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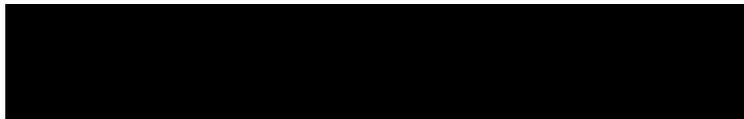
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FILE: WAC 03 232 53697 Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2006

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, 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 appeal will be dismissed. The petition will be denied.

The petitioner, a corporation engaged in management services, presently employs the beneficiary as a systems analyst, in accordance with a previously approved petition for the petitioner to employ the beneficiary in that position as an H-1B nonimmigrant worker in a specialty occupation, 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). In order to continue this employment beyond the period approved in the initial petition, the petitioner endeavors to continue the beneficiary's H-1B classification and extend his stay.

The director denied the petition on the basis that the petitioner had failed to establish that the beneficiary would be employed as a systems analyst. While the director found that the petitioner's general description of the duties of the proffered position comported with a specialty occupation, the director determined that the petitioner had not established that the beneficiary would be performing such duties for any business entity. In reaching this conclusion, the director determined that the petitioner is not the beneficiary's employer, on the basis of the director's finding that the petitioner contracts out the beneficiary's services without controlling the work that he performs. The director also determined that the petitioner had not established that it is the beneficiary's agent. The director also found that the labor condition application (LCA) "cannot be considered in compliance" because the record lacked contractual evidence by which LCA compliance may be evaluated.

On appeal, counsel submits a brief, styled as a motion to reopen, and documents pertaining to professional service agreements between the petitioner and two Holiday Inn Express motels.

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's June 14, 2004 brief on appeal, entitled "Motion to Reopen," and the documents enclosed with the brief.

The AAO does not concur with the director's finding that an employer-employee relationship would not exist between the petitioner and the beneficiary. The AAO finds that the contract documents submitted into the record on appeal and the previously submitted September 30, 2003 letter of the petitioner offering to extend the beneficiary's employment indicate that the petitioner would exercise sufficient control over the beneficiary's work as a consultant to qualify as the beneficiary's employer under the definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii). The AAO also finds that the aforementioned contract documents and extension-of-employment letter provide sufficient information to overcome the director's finding of insufficient information in the record regarding compliance with the terms and conditions of employment stated in LCA.

However, as discussed below, the director's ultimate basis for denying the petition was correct, namely, the petitioner's failure to establish that the beneficiary would be performing the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In an addendum to the Form I-129 (Petition for Nonimmigrant Worker), the petitioner provided this description of the proposed duties:

Analyze requirement[s], procedures and problems to design, develop, and test software applications to process or improve existing computer systems and review system capabilities, workflow and scheduling limitations to determine the requested program changes and possibilities within existing system. Study systems to evaluate effectiveness of and develop new systems to improve production or workflow as required. Write user needs, functions and steps required to develop and modify programs. Plan and prepare technical reports, instructional manuals and documentation. Upgrade system and correct errors to maintain the system after implementation.

In his letter of reply to the RFE, counsel provided the following additional information about how the beneficiary’s workday would be divided among different duties:

- Analyze information processing and computation needs of clients and plan and design information management systems using techniques such as structured analysis, data modeling and information engineering (20%)
- Analyze client’s existing technology requirements and develop software applications to replace or improve existing computer systems for use in accounting transactions, billing, and scheduling (15%)
- Analyze and monitor the integrity of system information and security, especially financial information data flowing over WAN and LAN (10%)
- Develop computer information resources, providing for data security and control, strategic computing, risk assessment, and disaster recovery (15%)
- Study the client’s current systems and evaluate their effectiveness in meeting client requirements in terms of financial transactions and scheduling (10%)
- Prepare reports on existing systems for management review and make suggestions on modifying systems to improve production and workflow (10%)

- Prepare technical reports, documentation, and instructional manuals for clients on the effective use of the computer systems and software (10%)
- Maintain the system through upgrading and debugging, as required (10%)

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 (5<sup>th</sup> 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.

In this particular case, the beneficiary is to work in a consulting capacity for two clients of the petitioner. However, the petitioner has not provided specific details of particular work to be done for either client. Accordingly, it is impossible for CIS to determine whether the actual performance requirements of the proffered position support the petitioner's claim that the position is a specialty occupation.

In response to the RFE, the petitioner's president submitted an April 27, 2004 document asserting that the petitioner has management consultancy contracts until December 31, 2007 with a Holiday Inn Express of Lawndale, California, and a Holiday Inn Express of Los Angeles. The RFE response also included a document from the petitioner stating that the beneficiary would perform work for the Lawndale motel from October 1, 2003 through April 30, 2005, and for the Los Angeles motel from May 1, 2005 through September 30, 2006. However, the RFE response included no copies of contractual material pertaining to either of the clients, even though the RFE specifically requested copies of "contractual agreements between the petitioner and the companies for which the beneficiary will be providing consulting services" and copies of "the statements of work, work orders and any other documents and appendices." As a consequence of the petitioner's failure to provide documentary evidence of the actual work to be performed, the evidence of record at the time of the director's decision did not establish that the beneficiary would be performing work that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty, as required by the Act and its implementing regulations.

