



U.S. Citizenship
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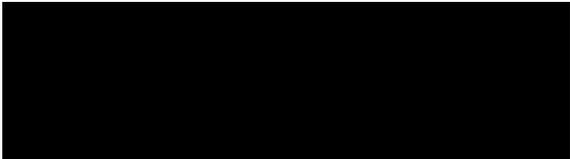
FILE: WAC 04 129 51448 Office: CALIFORNIA SERVICE CENTER Date: **JUN 07 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 manufacturer that seeks to employ the beneficiary as a computer applications programmer and to classify her 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 grounds that the petitioner failed to establish that the proposed position meets the definition of specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel submits a brief.

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 bachelor's or higher degree, but one in a specific field of study directly related to the proposed position.

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

The petitioner seeks the beneficiary's services as an applications programmer. Evidence of the beneficiary's duties includes the documentation submitted with the I-129, the response to the RFE, and the materials

submitted on appeal. According to this evidence, the beneficiary's duties would include: developing a computer software system designed to keep track of inventories that arrive from international locations and creating a software system that could analyze database inventory records; remedying programming bugs that surface during the development of applications software; designing high-speed voice and data networks that would enable the sharing of broadband Internet access as well as filed, printers, and fax modems within the networks; creating an Intrusion Detection System with programs such as C, VC, NDIS, Hook Driver, Sockets, TCP/IP, and Firewall; and providing integrated solutions. The petitioner stated that individuals with backgrounds in computer science, applied mathematics, engineering, and business administration would be appropriate for the job.

The director found that the proposed position did not meet any of the criteria required for classification as a specialty occupation. The director found that the petitioner's business did not require the services of a systems programmer. The director found that a bona fide programmer position would require the beneficiary to have a bachelor's degree but that, in this case, no bona fide position existed.

On appeal, counsel asserts that the proposed position is that of an applications programmer as described in the Department of Labor's *Occupational Outlook Handbook*. Counsel further asserts that two experts concluded that the proposed position is a specialty occupation because the nature of the duties were so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree. Finally, counsel asserts that the size of the petitioner's business should have no bearing on whether or not the proposed position is a specialty occupation.

The petitioner need only satisfy one of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review, the AAO concludes that the petitioner has failed to establish that the proposed position meets any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position. CIS considers the specific duties of the proposed position and any supporting evidence, in relation to the nature of the petitioning entity's business operations, to determine if the position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in a specific field of study as the minimum for entry into the occupation.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* in its consideration of whether or not a position is a specialty occupation and for the *Handbook's* information about the duties and educational requirements of particular occupations. Based on the petitioner's description and a thorough review of the *Handbook*, the AAO concurs with the petitioner that the description of the proposed position reflects the duties of applications programmers, who, according to the *Handbook*, write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications which are frequently purchased from vendors. According to the *Handbook*, applications programmers are distinct from systems programmers, who write programs to maintain and control computer systems software, and who, because of their knowledge of the entire computer system, often help applications programmers with problems that may occur with their programs. The *Handbook* further indicates that applications programmer positions are less complex than systems programmers and systems analysts due to the growing use of packaged software which allows end-users to write simple programs to access data and perform calculations. According to the petitioner's description, the beneficiary will develop "a computer software system designed to keep track of inventories" and create "an Intrusion Detection System with programs such as C, VC, NDIS, Hook Driver, Sockets,

TCP/IP, and Firewall.” Notwithstanding this, the AAO finds that the petitioner has not established that the proposed position is a specialty occupation.

To determine whether the proposed position is a specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(A)(I) – a bachelor’s or higher degree or its equivalent is normally the minimum requirement for entry into the particular position – the AAO turns to the *Handbook*’s discussion of the educational requirements for applications programmers. The *Handbook* indicates that employers value practical experience in computer programming over formal education and that, while employers commonly require bachelor’s degrees, some programmers may qualify for certain jobs with 2-year degrees or certificates. The *Handbook* indicates that an associate’s degree is a widely used entry-level credential for prospective applications programmers.

