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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 252 50181 Office: CALIFORNIA SERVICE CENTER Date:

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 director of the California 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 provides software development and consulting services. It seeks to employ the beneficiary as a full-time analyst programmer 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; (3) the petitioner's response to the director's request for evidence, dated November 1, 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 an Analyst Programmer. Evidence of the beneficiary’s duties includes: the Form I-129, and petitioner’s response to the director’s request for evidence (RFE), dated November 1, 2004.

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

- Analyze and evaluate existing and proposed systems and devices;
- Analyze and evaluate computer programs and systems as well as related procedures to process data;
- Prepare program specifications, charts, and diagrams to assist in problem analysis and submit recommendations for solutions;
- Develop coding logic flowcharts, encode, test, debug and install operating programs and procedures in conjunction with user development;
- Implement each project assigned;
- Serve as technical resource on all projects.

The beneficiary’s daily task activities would include:

- Develop - 50%
- Support - 30%
- Coding - 10%
- Testing - 10%

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

- Work in customer relations management Siebel product;
- Support sales team which gathers various requirements from their clients in the areas, related to CMR-Siebel;
- Work on developing prototypes based on customer requirements and participate in demonstration of such prototypes with petitioner's clients;
- Perform product configuration, development, testing and implementation;
- Perform business process analysis, requirement mapping, and technical assessment;
- View and interface inventory and define data conversion strategy;
- Assist in designing and monitoring development of UI views and screen;
- Design and configure Siebel;
- Implement enterprise integration using EIM, eAL HTTP transport methodologies;
- Design and execute data conversion mappings as well as develop interface programs for inbound/outbound interface between mainframe systems using EIM.

In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding items such as: design and configuration of Siebel. In sum, the initial description changed from essentially analyzing, coding, and evaluating programs and systems to designing and configuring Siebel applications.

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; and 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. **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 position is comparable to that of a computer systems analyst. The 2006-2007 *Handbook's* description of computer systems analyst, at <http://www.bls.gov/oco/ocos287.htm>, states:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems—for example, business, accounting, or financial systems, or scientific and engineering systems—that vary with the kind of organization. Some systems analysts also are known as *systems developers* or *systems architects*.

When a system is accepted, systems analysts determine what computer hardware and software will be needed to set the system up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then, they work with programmers to “debug,” or eliminate, errors from the system.

Rapidly changing technology requires an increasing level of skill and education on the part of employees. Companies increasingly look for professionals with a broad background and range of skills, including not only technical knowledge, but also communication and other interpersonal skills. This shift from requiring workers to possess solely sound technical knowledge emphasizes workers who can handle various responsibilities. While there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills.

The *Handbook* indicates that a baccalaureate degree in a specialty is not normally required to enter the occupation. The *Handbook* indicates that employers look for people with a broad range of skills, and there is no universally accepted way to prepare for a systems analyst job. 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.

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.

The AAO notes that the petitioner provided no documentation to establish that firms similar to the petitioner offering jobs similar to the proffered position employ individuals with a degree in the specialty. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. See *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)). 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 systems analysts. However, the duties of the proffered position, as first listed, are so generic that they provide no meaningful description of the tasks that the beneficiary would perform for the petitioner on a daily basis. The petitioner provided no 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, the 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.

CIS interprets the statute and the regulations to require the petitioner to show that the entity ultimately employing the beneficiary requires a bachelor's degree for all employees in that position. The degree requirement should not originate with the employment agency that seeks to hire the beneficiary for employment with the agency's client. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

Although the record contains an agency service agreement between the petitioner and Pacific West Corporation, where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of Pacific West Corporation. As the contract from Pacific West Corporation does not include a comprehensive description of the job duties, it cannot be determined that the work that the beneficiary will perform at Pacific West Corporation will qualify as a specialty occupation.

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. 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. 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).

The director found that the proffered position could not be considered a specialty occupation because the petitioner failed to submit contracts between it and its clients. The record is not clear where the beneficiary will be working. At the time of filing and in response to the RFE, the petitioner indicated that the beneficiary would be working at its offices in San Jose, California. Also, in response to the RFE, the petitioner submitted a copy of its contract with the beneficiary indicating that the beneficiary must be prepared to travel to client sites. On appeal the petitioner states that the beneficiary will be performing services for the Pacific West Corporation at its offices in Santa Clara, CA. 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. 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*, 19 I&N Dec. 582, 591 (BIA 1988).

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 set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director raised the issue of whether or not the petitioner would be the beneficiary's employer. Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

To qualify as a United States employer, all three criteria must be met. The AAO finds that the petitioner meets the definition of a United States employer. The payroll records indicate that the petitioner engages persons to work in the United States, and the form I-129 indicates that it has an Internal Revenue Service Tax Identification Number. The petitioner, a computer software development and consulting company, provides enterprise software development services. The petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, and otherwise control the work the beneficiary would perform.

The director also questioned the petitioner's documentation and specifically noted that although the petitioner has filed 808 petitions, it claimed 94 positions. The AAO also notes that the withholding records the petitioner submitted shows only 23 employees. 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*, 19 I&N Dec. 582, 591 (BIA 1988).

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 a degree certificate from Newport University, indicating that the beneficiary obtained a bachelor of science in Computer Science in 1999. With the appeal brief, the petitioner submitted an evaluation by an official stating that the combination of the beneficiary's education and experience are equivalent to a baccalaureate degree in Information Technology. The credentials evaluation indicates that the evaluator based the assessment of the beneficiary's credentials, in part, on the beneficiary's online degree from Newport University.

Newport University is not an accredited university as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).¹ It is noted that the record contains three versions of degree certificates of the claimed online degree. Although the three "copies" came from the same original degree certificate, all have major variations from each other. The variations in the certificates cast considerable doubt on whether the claimed credential exists. 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*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO finds the Newport University degree unreliable and will not consider it in its evaluation of the beneficiary's credentials.

As the credentials evaluation submitted on behalf of the beneficiary is based, in part, on unreliable evidence, it cannot be considered. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The credentials evaluation of the beneficiary's academic training and work experience also cannot be accepted as it is not 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 as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The letter from the acting dean of the College of Arts and Sciences at Western Washington University does not indicate that the university has a program for granting credit based upon an individual's training and/or experience in the specialty. A reliable credentials evaluation service may evaluate the equivalency of education. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

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 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 letters from the beneficiary's former employer and coworkers do not provide enough descriptive detail to indicate that such experience included the theoretical and practical application of highly specialized knowledge, or that the experience was gained while working with peers, supervisors or

¹ U.S. Dept. of Education, Office of Post Secondary Education, <http://ope.ed.gov/accreditation>. The petitioner's credentials evaluator confirmed that the institution is not accredited.

subordinates who have degrees in a computer software engineering specialty. Further, the letters do not establish recognition of expertise. Thus, the AAO does not find the beneficiary's educational and work experience to be the equivalent of a bachelor's degree in computer science or a related field.

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.