

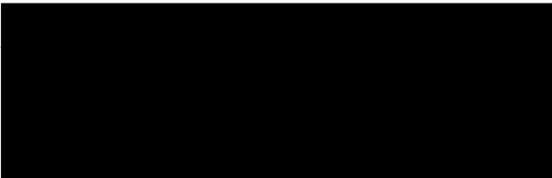


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: LIN 00 080 52534 Office: NEBRASKA SERVICE CENTER Date: 15 FEB 2002

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)

IN BEHALF OF PETITIONER:  
[Redacted]

Public Copy

INSTRUCTIONS:  
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS  
  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and certified to the Associate Commissioner for Examinations for review. The director's decision will be affirmed.

The petitioner is a company that provides specialized computer consulting services with 145 employees and a gross annual income of \$12,000,000. It seeks to employ the beneficiary as a computer programmer analyst for approximately three-years. The director denied the petition finding that the petitioner had failed to establish that the position qualified as a specialty occupation. The director then certified his decision to the Associate Commissioner and gave counsel an opportunity to submit a brief or a statement addressing the issues discussed in the decision. Since counsel has not submitted a brief or written statement, the decision will be rendered on the record as it now stands.

The regulation at 8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

Further, the regulation at 8 C.F.R. 214.2(h)(4)(iii)(A) that a petitioner could qualify the offered position as a specialty occupation if the petitioner could establish that:

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.

The petition is supported by a description of the duties of the position that indicates that the beneficiary will be required to perform the following duties:

1. Analyze user requirements, procedures, and problems to automate processing and to improve existing computer system using C, Oracle, Visual Basic, MS Access, Fox Pro on Windows, and Unix Environment;
2. Confer with personnel of organizational units involved to analyze current operational procedures, identify problems, and learn specific input and output requirements, such as forms of data input, how data is to be summarized and format for reports;
3. Write detailed descriptions of user needs, program function and steps required to develop or modify computer program;
4. Review computer system capabilities, work flow and scheduling limitations to determine if requested program or program change is possible within existing system;
5. Analyze business procedures and problems to redefine data and convert it to programmable form for EDP;
6. Study existing information processing systems to evaluate effectiveness and develop new systems to improve production or work flow as required;
7. Conduct studies pertaining to development of new information systems to meet current and projected needs;
8. Plan and prepare technical reports, memoranda and instructional manuals to meet current and projected needs;
9. Upgrade system and correct errors to maintain system after implementation.

The petitioner is in the business of providing computer consultants to various firms and businesses. In order to determine if the proffered position qualified as a specialty occupation the director requested that the petitioner submit additional evidence relating to the nature of the beneficiary's proposed employment. In response to that request, the petitioner submitted a statement indicating that it is almost impossible to predict where the beneficiary will eventually be employed because of a number of factors outside of its control. The petitioner also indicated that it could not enter into contracts with its clients until such time as the alien is physically present in the United States to avoid being held liable for breach of contract if the alien's arrival in the United States was delayed.

Positions in the computer industry are not clearly defined, in part, due to the relative sophistication and fast growth of the industry. Generally, positions in that industry are considered to fall within several groups: engineers (who may design the actual hardware used in the computer systems); systems analysts (who may determine the needs of a process, select equipment, plan processing methods, and prepare specifications for programmers); and programmers (who, in turn, write instructions on programs for technicians).

The Service has found that the positions of systems engineer (and related engineering positions including designer), pure systems analyst, and programmer of computers used for scientific or engineering applications are considered to be within the professions, as contemplated by section 101(a)(32) of the Act. The positions of programmer of computers used for business applications and technician, on the other hand, normally require training commonly gained and widely available outside of college or university studies. They are, therefore, usually not considered to be a specialty occupation. (See the sections of the Handbook on electrical and electronics engineering, computer systems analysts, computer programmers, and computer service technicians. The Handbook at page 115 indicates that while a baccalaureate degree is usually required, a degree in a specialized area does not appear to be a requirement.

It is the duties of a proffered position, not the title that determines if a position qualifies as a specialty occupation. Further, the duties of the position must be realistic in terms of the nature and scope of the petitioning entity. The duties of a position do not exist in a vacuum, they must be related to a position that is a normal part of the every day business of the petitioning entity. The petitioner bears the burden of establishing that its need for the beneficiary's services is realistic in terms of its business activities.

In this case, the petitioner's description of the duties of the proffered position is general in nature. It is noted that the director has the authority to request any information deemed necessary to make a proper determination on a particular petition. The director properly asked the petitioner to provide copies of any contracts that it has entered into with its clients in order to determine the beneficiary's eligibility for the benefit sought. The petitioner responded to the director's request by advising that the beneficiary's actual work assignment has not yet been identified because the petitioner has not entered into any binding agreements or contracts with potential clients. As a result, it is obvious that the petitioner is not aware of the actual location where the beneficiary will eventually be employed or the nature of the duties that the alien will be required to perform.

As the director correctly noted in his decision, it is possible under these conditions that the alien will eventually be placed in a position that does not qualify as a specialty occupation. The petitioner can make no guarantee or provide any reasonable assurance that that the beneficiary will be performing duties relating to a specialty occupation when the alien arrives in the United States. The petitioner has not described the actual types of computer systems on which the beneficiary will work or the nature of the clients with whom he will work. In the absence of such information a determination cannot be made as to whether this position is, in fact, a specialty occupation.

In addition, the petitioner has not established that the duties of the proffered position are of such complexity that a baccalaureate degree in a specific specialty, as distinguished from familiarity with programming or a less extensive education, is necessary for the successful completion of its duties. Finally, the record does not establish that the petitioner has hired individuals with bachelor's degrees for this position in the past or that the degree requirement is common to the industry in parallel positions among similar organizations.

In view of the forgoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

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 decision of the director will not be disturbed.

**ORDER:** The director's decision denying the petition is affirmed.