Counsel asserts that a bachelor’s degree in computer science or a related field is normally the minimum requirement for entry into a job as an applications programmer. To support this assertion, the petitioner submits an opinion letter from [REDACTED] from the Computer Science department at the University of California, Los Angeles (UCLA). [REDACTED] asserts that in today’s job market, employers seeking computer programmers to carry out business applications programming will require the prospective employee to hold a degree in computer science, mathematics, or a related field. [REDACTED]

[REDACTED] did not cite any industry data, surveys, or other documentation data in support of his opinion. 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)). The *Handbook*, a compilation of nationwide data from surveys, interviews, questionnaires, studies, and other sources, indicates that a two-year degree is often sufficient to perform the duties of an applications programmer for use in business applications. The *Handbook* distinguishes between the educational requirements of employers who use scientific or engineering applications and who prefer college graduates with degrees in computer science and the requirements of employers who use computers for business applications and prefer those who have had college courses in management information systems and business and who possess strong programming skills. [REDACTED]

[REDACTED] opinion is not persuasive in establishing that a computer science or related bachelor’s degree is the normal minimum requirement for entry into applications programmer positions. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the record indicates that individuals may enter these occupations with less than a bachelor’s degree, the petitioner has failed to establish that the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether letters or affidavits from companies or individuals in the industry attest that such companies “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)). The job ads the petitioner submitted either do not describe the duties with sufficient particularity to determine if they are similar to the proposed position, or are from companies dissimilar to the petitioner, a stated jewelry manufacturer that employs six

people and grosses about \$250,000 a year. The petitioner has not established that the degree requirement is common to the industry in parallel position among similar organizations. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor's degree or its equivalent, in a specific field of study, for the position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner has submitted no evidence to establish its normal hiring practices. In the absence of an employment history for the proposed position, the petitioner cannot establish that its proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. A petitioner satisfies the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to 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 bachelor's or higher degree in a specific field of study.

The record does not indicate that the proposed duties are distinguishable from those of a typical applications programmer, an occupation the *Handbook* says can be performed by individuals with associate's degrees in computer science and extensive programming experience. Furthermore, in light of the nature of the petitioner's business operations, the petitioner has failed to establish that the proposed duties are so complex, specialized, or unique that they would require a bachelor's degree in a computer-related field. While the petitioner stated on the petition that it employs six people, the contemporaneous wage records of the petitioner indicate that it employs two people, one of whom is the beneficiary. The 2003 tax returns indicated that the petitioner paid \$26,352 in wages and salaries. The organizational chart submitted in response to the RFE shows five employees, three of whom are employed by different organizations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not addressed these inconsistencies. In addition, the petitioner has not provided any evidence of the volume and complexity of its business upon which it bases its need for an applications programmer, such as its nationwide customer orders and inventories arriving from worldwide destinations on a daily basis to be tracked. The petitioner asserts that the position will include extensive design work on the local area network, but the petitioner only appears to have one computer. The petitioner has not established that it has a complex local area network for the beneficiary to design and work on. Simply 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)).

Counsel asserts that the complex nature of the proposed position requires that the beneficiary hold at least a bachelor's degree or its equivalent in a computer-related field. To support this assertion, the petitioner submits opinion letters from two professors: [REDACTED] from UCLA and [REDACTED] from the credentials evaluation service, International Credential Evaluators, Inc. These letters are not probative. Neither professor provides sufficient detail and analysis to establish this complexity.

The professors assert that the duties of the proposed position require the beneficiary to hold a degree in computer science, mathematics, or a related field. [REDACTED] states that his statement is based primarily on his review of the beneficiary's academic credentials. Neither professor notes that the petitioner is a jewelry maker and store that employs two people and grosses about \$250,000 a year. The authors do not indicate that they reviewed company information about the petitioner, visited the petitioner's site, or interviewed the petitioner. The petitioner designs, manufactures, and sells jewelry. The petitioner's lease indicates that the business premises consist of 284 rentable square feet. The petitioner states that the duties of the position will include extensive IT and database solutions and network programming and security. The petitioner fails, however, to establish that the IT and database solutions and network programming and security duties for a jewelry manufacturer with one computer, and occupying 284 square feet with two employees requires a bachelor's degree in a specialty. While some applications programmer positions may require a bachelor's degree in computer science or a related field, neither professor gives sufficient details about the complexity of the duties in relation to the petitioner's jewelry business to substantiate his conclusions. There is thus an inadequate factual foundation established to support the opinions. As the duties of the position have not been substantiated by the facts of record, the AAO will accord less weight to the testimony of the experts submitted by the petitioner. *Matter of Caron International*. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical applications programmer and that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in computer science or a related field. The opinions of these two professors are not sufficiently specific to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Thus, the petitioner has not established that the proposed position is 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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.