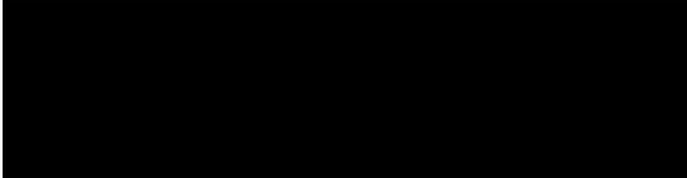


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: SRC 04 236 51363 Office: TEXAS SERVICE CENTER Date: **NOV 28 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 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 a pet grooming salon with four employees and stated gross annual revenue of \$72,153 that seeks to employ the beneficiary as a systems analyst. 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 on the basis of her determination that the petitioner had failed to demonstrate (1) that its proposed position qualifies for classification as a specialty occupation and (2) that the beneficiary qualifies to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

Counsel submitted the Form I-290B on September 13, 2005. Counsel marked the box at section two of the Form I-290B to indicate that a brief and/or evidence would be sent within 30 days. The AAO did not receive this additional brief and/or evidence. As such, the AAO faxed a follow-up letter to counsel's office on October 12, 2006, requesting that the brief and/or additional evidence be sent within five business days. The AAO has not received a response to this facsimile, so it deems the record complete and ready for adjudication.

The AAO will first address the question of whether the proposed position qualifies for classification as a specialty occupation.

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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

According to the petitioner's July 28, 2004 letter of support, the duties of the proposed position would consist of solving computer problems; applying computer technology to meet the individual needs of the company; analyzing data processing problems for application to electronic data processing systems; analyzing user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations; troubleshooting network systems and recommending improvements to the network; providing documentation/project tracking and management reporting; preparing detailed workflow chart and diagram to illustrate sequence of steps that the program must follow and describe the input, output, and logical operations involved; providing tactical and strategic input on overall network planning and related products; converting project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language; repairing and updating network hardware and equipment including servers, switches, and other networking hardware; reviewing computer system and hosting capabilities, workflow, and scheduling limitations to determine whether the requested program/link or program/link change is possible within the existing system.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the proposed 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 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The duties of the proposed position fall within those noted for computer systems analysts, database administrators, and computer scientists, as the *Handbook* places the position of systems analyst within that occupational grouping.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor's degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers

seek applicants who have a bachelor's degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by counsel in response to the director's request for additional evidence. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement is common in the petitioner's industry in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

There is no evidence in the record to demonstrate that any of the companies that issued the job postings are similar to the petitioner, a pet grooming salon with four employees, in size, scope, or scale of operations.¹ 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

According to its posting, RxAmerica is a biotechnology/pharmaceutical company. [REDACTED] Farm is an agricultural company. Schaller Anderson administers Medicaid and employer self-funded health plans and manages behavioral health plans. Humana is a health benefits company. According to its posting, the unnamed company advertising its vacancy through Robert Half Technology is "a leading global media conglomerate."

Nor do the postings submitted by counsel confirm that a degree in a specific specialty is an industry-wide standard. According to their postings, [REDACTED] and Humana do require that applicants possess a four-year degree, but they do not require that the degree be in any particular field of study.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The second prong of the second criterion will be discussed later in this decision.

¹ Counsel's citation of *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989) regarding the director's finding that the petitioner had not satisfied the first prong of the second criterion in this matter is misplaced. While the size of a company does not, in and of itself, determine its need for a given position, its size, scope, and scale of operations do have a direct and substantial bearing on the question of whether it is "similar" to another organization.

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

In her February 5, 2005 request for additional evidence, the director afforded the petitioner the opportunity to establish eligibility under this criterion by requesting evidence that the petitioner had hired degreed individuals for this position in the past. Counsel's May 4, 2005 response to the director's request did not attempt to establish eligibility under this criterion. Rather, counsel stated the following:

[D]iscriminating based on the size and hiring history of the Petitioner is clearly a violation of the regulations and the Code as well as inherently incongruent with the legislative intent of Congress.²

However, establishing eligibility under this criterion requires a demonstration that the petitioner normally requires a degree for the position. If the petitioner has never before filled this position, or has never required a degree for the position in the past, then the petitioner cannot establish that it normally requires a degree for the position. Thus, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

Finally, the duties to be performed by the beneficiary do not appear so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can only be performed by an individual with a degree in a specific specialty.

