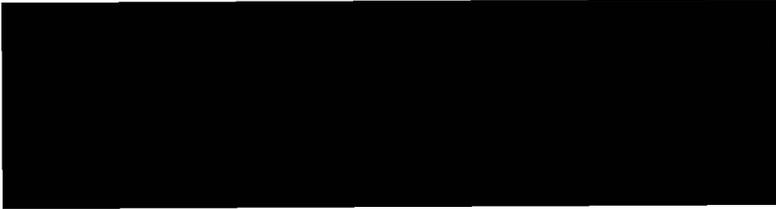


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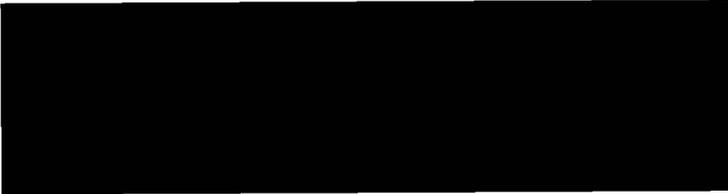
JUN 23 2006

IN RE:



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 director of the Vermont 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 operates a retail and web-based wireless and cellular store, was established in 1998, and has 6 employees. It seeks to employ the beneficiary as a full-time programmer analyst 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 based on his determination that the proffered position was not a specialty occupation and that the beneficiary was not qualified to perform the services of 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 (RFE); (3) the petitioner's response to the director's RFE, dated September 24, 2004; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's brief and new and previously submitted evidence.

The first 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

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, 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In order to determine whether a position is a specialty occupation, CIS must examine the ultimate employment of the alien. 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 a Programmer Analyst. Evidence of the beneficiary’s duties includes: the Form I-129, and petitioner’s response to the director’s request for evidence (RFE).

At the time of filing, the petitioner indicated the duties of the proposed position as follows:

- Develop and implement a new sales module on the web;
- Develop and implement MIS to make it a self-run high tech store;
- Develop a telesales reporting system;
- Develop a system to reduce the number of charge backs;
- Develop, implement and manage the low cost inventory system;
- Develop a system to plug the loopholes of commission and spiffs;
- Develop a system to make available usage on the net for customers;
- Develop a system which can present a full flow of information from Call Center to execution to charge backs to commission to customer service to save money on multiple systems;
- Achieve the final goal of making a self-run high tech store with one person at the helm of its affairs for every \$1 million of sales.

In response to the RFE, the petitioner stated that the duties of the proffered position would require the beneficiary to:

- Research and analyze the processes of clients and determine their process re-engineering needs, including analysis of currently existing information systems and on-going information systems enhancement projects for various sales modules;
- Consult with clients regarding their Enterprise Resources Planning and suggest alternate and more efficient or optimal models for implementation;
- Design new process structures and implement them;
- Research, design and develop information systems, for harnessing the component parts of the newly-engineered processes in conjunction with hardware choices, for medical, industrial, communications, scientific, engineering, commercial and financial applications which require use of advanced computational and quantitative methodologies;
- Apply principles and techniques of Enterprise and Project Planning and quantitative methodology & techniques to determine feasibility of design within time and cost constraints;
- Analyze the communications, informational, database and programming requirements of clients;
- Plan, develop, design, test and implement appropriate information systems;
- Review existing information systems to determine compatibility with projected or identified client needs;
- Research and select appropriate systems, including ensuring forward compatibility of existing systems; and
- Train clients on use of information systems and provide technical and de-bugging support.

In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding items such as: design new processes, research and analyze clients' processes, apply principles and techniques of enterprise resources, enterprise resource planning for clients, and train clients on use of information systems. In sum, the initial description appeared to have changed from essentially system development and implementation for the petitioner to system design, research and analyses, and training for clients of the petitioner.

The purpose of the 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 a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the proffered position exists when the petition is filed and merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 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. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

To determine whether the duties described at the time of filing are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)& (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; factors considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The AAO turns first to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the duties of the position as initially described are comparable to those of a computer programmer. The 2006-2007 Internet version of the *Handbook's* description of computer programmer, at <http://www.bls.gov/oco/ocos110.htm>, states:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmers* are individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending on the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas whose solutions can only be approximated or that draw data from many existing systems may require more than a year of work. In most cases, several programmers work together as a team under a senior programmer's supervision.

Many programmers update, repair, modify, and expand existing programs. When making changes to a section of code, called a routine, programmers need to make other users aware of the task that the routine is to perform. ...

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct results. This process is called testing and debugging. ...

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* 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. *Systems programmers*, in contrast, write programs to maintain and control computer systems software, such as operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of the system handle the various jobs they have been given and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

Regarding training of computer programmers, the *Handbook* states:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

Employers primarily are interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return

to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to place more emphasis on previous experience.

The *Handbook* indicates that a baccalaureate degree in a specialty is not normally required to enter the occupation. The *Handbook* indicates that some programmers may qualify for certain jobs with 2-year degrees or certificates. The 2-year degree is a widely used entry-level credential for prospective computer programmers. The *Handbook* is clear that a degree or its equivalent is not the normal minimum requirement for entry into the occupation. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In its response to the RFE counsel asserts that the AAO has held in prior petitions that the position of programmer analyst is a specialty occupation. The AAO notes that the proffered position is that of a computer programmer, and not a systems analyst position. Also, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – establish that a 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.

