

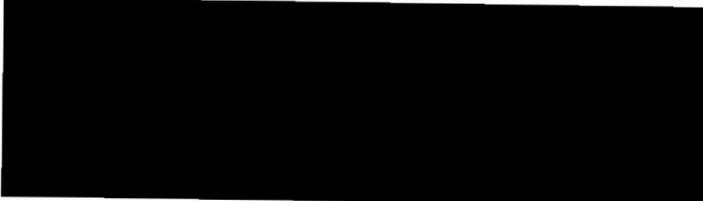
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U.S. Citizenship  
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FILE: SRC 04 138 52474 Office: TEXAS SERVICE CENTER Date: MAR 07 2006

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:

SELF-REPRESENTED

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.

*for* *Michael T. Kelly*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a computer hardware and software consultant that seeks to employ the beneficiary as a management analyst consultant in hardware and software engineering. 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).

The director denied the petition because the beneficiary does not qualify to perform the duties of a specialty occupation. On appeal, the petitioner submits a brief.

The director determined that the beneficiary was not qualified to perform the duties of a specialty occupation. The petitioner submitted an evaluation from the Foundation for [REDACTED] a company that specializes in evaluating academic credentials. The evaluator concluded that the beneficiary possesses the equivalent of a bachelor's degree in computer engineering from an accredited U.S. college or university. The AAO finds that this evaluation meets the terms of 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), which states that a beneficiary can qualify to perform services in a specialty occupation if he or she holds 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.

The petition still may not be approved, however. The director did not determine whether the proffered position is 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.

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 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 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 management analyst consultant in computer sciences engineering. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's April 5, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing and proposing ways to improve the company's structure, efficiency and profits; researching, designing, developing and testing computer hardware and supervising its manufacture and installation; designing and developing the software systems that control computers; applying the principles and techniques of computer science, engineering, and mathematical analysis to the design, development, testing and evaluation of the software and systems that enable computers to perform their applications; analyzing users' needs and designing, creating, and modifying general computer applications software or systems; designing and developing many types of software, including software for operating systems, network distribution and compilers; and coordinating the construction and maintenance of a company's computer systems and planning their future growth. The petitioner stated that a qualified candidate for the position would possess a bachelor's degree in computer science or a related field.

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 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.<sup>1</sup> To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought in the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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<sup>1</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

Although the petitioner calls the proffered position a manager analyst consultant in computer engineering sciences, the AAO notes that the evidence of record does not substantiate that the beneficiary would actually perform duties above the level of a computer support specialist and web designer, and that they would require theoretical and practical application of the highly specialized knowledge attained by a bachelor's degree or its equivalent in computer engineering or a related field. In response to the director's request for evidence, the petitioner submitted four invoices and proposals for the work that it does for clients. As evidenced by the proposals and invoices, the proposed work would encompass computer maintenance, preventive maintenance, the sale of computers, and webpage design. None of this work is at the level of duties described in the petitioner's letter of support, but much of it falls squarely within the description for computer support specialists in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The *Handbook* indicates that a bachelor's degree in a specific specialty is not a requirement for entry into computer support or web design.

In addition to the invoices and proposals referenced above, which do not indicate that the petitioner is actively engaged in business that requires the services of a person with a bachelor's degree level of knowledge in computer engineering or a related specialty, the AAO notes that the petitioner's Form I-129 (Petition for Nonimmigrant Worker) was filed in April 2004, and that it states that the petitioner's business has only been established "since 2004." In light of these facts, the petitioner has not established that its business has advanced to providing any services beyond those indicated in the aforementioned invoices and proposals, which the AAO has found do not support a finding that the petitioner will employ the beneficiary in a specialty occupation.

The petition shall be remanded for the director to enter a new decision on whether the proffered position is a specialty occupation as described at 8 C.F.R. § 214.2(h)(4)(iii)(A), and, if so, whether the beneficiary is qualified to serve in that occupation in accordance with the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

Prior to entering that decision, the director shall afford the petitioner a reasonable opportunity to establish (1) that it is continuously engaged in providing the services that it has heretofore identified itself as providing, and (2) that the proffered position's part in those services qualifies it as a specialty occupation. The director's notification of the opportunity to submit evidence shall include an instruction that the petitioner should provide whatever contracts, affidavits from clients, examples of work performed, expert evaluations of the educational requirements for work actually performed, and/or other independent evidence that the petitioner believes will establish the actual services that it is providing and that will substantiate that the proffered position's role in those actual services makes it a specialty occupation. If the director's decision is adverse to the petitioner, it is to be certified to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's July 29, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.