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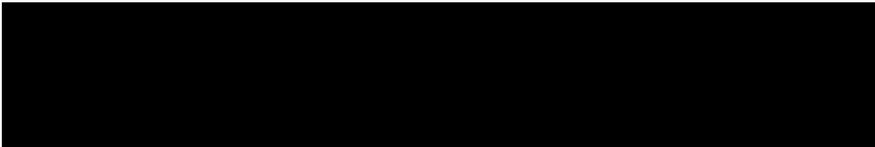
FILE: EAC 06 055 52631 Office: VERMONT SERVICE CENTER Date:

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, Vermont 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 designs, imports, and retails oriental furniture. The petitioner avers that it employs 40 personnel and had \$3.4 million in gross annual income when the petition was filed. It seeks to employ the beneficiary as a website developer. Accordingly, the petitioner 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).

On March 16, 2006, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts: (1) the Department of Labor finds the position to be a specialty occupation; (2) the petitioner currently employs others in similar positions, whom the petitioner requires to possess at least an undergraduate degree; and (3) the industry in the greater Washington, D.C. area requires at least an undergraduate degree for the position of web developer. Counsel submits a brief and documentation in support of the appeal.

The record of proceeding before the AAO includes: (1) the Form I-129 filed December 5, 2005 and supporting documentation; (2) the director's December 22, 2005 request for evidence (RFE); (3) counsel for the petitioner's March 8, 2006 response to the RFE; (4) the director's March 16, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and documentation submitted in support of the appeal.

The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation. To meet its burden of proof in this regard, the 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 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:

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.

The petitioner seeks the beneficiary's services as a website developer. In a December 8, 2005 letter appended to the petition, the petitioner stated:

The Website Developer will design and develop the company's website architecture; customize web-based interactive features; build database gateways; and implement electronic commerce services. Her duties include, but are not limited to, analysis, design of the application's specifications, documentation of software user requirements, development of programming using PHP, Perl, and/or ASP, ASP.Net scripting languages, as well as design of business logic database units using MySQL and Microsoft SQL Server. [The beneficiary] will be responsible for the planning, design, development, debugging, and implementation of projects.

The Website Developer will also design web sites that will match clients' objectives. The Developer must understand clients' vision of what needs to be delivered as the end-product. [The beneficiary] will be responsible for all phases of system analysis and development in consultation with the planning team to ensure a common understanding of the end-product. [The beneficiary] will also promote the usability of the site. She will work closely with customers to consult and advise the best practices for promoting the web site, either as an Intranet being used within a corporate environment or a consumer site with open access.

The petitioner added that because of its specialized nature, it "requires the services of a Website Developer who is familiar with the language, customs, business practices and products of Asia." The petitioner provides a copy of the Labor Condition Application (LCA) stating that the prevailing wage for a website developer in the Potomac, Maryland region is \$35,194.

In a March 1, 2006 letter attached to counsel's response to the director's RFE, the petitioner repeated the majority of the initial description and noted that due to its continued expansion and because the website must be updated frequently, it needed a full-time web developer. The petitioner stated that it needed a website developer to develop and maintain the company's website to provide its customers and prospective customers easy access to its products and services information and to place orders and trace orders online. The petitioner indicated that it currently employed a part-time worker in the position who had a master's degree in computer science and also employed a part-time database analyst who had a master's degree in information systems.

The petitioner also submitted several job advertisements for various positions including web designer/developer, web developer, Java developer, senior IT/Java developer, interactive designer, website merchandise coordinator, e-commerce/e-marketing web manager, web design specialist and web designer I. The companies advertising included large retail operations, a mortgage company, and Internet and catalogue operations. Some of the advertisements submitted provided a general description of duties for the position, while some provided detailed descriptions. The advertisements, in addition, provided a range of educational requirements including a bachelor's degree in fine arts in art, design, or computer science, a master's of science degree in computer science, a bachelor's of science degree in computer science, and a bachelor's degree in graphic/multimedia design. Several listed general bachelor's degrees and did not include a specific discipline or indicated a bachelor's degree was preferred but not required.

Counsel asserted that the Department of Labor's *Occupational Outlook Handbook (Handbook)* report on web developer positions reinforced the petitioner's view of the educational requirements for the position, when stating: "a bachelor's degree is a prerequisite for many jobs."

Upon review of the petitioner's description of duties, the *Handbook's* statements regarding the educational requirements for web developers, webmasters, computer scientists, and database administrators, and the job advertisements submitted, the director determined that the evidence presented did not establish the proffered position as a specialty occupation. The director noted the petitioner's claim that it employed an individual in the proffered position that had a master's degree in mathematics and computer science; the director found, however, that the petitioner had not submitted evidence substantiating the employment of this individual. The director concluded that the evidence of record did not establish that the job offered qualified as a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

On appeal, counsel for the petitioner asserts that the petitioner intends that the beneficiary will perform duties that are not the duties of a typical website developer. Counsel contends that the beneficiary will not only update information on the website but must analyze the customers' need, the petitioner's need, and the needs of the petitioner's vendors to build an e-commerce website; thus the position is more of a hybrid position between that of a database administrator, webmaster, and web developer. Counsel also asserts, based on the complexity of the responsibilities of the position, that an undergraduate degree is required.

Counsel avers that in the Washington, D.C. geographical area, "the rate of educational background of the population in the region in question is nearly twice the national averages." Counsel extrapolates from that statistic that the proffered position in the Washington, D.C. area would require an undergraduate degree. Counsel asserts that a search of the Washington Post job bank revealed 250 web developer positions that

listed a bachelor's degree as a minimum requirement and 45 web developer positions that listed an associate degree as a requirement. Counsel asserts that a review of the 45 advertisements listing an associate degree as a minimum requirement, upon further review, resulted in only 10 of the positions requiring only an associate's degree as a minimum requirement. Counsel provides a number of the advertisements in an effort to substantiate that companies in the greater Washington, D.C. area require a web developer to have an undergraduate degree as a minimum requirement.

