

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



b2

FILE: WAC 07 008 52145 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 is engaged in the distribution and marketing of auto parts. It seeks to employ the beneficiary as a website/database specialist. 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 based on a finding that the evidence of record did not establish that the job offered qualified as a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

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.

United States Citizenship and Immigration Services (USCIS) 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 proffered position.

The record of proceeding before the AAO contains: (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, appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a website/database specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to the petitioner's letter of support dated October 2, 2006, and counsel's letter dated September 18, 2007, the beneficiary would perform the following duties:

- Responsible for website development and creating online browser and multimedia applications and presentations. (20%)
- Develop and maintain standards, procedures, and methodologies for effective operation, access, control, and backup recovery of database systems. (5%)
- Design and maintain electronic records in easily retrievable database. (5%)
- Research, maintain, upgrade and direct the strengthening of images and functions of company's website. (5%)
- Coordinate human forces in establishing, implementing, and modifying an efficient operating system. (10%)
- Solve problems with online customers. (5%)
- Conduct and review tests to verify data accuracy and quality standard, ensure integrity of backup and restore procedures. (5%)
- Update customer records for the most current status and profile information. (5%)
- Compile data from various sources for direct marketing campaigns, sales reports, and measurements. (15%)
- Assist in developing strategies to import data from website and external list sources. (15%)
- Provide management with weekly, monthly, quarterly, and ad hoc reports. (5%)
- Evaluate and recommend tools and utilities required for performing management duties. (5%)

It is noted that despite the director's request for a more detailed description of the beneficiary's duties in the second request for evidence issued on July 24, 2007, counsel for the petitioner submitted the same list provided in the petitioner's October 2, 2006 letter, with the addition of the percentage of time the beneficiary would devote to each task.

In the initial petition, the petitioner did not indicate the minimum educational requirements for the proffered position. In counsel's response to the second request for evidence, he claimed that the

proffered position was equivalent to that of a software engineer, and required at least a bachelor's degree in computer science, information management, or related fields.

The petitioner also submitted Internet job postings for the position of computer software engineer, associate software engineer, computer systems administrator, database ETL engineer, database administrator, software engineer, software development engineer, and web developer.

The director noted that he requested evidence that similar types of organizations require bachelor's degrees to perform the requested services. The director noted that although the petitioner provided the Internet job postings listed above, none of them appeared to be businesses similar to the petitioner's business. The director noted that in an analysis of whether a particular position requires a bachelor's degree, USCIS must consider the particular needs of the business. Moreover, the director found that upon review of the stated duties of the proffered position, it did not appear to be that of a software engineer, as counsel claimed, but more an amalgam of three positions: website developer/designer, database administrator, and customer service representative. The director cited the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), noting that for web developers and designers, "[M]ost employers place a premium on formal education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a two-year degree. . . ." Based on this premise and a careful review of the stated duties, the director found that the petitioner's needs could be met by an individual with less than a baccalaureate degree. The director found that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field. In conclusion, the director determined that the proffered position was not a specialty occupation.

On appeal, counsel states that the proffered position is actually that of a computer software engineer, and submits on appeal a copy of a prevailing wage determination, issued by the State of California's Employment Development Department, for such a position. Counsel concludes that since the proffered position is that of a computer software engineer, which requires a bachelor's degree as the minimum requirement for entry into the profession, the proffered position is therefore a specialty occupation. In the alternative, counsel asserts that if the petitioner were to concur with the director's conclusion that the position offered is akin to database administrator, the proffered position is likewise a specialty occupation because the duties require the skills and knowledge of a person with a bachelor's degree or higher.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a 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 USCIS 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)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel states that the duties of the proffered position are performed by computer software engineers. The *Handbook* discloses that the duties of the proffered position are performed by a combination of positions, such as website developer/designer, database administrator, and customer service representative. Like the beneficiary, who will spend 20% of his time on website development, the proffered position embodies elements of the position of web designer. The *Handbook* reports:

The growth of the Internet and the expansion of the World Wide Web (the graphical portion of the Internet) have generated a variety of occupations related to the design, development, and maintenance of Web sites and their servers. For example, *webmasters* are responsible for all technical aspects of a Web site, including performance issues such as speed of access, and for approving the content of the site. *Internet developers* or *Web developers*, also called *Web designers*, are responsible for day-to-day site creation and design.

