

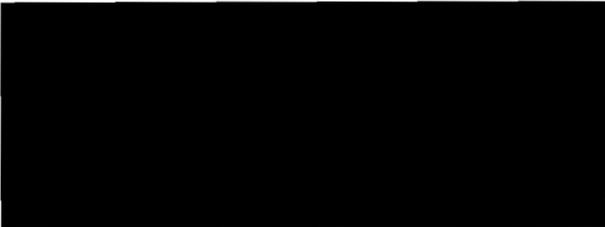


U.S. Citizenship
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FILE: WAC 03 248 50318 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2006

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.

for *Michael T. Kelly*
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 The director's decision will be withdrawn and the matter remanded to the director for the entry of a new decision.

The petitioner is an investment company with several mobile home parks that seeks to employ the beneficiary as a computer programmer and to classify him 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 job title on the Labor Condition Application (LCA) was different than the job title listed on the Form I-129. On appeal, counsel contends that the two job titles fall under the same occupational category, that the wage determinations for both job titles are less than the proffered salary, and that the two job titles are interchangeable in the computer industry.

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 states that it is seeking the beneficiary's services as a computer programmer. Evidence of the beneficiary's duties includes the Form I-129 with accompanying employment offer letter, the response to the RFE, and additional evidence submitted with the appeal. The petitioner described the duties of the proposed position in the following manner with a corresponding breakdown of time to be spent on each duty:

Document, develop, test and implement portions of software system	22.5 hours
Meet outside vendors, site managers and 3 rd party software providers	2.5
Interface with owner – report progress, discuss problem areas	
Learn what is desired for that particular phase	5.0
Create procedures manual – first determine existing procedures;	
research to determine best practices for this sector, and	
then explain changes to those who will be inputting data into system.	10.0

On appeal, the petitioner has overcome the director's basis for denying the petition. Counsel has demonstrated that the petitioner intends to employ the beneficiary as a computer programmer. The Form I-129 lists the Job Title as "Software Engineer" but lists the Non-Technical Description of the Job as "Programmer." The petitioner's employment offer letter to the beneficiary lists the proposed position as "computer programmer." The fax cover sheet to the Arizona Department of Economic Security lists the position as "software programmer." In the response to the RFE, counsel stated that the petitioner wanted to amend the Form I-129 to change the job title to "computer programmer." On appeal, counsel asserts that the two job titles are interchangeable in the computer industry. The proposed job duties resemble those of a computer programmer as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Since the original LCA was approved for a computer programmer, the job description matches that of a computer programmer, and the petitioner intends to employ the beneficiary as a computer programmer, despite the fact that the job title on the Form I-129 and the LCA are not identical, the petitioner has met the requirements of 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

The petition may not be approved, however, because the AAO finds that the evidence in the current record does not establish that the proposed position is a specialty occupation as required by the Immigration and Naturalization Act (Act) and the relevant Citizenship and Immigration Services (CIS) regulations.

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 specialty that is directly related to the proposed position.

The proposed position does not meet the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) - a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Employers consider those with a variety of degrees and relevant work experience suitable for jobs in this area. While some employers prefer, but do not require, computer programmers to possess bachelor's degrees in computer science or related fields, others only require a two-year associate's degree. The *Handbook* also indicates that entry-level programmers, some of whom hold bachelor's degrees, but not necessarily in a computer-related field, and some of whom only hold associate's degrees, can advance into software engineer positions within the organization they work in. Since a bachelor's degree in computer science or a related field is not the normal minimum requirement for entry into computer programmer positions, the petitioner fails to establish that the proposed position is a specialty occupation under the first criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The proposed position does not meet the two alternative prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - the 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)). The petitioner has not provided any evidence that the requirement of a bachelor's degree is common to the industry in parallel positions among similar trailer park owners. In addition, the employer has not shown that this particular computer programmer position is so complex or unique that only an individual with a bachelor's degree in a computer-related field can perform it.

The proposed position does not meet the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the employer normally requires a degree or its equivalent for the position. As the record does not contain any evidence of the petitioner's past hiring practices for the position, the petitioner has not met its burden of proof in this regard.

Finally, the evidence does not establish that the proposed position is a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): 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 computer-related field. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's or higher degree, or its equivalent, in a specific specialty. The petitioner has not presented any evidence to establish that its computer programmer position is distinguishable from those of other computer programmers. Again, the *Handbook* indicates computer programmer positions do not normally require a bachelor's degree in a computer-related field for entry into the occupation.

No evidence contained in the record demonstrates that the proposed position is a specialty occupation. As the director has not made a determination on whether or not the position is a specialty occupation, the director's decision will be withdrawn and this petition will be remanded to allow the director to rule on the issue. The director may afford the petitioner reasonable time to submit evidence pertinent to the issue of whether the position is a specialty occupation and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the statutory and regulatory requirements for eligibility.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 4, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.