In *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

The contractual documents submitted on appeal do not illuminate the specific work that would be performed for the two motels. The only reference to the work to be performed is the generic statement in the first paragraph of each contract that the petitioner "will provide the following employee, [the beneficiary], for

technical related services as applicable to BUYER.” The two “work orders” submitted on appeal only provide this generic and generalized “Services Description:” “Development of Web-based document management systems (DMS).”

As the petitioner has presented no contract specifications or other explanatory documentation, the vague phrasings “technical related services as applicable” and “[d]evelopment of Web-based document management systems” in the work orders do not substantiate counsel’s contention that “[t]he skills required can be obtained only as part of at least a Bachelor’s degree in Information Systems or Computer Science offered at accredited institutions of higher learning.” 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).

In light of the insubstantial evidence that the petitioner has presented about the duties that the beneficiary would perform as a consultant to the two motels, the petitioner has not satisfied any of the other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor’s degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The evidence of record demonstrates that the director was correct in concluding that the petitioner had not established that the general duties that the petitioner described for the proffered position actually comport with work that the beneficiary would perform for the two motels.

Furthermore, the generalized duties that were asserted, but not corroborated by evidence in the record, do not comprise a position for which the normal hiring requirement is at least a bachelor’s degree, or the equivalent, in a specific specialty. Those duties generally comport with the occupational categories of computer systems analyst, data-base administrator, and programmer-analyst as described in the section “Computer Systems Analysts, Database Administrators, and Computer Scientists” at pages 105-112 of the 2004-2005 edition of the Department of Labor’s *Occupational Outlook Handbook*, which CIS recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. However, as discussed below, the *Handbook* indicates that a bachelor’s degree, or the equivalent, in a specific specialty is not normally a minimum hiring requirement for positions in these occupational categories.

According to the *Handbook*, the computer systems analyst, data-base administrator, and programmer-analyst occupations primarily engage in the design and development of new hardware and software systems and the incorporation of new technologies. The *Handbook* includes this information about computer systems analysts:

*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*.

Systems analysts begin an assignment by discussing the systems problem with managers and users to determine its exact nature. Defining the goals of the system and dividing the solutions into individual steps and separate procedures, systems analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan the system. They specify the inputs to be accessed by the system, design the processing steps, and format the output to meet users' needs. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology will be financially feasible.

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. Systems analysts who do more indepth testing of products may be referred to as *software quality assurance analysts*. In addition to running tests, these individuals diagnose problems, recommend solutions, and determine whether program requirements have been met.

The *Handbook* includes the following information about database administrators:

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 requirements, set up computer databases, and test and coordinate modifications to the systems. 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 they also may design and implement system security, database administrators often plan and coordinate security measures. With the volume of sensitive data generated every second growing rapidly, data integrity, backup systems, and database security have become increasingly important aspects of the job of database administrators.

The *Handbook* provides this general description of programmer-analyst work:

In some organizations, *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate statement on computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more commonplace, these analysts increasingly work with databases, object-oriented programming languages, as well as client-server applications development and multimedia and Internet technology.

The *Handbook* does not indicate that employers of any of the occupations discussed above normally require a bachelor's degree, or the equivalent, in a specific specialty. One of the Significant Points introducing the *Handbook's* narrative in the section on Computer Systems Analysts, Database Administrators, and Computer Scientists is: "Education requirements range from a 2-year degree to a graduate degree." The subsection "Training, Other Qualifications, and Advancement" includes these statements indicative of the fact that, while some employers may require such credentials, a bachelor's degree in a specific specialty is not a normal hiring requirement:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, most employers place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

For systems analyst, programmer-analyst, and database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS). MIS programs usually are part of the 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 (MBA), with a concentration in information systems, as more firms move their business to the Internet. For some network systems and data communication analysts, such as webmasters, an associate's degree or certificate is sufficient, although more advanced positions might require a computer-related bachelor's degree. For computer and information scientists, a doctoral degree generally is required due to the highly technical nature of their work.

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment in these computer occupations. The level of education and type of training that employers require depend on their needs. One factor affecting these needs is changes in technology. Employers often scramble to find workers capable of implementing "hot" new technologies. Those workers with formal education or experience in information security, for example, are in demand because of the growing need for their skills

and services. Another factor driving employers' needs is the timeframe during which a project must be completed.

Most community colleges and many independent technical institutes and proprietary schools offer an associate's degree in computer science or a related information technology field. Many of these programs may be more geared toward meeting the needs of local businesses and are more occupation specific than are 4-year degree programs. Some jobs may be better suited to the level of training that such programs offer. 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. Courses in computer science or systems design offer good preparation for a job in these computer occupations. For jobs in a business environment, employers usually want systems analysts to have business management or closely related skills, while a background in the physical sciences, applied mathematics, or engineering is preferred for work in scientifically oriented organizations. Art or graphic design skills may be desirable for webmasters or Web developers.

The petitioner has not presented evidence to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, the petitioner has not presented any evidence to establish that the proffered position qualifies as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), that is, by the petitioner's having an established history of recruiting and requiring only persons with at least a bachelor's degree in a specific specialty.

Because it leaves the actual duties and performance requirements of the work for the two motels in doubt, the record does not convey the complexity, uniqueness, or specialization required to qualify a position as a specialty occupation under either the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner noted that CIS approved a previous petition filed on behalf of the beneficiary for the position that is the subject of the present petition. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same type of evidence that is contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has not established that the beneficiary would be performing the duties of a specialty occupation, the decision of the director shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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