In addition, the proffered position embodies many elements of the position of database administrator. Counsel states that the beneficiary will devote significant time to the importation, storage, backup and integration of data and database systems. These duties are likewise similar to the position of database administrator, which is described by the *Handbook* as follows:

With the Internet and electronic business generating large volumes of data, there is a growing need to be able to store, manage, and extract data effectively. *Database administrators* work with database management systems software and determine ways to organize and store data. They identify user needs and set up new computer databases. In many cases, database administrators must integrate data from outdated systems into a new system. They also test and coordinate modifications to the system when needed, and troubleshoot problems when they occur. An organization's database administrator ensures the performance of the system, understands the

platform on which the database runs, and adds new users to the system. Because many databases are connected to the Internet, database administrators also must plan and coordinate security measures with network administrators. With the growing volume of sensitive data and the increasing interconnectedness of computer networks, data integrity, backup systems, and database security have become increasingly important aspects of the job of database administrators.

Finally, in reviewing the duties of the proffered position, it also appears that the beneficiary's proffered position is akin to a customer service representative. For example, the description of duties states that the beneficiary will be responsible for "solv[ing] problems with online customers;" "updat[ing] customer records;" and "compil[ing] data from various sources for direct marketing campaigns, sales reports, and measurements." According to the *Handbook*:

All customer service representatives interact with customers to provide information in response to inquiries about products or services and to handle and resolve complaints. They communicate with customers through a variety of means—by telephone; by e-mail, fax, regular mail; or in person. Some customer service representatives handle general questions and complaints, whereas others specialize in a particular area.

* * *

Customer service representatives also may make changes or updates to a customer's profile or account information. They may keep records of transactions and update and maintain databases of information.

Despite the similarities of the proffered position to these three positions, counsel continues to assert that the proffered position is akin to that of a computer software engineer, applications. However, the *Handbook's* overview of this position provides, in relevant part:

Computer applications software engineers analyze users' needs and design, construct, and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program. The programming languages most often used are C, C++, and Java, with Fortran and COBOL used less commonly. Some software engineers develop both packaged systems and systems software or create customized applications.

The description of duties for the proffered position makes no mention of designing software or utilizing programming language, and does not indicate that the beneficiary would be creating customized software applications. Therefore, the AAO concurs with the director's determination that the proffered position is an amalgam of developer/designer, database administrator, and customer service representative.

The petitioner, therefore, fails to establish the first criterion because the *Handbook* states that for database administrators and web developers or designers, there is no universally accepted way to prepare for a job in such a position. Though the *Handbook* indicates a bachelor's degree is a prerequisite for many jobs, some jobs may require only a two-year degree. Additionally, with regard to the customer service aspect of the position, the *Handbook* states that most employers require simply a high school diploma. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered 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) - that a specific degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can only be performed by a degreed individual. To establish its degree requirement as an industry norm, counsel relies on submitted Internet job postings from a wide variety of companies including a global defense and technology company, Internet companies, and software and middleware providers.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. One deficiency in the postings is that the companies are either obviously dissimilar to the petitioner or their nature is undisclosed. For example, Northrop Grumman is a global defense and technology company, whereas Yahoo! is the world's largest global online network of integrated services with more than 500 million users worldwide.¹ Clearly, there is no evidence that the companies are similar in size and scope to that of the petitioner, which is an auto parts manufacturer which currently employs four persons. Finally, many of the postings are for computer software engineers, a position which does not encompass the duties of the proffered position as discussed above. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

Further, the AAO also concludes that the record before it does not 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. It finds no evidence in the record that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Despite being in business since 2002, the petitioner has not submitted any evidence to demonstrate a past practice of hiring degreed individuals for the proffered position.

¹ See <http://yhoo.client.shareholder.com/press/overview.cfm> (January 9, 2009).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* indicates that some jobs in this area may require only a two-year degree. The petitioner has not related the listed duties to its business of manufacturing automobile parts beyond what is normally encountered in the occupational field. While counsel further states that the duties listed are complex tasks in a computer environment involving designing, developing and implementing databases, the petitioner has not shown, in relation to its business, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the duties of the proffered position would be performed most similarly by a database administrator or a web developer, an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For the reasons given herein, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on the ground that the proffered position does not qualify as a specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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