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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identification data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: LIN 99 179 53531 Office: NEBRASKA SERVICE CENTER Date: 15 FEB 2002

IN RE: Petitioner: [redacted]
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)

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 consulting services with 50 employees and a gross annual income of $7,000,000. It seeks to employ the beneficiary as a computer programmer analyst for a period of 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 written statement in response to 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 software requirements/user problems to determine feasibility of design within time and cost constraints. Formulate and define the scope and objectives through research and fact finding to develop or modify complex software programming application or information systems;

2. Consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system;

3. Formulate and design software system using scientific analysis and mathematical models to predict and measure outcome and consequences of design. Includes preparation of functional specifications and designing of software programs. Builds detailed design specifications and programs for scientific, engineering, and business application. Design date conversion software programs;

4. Develops and directs software systems testing procedures, programming and documentation. Also includes testing units and computer software system;

5. Coordinates installation of software system;

6. Consults with customer concerning maintenance of software system.

The petitioner is a firm that undertakes technical services processing needs of businesses and adapts existing computer technology to fit each company's requirements. The director denied the petition finding that the petitioner had failed to establish that the position qualified as a specialty occupation because the petitioner could not establish that the exact nature of the duties that the beneficiary would be required to perform. The director found that the contract entered into between the petitioner and its primary client did not establish that the position was a specialty occupation.

Upon review, the director's decision will be affirmed. The petitioner has failed to establish that position meets one of the four criteria enumerated above.

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 that determines if a position qualifies as a specialty occupation. Based on the above discussion, it is clear that, for petitions for occupations in the computer field, the petitioner must establish the exact nature of the beneficiary's duties for the Service to determine if the position qualifies as a specialty occupation. Further, the petitioner is required to provide a description of the actual work project on which the beneficiary will be engaged.

While the duties of the position described by the petitioner appear to be those of a specialty occupation, the petitioner has not provided a reasonable assurance that the beneficiary will, in fact, be performing the specified duties. The contract submitted in support of the petition does not guarantee that the beneficiary will be performing qualifying duties. It is quite possible that the beneficiary will also be employed in performing duties that are not related to a specialty occupation. In view of the petitioner's inability to provide a reasonable assurance that the beneficiary will be engaged in qualifying duties, the petition may not be approved.

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.