documents. Additionally, the petitioner submitted internet job postings for the position of software engineer.

The director determined that 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. The director found that the evidence of record is not persuasive to show that the job offered could not be performed by an experienced individual whose educational training falls short of a baccalaureate degree. Thus, the director determined that the proffered position was not a specialty occupation. Additionally, the director found that the beneficiary was not qualified to perform the duties of a specialty occupation. Furthermore, the director noted that the beneficiary had been working as the petitioner's IT manager for the two years prior to the filing of the present petition, in violation of his H-3 nonimmigrant trainee status.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel states that the responsibilities of the position are complex and the requirements for the position are analytical and mathematically based. Counsel contends that the position involves researching, analyzing, designing, and developing software systems for the sale, transportation and inventory of fitness equipment as well as implementing and testing the systems. Counsel contends that a bachelor's degree or equivalent is a common requirement for the industry and submits internet job positions in support of his contentions. Counsel refers to the Department of Labor's *Dictionary of Occupational Titles (DOT)* and notes that the position of Software Engineer has an SVP of 8 which she contends illustrates that the proffered position is a specialty occupation. Counsel also refers to the Department of Labor's *Occupational Outlook Handbook (the Handbook)* as indicating that "most employers prefer to hire person with at least a Bachelor's degree." Counsel also asserts that the beneficiary is qualified for the position.

The first issue in the case is whether the proffered position is a specialty occupation.

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. 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:

Software engineers working in applications or systems development analyze users' needs and design, construct, test, and maintain computer applications software or systems. Software engineers can be involved in the design and development of many types of software, including software for operating systems and network distribution, and compilers, which convert programs for execution on a computer. In programming, or coding, software engineers instruct a computer, line by line, how to perform a function. They also solve technical problems that arise. Software engineers must possess strong programming skills, but are more concerned with developing algorithms and analyzing and solving programming problems than with actually writing code.

The petitioner fails to establish the first criterion because although the *Handbook* states that 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.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on submitted internet job postings from a wide variety of companies which include engineering, communications, securities, hospital and manufacturing companies.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. A deficiency in the postings is that the companies are either obviously dissimilar to the petitioner or their nature is undisclosed. For example, Technisource is a staffing agency, Aerotek is an automotive supplier, and PanAmSat is a satellite operator. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

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 has not related the listed duties to its business of refurbishing and re-selling exercise equipment. The petitioner indicated that its strategic "improvements are

multi-faceted and are manufacturing, computer systems and administration oriented.” The petitioner explains that it had a new partnership that it “need[s] a new computer system to assist with inventory, tracking and sales of this new equipment.” The petitioner also states that the beneficiary would develop a website for equipment distribution. The petitioner attests that it would acquire new software and need someone to manage third party software development. The petitioner has not provided evidence of the size and complexity of its business such as the various software systems that need to be designed, 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. The petitioner asserts that the beneficiary will consult with hardware engineers and other engineering staff to evaluate interface between hardware and software and the operational and performance requirements of the overall systems. The organizational chart does not indicate an engineering staff or hardware engineers. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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).

The second issue in this case is whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner'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 software engineer. The petitioner indicated in its letter of support of the initial petition that the duties of the position require at least a bachelor's degree or its equivalent in computer science, mathematics or engineering.

The petitioner submitted a copy of the beneficiary's A.A. degree from Santa Monica college. The petitioner submitted an education and experiential evaluation prepared by a credentialing firm. The evaluation stated "it is the judgment of [the credentialing firm] that [the beneficiary] has the equivalent of a Bachelor of Science in Computer Information Systems"

The director issued a request for evidence and noted that the petitioner was attempting to establish that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training, and/or progressively responsible experience that is equivalent to a bachelor's degree and that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. The director indicated that the evaluation submitted by the petitioner is insufficient because the author did not provide evidence that he has the authority to grant college-level credit for training and/or experience in the specialty of computer software engineering. The director requested additional information to establish the authority to evaluate work experience such as a letter from the dean of the university establishing that the particular evaluating official is authorized to award college level credit on behalf of his university. The director requested evidence that the university is accredited, that the university has a program for granting such credit, and written verification or other documents or records to clearly substantiate that the evaluator is actually employed by the university.

In response, counsel submitted a second evaluation by a professor that counsel asserted is authorized to grant college-level credit for training and/or experience in the field of computer information systems. Counsel asserted that this evaluation does not include his work experience gained with his H-3 visa. Counsel submitted letters from the beneficiary's previous employers.

The director found that the evidence submitted by the petitioner did not establish that the evaluation of the beneficiary's training and/or experience met the regulations. The director found that the petitioner did not

submit evidence that Florida International University has a program for granting college level credit for training and experience. The director noted that the information about the author does not establish that he has authority to grant college level credit for various graduate and undergraduate degree programs in the Division of Computer Science of Florida International University. The director noted that a credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials See 8 C.F.R. 214.2(h)(4)(iii)(D)(3).

On appeal, counsel contends that the professor from Florida International University is able to grant college-level credit and submits another letter on appeal in support of her contentions. The second letter is dated June 2, 2002 from the Office of General Counsel and indicates that Professor Batra has advisory authority to grant college-level credit to students based on their work experience. This letter further explains that "this advisory authority is limited solely to certain courses within the College of Business Administration."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record does not indicate that Florida International University has a program for granting credit in the School of Computer Science based on training and experience. Thus, the experiential portion of the evaluation may not be considered under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). An evaluator may evaluate educational credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

The petitioner has not met the terms of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and has not established that the beneficiary has the equivalent of a bachelor's degree in the specific specialty required by the specialty occupation. The petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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.