As previously noted, not all systems analyst positions require a bachelor's degree, as some require only a two-year degree. As evident in the listing of proposed duties presented in the record, the petitioner has limited its description of the proposed position and its duties to generalized descriptions of functions generic to the systems analysis occupation. Neither those descriptions nor any other evidence of record develop the position or the nature of its duties in sufficient detail to establish either that the position is unique from or more complex than systems analysis positions not requiring at least a bachelor's degree in a specific specialty, or that its specific duties are more specialized and complex than systems analysis positions not requiring a degree in a specific specialty. Thus, the proposed position does not qualify as a specialty occupation under the second prong of the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), nor does it qualify under the fourth criterion of that regulation.

Finally, counsel cites to several unpublished AAO decisions as evidence that the proposed position qualifies as a specialty occupation. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner's citation of *Unico American Corporation v. Watson*, 1991 WL 11002594 (C.D. Cal. 1991), an unpublished decision from a district court, is similarly unpersuasive. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of*

² Counsel repeats this assertion on appeal.

K-S-, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district court judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as published decisions of the district courts are not binding on the AAO outside of that particular proceeding, an unpublished decision of a district court has even less persuasive value.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied on this ground.

The AAO will next address the question of whether the beneficiary qualifies to perform the duties of a specialty occupation.

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.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above. The beneficiary did not earn a degree from a United States institution of higher education, so he does not qualify under the first criterion.

The second criterion requires a showing that the beneficiary earned a foreign degree determined to be equivalent to a United States baccalaureate or higher degree. However, according to an evaluation contained in the record, the beneficiary's foreign degree is not equivalent to a United States baccalaureate or higher degree from an accredited college or university. According to the evaluation, the beneficiary possesses the equivalent of three years of undergraduate study in systems analysis, and related subjects, at a regionally accredited college in the United States. As such, the beneficiary does not qualify under this criterion.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

It is this fourth criterion under which the petitioner must classify the beneficiary's work experience.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under this criterion is 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 beneficiary does not qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D), as the evaluation does not state that the beneficiary possesses the equivalent of a United States baccalaureate or higher degree.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit 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).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because, according to the evaluation, his education is equivalent to three years of undergraduate study in systems analysis, and related subjects. It does not state that he possesses the equivalent of a baccalaureate or higher degree.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit 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 a specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record⁴ traces the beneficiary's work history from January 1999 through December 2003. The AAO's next line of inquiry is therefore to determine whether at least three years⁵ of this work experience included the theoretical and practical application of specialized knowledge required by the specialty, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the specialty, and whether the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

⁴ Regarding the beneficiary's work experience, the record contains a copy of the beneficiary's resume and an undated letter from Thamayra Basterrecha discussing the beneficiary's work experience in Venezuela.

⁵ Pursuant to the evaluation, the AAO recognizes three years of university-level study in general coursework taken while the beneficiary earned his degree.

However, the undated letter from Thamayra Basterrecha submitted by the petitioner does not establish that the beneficiary's previous work experience included the theoretical and practical application of specialty knowledge required by systems analysts, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that he achieved recognition of expertise in a computer-related field as described at section (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

On appeal, counsel states that "CIS failed to take into consideration that the recommendation letter which was written by a Web Services Manager indicated her progressive work experience." However, as noted previously, this letter does not establish that the work experience referenced therein included the theoretical and practical application of specialty knowledge required by systems analysts, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that he achieved recognition of expertise in a computer-related field as described at section (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Accordingly, the petitioner cannot use this letter to conclude that at least three years of the beneficiary's work experience will substitute for one year of college-level coursework.⁶

As such, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation.

The proposed position does not qualify for classification and the beneficiary does not qualify to perform the duties of a specialty occupation. Accordingly, the AAO will 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.

⁶ Moreover, and as noted by the director, much of this work experience was gained while the beneficiary was earning her degree. It is therefore unclear whether this was full-time employment.