With its response to the RFE, the petitioner submitted letters from representatives of three telecom service companies stating that a degree in engineering or its equivalent is a minimum requirement for a programmer analyst position. The AAO notes that the contents of the three letters are virtually identical; none of the letters indicate the credentials of the company representatives who signed them; and none of the letters indicate whether the author examined the petitioner's business and is familiar with the details of the petitioner's business operations. The authors do not indicate that they reviewed company information about the petitioner, visited the site, or interviewed the petitioner. None of the letters indicate that the author reviewed the duties of the position. While some programmer programmer positions may require a bachelor's degree in computer science or a related field, none of the authors gives sufficient details about the complexity of the duties in relation to the petitioner's wireless and cellular distribution business to substantiate his conclusions. There is thus an inadequate factual foundation established to support the opinions. 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). No other evidence of record establishes the first prong of the second criterion. Therefore, the petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, the petitioner has described duties normally performed by computer programmers. The petitioner states that it is a wholly owned subsidiary of I-Connection, LLC, and submits several agreements between I-Connection and third parties. The petitioner does not relate these contracts to the services to be performed by the beneficiary on behalf of the petitioner. These contracts are thus of limited evidentiary value.

The petitioner also submits copies of contracts between itself and several overseas companies to provide services such as marketing, long distance, and telemarketing. The petitioner does not relate the beneficiary's proposed job duties to develop and implement a new sales module on the web, make the petitioner a self-run high-tech store, develop a telesales reporting system, and the other duties listed at the time of filing the petition, to any of these contracts. The job duties are not specifically described in relation to the petitioner's business and the petitioner has not established that a baccalaureate degree in a specialty would be required to perform them.

The petitioner has not provided sufficient documentation to establish the complexity of the position. In its appeal brief, the petitioner simply asserted that the *Handbook* indicates that a degree is required by most employers for programmer analyst positions, and stated that similar to other programmer analysts the beneficiary will plan, develop, test, and document computer systems applications software. The AAO finds the petitioner to have provided no evidence that would support a finding that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Therefore, 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 position is so complex or unique that it can be performed only by an individual with a degree. Accordingly, the petitioner has not established its 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 the 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 the instant case, petitioner did not provide any such information. Accordingly, the petitioner failed to establish its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, the petitioner contends that the duties of the proffered position satisfy the criterion's requirements. The AAO does not agree.

As previously noted, the AAO requires information regarding the specific duties of a proffered position, as well as the nature of the petitioning entity's business operations, to make its determination regarding the position's degree requirements, if any. In the instant case, the record offers a general description of the type of work to be performed, rather than a description of the proffered position's duties as they relate to the petitioner's business. The petitioner provided generalized information about its business. As the petitioner has

provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. No evidence of record indicates that the duties of the position will require baccalaureate level knowledge. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director also determined that the petitioner did not establish that the beneficiary is qualified to perform the services of a specialty occupation. The AAO agrees. The record does not contain sufficient reliable documentation to persuade the AAO that the beneficiary qualifies to perform services in a specialty occupation, as required at section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), 8 C.F.R. § 214.2(h)(4)(iii)(C).

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (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.

No evidence has been submitted to establish that the beneficiary holds a U.S. degree in the specialty or a foreign degree equivalent to a U.S. degree in the specialty, nor is the beneficiary required to have a license to perform the duties of the proffered position. The petitioner submitted an evaluation by [REDACTED] of International Credentials Evaluation and Translation Services (ICETS) indicating that the beneficiary obtained a bachelor of engineering degree from Bangalore University in 1997. The director found this evidence insufficient to establish the beneficiary's qualifications for the position, and requested the petitioner to submit the beneficiary's transcripts in the request for evidence. The petitioner did not submit the beneficiary's transcripts as requested, and the director denied the petition as the beneficiary was not qualified to perform the duties of a specialty occupation.

On appeal, the petitioner submits the beneficiary's transcripts from Bangalore University. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

As the ICETS evaluation is not supported by the beneficiary's transcripts of record, it may not be accepted. 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) requires that school records be submitted into the record.

The AAO also notes several inconsistencies in the transcripts submitted. The provisional degree certificate awarded to the beneficiary indicates that the beneficiary attended the university from 1990-1991 to 1994-1995. The transcript of record, however, indicates that the beneficiary completed fourth year in July 1996 and completed two repeated fourth year courses in February 1997 and a repeated third year course in February 1997. Additionally, on several pages of the transcripts, the name of the beneficiary and the course of study

appear to have been altered. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*.

CIS may make its own determination of the beneficiary's qualifications based on an evaluation of the beneficiary's education, training and work experience under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The AAO notes, however, that the on-the-job experience that may be substituted for education under 8 C.F.R. § 214.2(d)(h)(4)(iii)(5) must include the theoretical and practical application of specialized knowledge. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Based on its own review of the record, the AAO finds that the letter from the beneficiary's former employer does not provide enough descriptive detail to indicate that such experience included the theoretical and practical of highly specialized knowledge, that the experience was gained while working with peers, supervisors or subordinates who have degrees in a computer software engineering specialty, or that the beneficiary has recognition of expertise. Thus, the experience letter does not establish the beneficiary's degree equivalence.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation and that the beneficiary is qualified to perform the services of 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.