

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

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



U.S. Citizenship
and Immigration
Services

81

PUBLIC COPY



FILE: LIN 04 224 52082 Office: NEBRASKA SERVICE CENTER Date: **SEP 25 2008**

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 engaged in the business of providing computer software development and consulting services. It seeks to employ the beneficiary as a programmer 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 because the evidence of record does not establish that the job offered qualifies as a specialty occupation and that the petitioner will be the employer of the beneficiary. On appeal, counsel 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.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) 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 full-time programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129. According to this evidence, the beneficiary would perform duties that entail: designing the universe by creating Business Objects data model selecting/joining tables, indicating cardinalities, creating aliases to resolve the loops, subdividing into contexts and creating the objects which are grouped into classes for convenience; creating the drill path for the reports in HTML/PDF formats; creating and formatting reports to meet user needs; designing, developing, coding, and testing client server applications (primarily in Oracle and SQL Server on the backend and Developer 2000 on the front end) and web based applications; and developing applications using GL, AP, AR and Inventory with Lotus Notes Application.

In his decision, the director noted that the petitioner was established in 2001 and did not indicate the number of employees or gross annual income on the Form I-129. The director noted that the petitioner may have six employees from the documentation submitted. The petitioner submitted its 2003 Federal Income Tax Return which indicated that the petitioner paid \$23,696 in salaries or wages. The director noted that the petitioner submitted copies of four contractual agreements. The director noted that none of the contractual agreements specify the beneficiary as the person to be performing the services, or what the beneficiary's duties would be while working at any of the locations listed in the contracts. The director noted that all of the contractual agreements state the companies are in the business of locating temporary personnel with information technology skills for various clients. The director noted that there are no specific contractual agreements between the petitioner and any of the third party clients referenced. The director found that the record contained no information about the beneficiary's specific job duties at the actual place of business where he will carry out his functions. The director determined that the petitioner had not demonstrated that the proffered position is a specialty occupation. Further, the director noted that the certified Labor Condition Application (LCA) indicated a worksite of Cedar Rapids, Iowa. The director noted that none of the contractual agreements submitted in support of the petition indicated a worksite of Cedar Rapids, Iowa. The director determined that the petitioner had not established that it had at the time of filing the present petition, a specialty occupation position available for the beneficiary in the location identified on the Form ETA 9035.

On appeal, counsel notes that the director did not issue an RFE in order to clarify the issues listed in the director's decision. Counsel explains that the contracts submitted with the petition were submitted solely as evidence that the petitioner is conducting business and not as evidence of where the beneficiary would be working. Counsel asserts that the beneficiary will initially be working in the petitioner's main office in Cedar Rapids, Iowa on an in-house project. Counsel notes that the LCA submitted with the petition indicates a worksite location of Cedar Rapids, Iowa.

On appeal, the petitioner submits a purchase order and a subcontractor agreement between AA Tech and the petitioner. The AAO notes that the purchase order and Sub-Contractor Agreement states that the location is

an in-house project at the petitioner's home office. The Independent Contractor Agreement between _____ and the petitioner states that the petitioner agrees "to provide programming and/or engineering and other specialized services as an independent contractor to _____ and to work at _____ clients" who engaged the petitioner or for whom _____ is proposing to locate staffing for its client's project.

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

The petitioner states that the beneficiary will be working at its home office. The petitioner has established that it has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of the beneficiary. Based on the evidence of record, the petitioner has established that it is an employer pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

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 CIS 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, CIS 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.

The petitioner stated that the industry standard for educational requirements among computer scientists and systems analysts is that the candidate possess at least a bachelor's degree in computer science or a related area. The *Handbook* discloses that the duties of the proffered position are performed by a programmer

analyst. Like the beneficiary, who will design, program and implement software application and packages customized to meet specific client needs, the *Handbook* reports:

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*.

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. 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 petitioner fails to establish the first criterion because the *Handbook* states the following about training and education requirements:

While 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).

Although many employers prefer to hire persons who have at least a bachelor's degree and relevant work experience with a variety of computer systems and technologies, it is not a requirement for entry into the field. The *Handbook* specifically notes that 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 depends on their needs. One factor affecting these needs is changes in technology. Employers often scramble to find workers capable of implementing "hot" new technologies. The petitioner has failed to describe the proffered position with sufficient detail to find that the position of programmer analyst rises to the level that requires a baccalaureate degree as a minimum requirement for entry into the profession.

The petitioner has not provided a detailed description of the duties from the entity ultimately using the alien's services. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), reasonably interpreted the statute and

the regulations when it required the petitioner to show that the entities ultimately employing the alien's 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 alien's to the United States for employment with the agency's clients. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the third party will qualify as a specialty occupation. Although the record contains a purchase order agreement between the petitioner and a contractor, the record does not contain a comprehensive description of the beneficiary's proposed duties from the contractor. Although the purchase order contains duties to be performed by the beneficiary at the petitioner's office, it is not clear who the work is for. The independent contractor agreement of [REDACTED] states that it is in the business of locating personnel for third parties, not contracting employees for its own projects. As noted above, the petitioner initially submitted contracts that it has with contractors who would then place its employees with third parties. As discussed above, the petitioner submitted a purchase order and a sub-contractor agreement with [REDACTED] Inc. on appeal. The purchase order provides a brief list of duties and indicates that the work location is an in-house project at the petitioner. However, the independent contractor agreement between the petitioner and [REDACTED] states that the [REDACTED] has engaged the petitioner to locate staff for third party projects. The AAO notes that the initial job description indicated on the Form I-129 and the duties submitted on appeal are not the same. There is a discrepancy between the purchase order and independent contractor agreement as to the final place of employment of the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without a description of the proffered position from the entity ultimately employing the beneficiary, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The record does not contain sufficient evidence demonstrating that a degree requirement is the industry standard for this position, or that the beneficiary's duties are so unique that they can only be performed by an individual with a baccalaureate degree in a specialty.

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.

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. While the *Handbook* indicates that some employers prefer to hire persons who have at least a bachelor's degree, others may accept a two year degree or other training. Without a complete description of the duties from the location where the beneficiary will perform services, the AAO is unable to determine whether the duties require a four-year degree to perform them. The petitioner has not shown 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.

Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director also found that the petitioner will not be working at the location specified on the LCA. The AAO agrees. As noted above, the petitioner submitted a purchase order and Sub-Contractor Agreement

between [REDACTED] and the petitioner which state that the location is an in-house project at the petitioner's home office. The Independent Contractor Agreement between [REDACTED] and the petitioner states that the petitioner agrees "to provide programming and/or engineering and other specialized services as an independent contractor to [REDACTED] and to work at [REDACTED] clients" who engaged the petitioner or for whom [REDACTED] is proposing to locate staffing for its client's project. The documents contradict each other as to the services to be provided by the petitioner to [REDACTED] and where these services will be performed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, CIS cannot determine whether the LCA is valid for the work location specified on the LCA.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, that the beneficiary will be employed in a specialty occupation, or that the LCA is valid for the work location. Accordingly, the AAO shall 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