Counsel's assertions are not persuasive. The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The *Handbook* discusses occupations related to the proffered position in the section on computer scientists and database administrators 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 requirements, set up computer databases, and test and coordinate modifications to the computer database system. 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.

* * *

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.

The petitioner's description of the duties of the proffered position focus on the design, development, and updating of the petitioner's website. The petitioner indicates the necessity of understanding the customers' vision and understanding the petitioner's product when designing and promoting the usability of the website. These are the duties of a website developer, not a database administrator. The AAO observes that the petitioner has not added any duties that expand the duties of the position to one that incorporates the duties of a database administrator. Moreover, the petitioner expressed its desire to hire a website developer in the Potomac, Maryland area at the prevailing wage set for a website developer, not the prevailing wage set for a database administrator. The record in this matter does not establish that the petitioner's business requires or

that the beneficiary will be responsible for working with database management systems software, setting up computer databases, or will be responsible for designing and implementing system security.¹

The *Handbook* discusses the educational requirements for positions associated with the design and development of websites as:

For some network systems and data communication analysts, such as webmasters, an associate degree or certificate is sufficient, although more advanced positions might require a computer-related bachelor's degree.

* * *

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment in these occupations. The level of education and the type of training that employers require depend on their needs.

* * *

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 the programs may be geared more toward meeting the needs of local businesses and more occupation specific than are 4-year degree programs. Some jobs may be better suited to the level of training that such programs offer.

* * *

Art or graphic design skills may be desirable for webmasters or Web developers.

Based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the particular position; rather there are many avenues to obtaining employment as a website developer, including associate degrees, technical certificates, and general fields of study at the bachelor's level. The AAO observes that when a job, like that of a website developer, may be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Further, the fact that some employers prefer to hire individuals who have a bachelor's degrees as a website

¹ Although counsel on appeal adds that the beneficiary will be responsible for securing credit card and other financial data of its customers placing orders online, the petitioner does not describe this duty. Moreover, securing customer's financial data is not the same as designing and implementing the systems' security. 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 Obaighena*, 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).

developer does not satisfy the degree requirement set forth in the first criterion. Employer preference is not synonymous with the "normally required" language of the criterion. The *Handbook* does not report that a bachelor's degree in a specific discipline is a requirement for the occupation of website developer. Consequently, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish that a degree requirement is the norm within the petitioner's industry under the first prong of the criterion, the petitioner submitted several Internet job advertisements in response to the director's RFE and submitted numerous Internet job advertisements on appeal. The AAO has considered the job announcements submitted and finds that the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. Going on the 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 190 (Reg. Comm. 1972)). Nor are the duties of the proffered position sufficiently similar to the descriptions in the majority of the advertised positions. The AAO notes that a number of the advertisements provide a general overview of the duties of the advertised position and that some provide extensive detail regarding the duties of the advertised position. Further, some of the advertised positions list salaries at double and triple the petitioner's proffered salary for its position of a website developer. The advertisements when reviewed as a whole do not establish that the proffered position is parallel to any specific advertised position and do not establish that the advertising companies are similar to the petitioner or are in the retail industry. The record is insufficient to establish the first prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO acknowledges counsel's assertion on appeal regarding the geographical region of Washington, D.C.; however, counsel has not provided copies of all the advertisements reviewed, has not included a discussion of the elements that make particular website developer positions require double or triple the salary of the proffered position, and has not otherwise provided an adequate foundation to substantiate his claim that companies in the greater Washington, D.C. area require website developers to have an undergraduate degree as a minimum requirement. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The advertisements in the record do not establish an industry standard for the petitioner's industry for positions that are parallel to the proffered position.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree in a specific discipline can perform the work associated with the position. The petitioner has not described any elements of the proposed position that exceed the scope of a typical website developer. The AAO acknowledges the petitioner's desire to employ an individual who is familiar with the language, customs, business practices and products of Asia; however such familiarity is routinely expected of a company's website developer. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical website developer, a position that does not normally require a degree, or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. A review of the evidence of record finds it insufficient to establish the proposed duties as a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from similar but

non-degree-requiring positions. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, the AAO usually 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 this matter, the petitioner indicates that it employs or had employed individuals in part-time positions similar to the proffered position. The petitioner provides copies of those individuals' diplomas showing the individuals had obtained a master's degree in computer science and a master's degree in information systems. The petitioner has not provided substantiating evidence of when these individuals were employed, the salaries paid, or other evidence supporting the claim. Again, going on the 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. at 165. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. The critical element is not the title of the position or 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 matter, it does not. Further, were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 duties of the proposed position parallel the duties of a typical website developer, an occupation that does not require a bachelor's degree in a specific specialty. The petitioner has not provided sufficient evidence that the duties of the proffered position contain elements different from that of a generic website developer or other entry-level computer position. The AAO acknowledges the petitioner's reference to its continued expansion and its need to have its website developer develop, frequently update, and maintain the company's website; however this information does not connote a specialized or complex position distinguishable from that of a typical website developer. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical website developer position. The petitioner's general description does not provide substantive evidence that the individual in the proffered position will be required to perform specialized and complex duties that are usually associated with the attainment of a baccalaureate degree in a specific discipline. The petitioner has not established that the duties of the position satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not established that the proffered position is a specialty occupation. The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 AAO will not disturb the director's denial of the petition.

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