

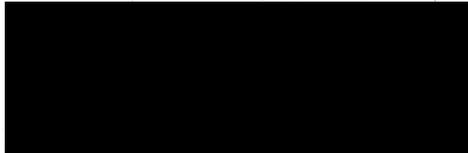
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U.S. Department of Homeland Security

Citizenship and Immigration Services

**identifying data deleted to
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invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: LIN-02-008-52351

OFFICE: NEBRASKA SERVICE CENTER

DATE: OCT 16 2003

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

PUBLIC COPY

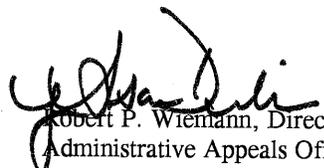
INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director who affirmed his decision in a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology and solutions company that employs 35 persons and has a gross annual income of \$1,209,860. It seeks to employ the beneficiary as an electronics engineer. The director denied the petition because the position is not a specialty occupation. The petitioner appealed the decision to the AAO. However, because the appeal was untimely, it was remanded to the director to treat as a motion to reconsider. The director determined that the motion did not overcome the grounds for denial and he affirmed the prior denial.

On appeal, the petitioner submits a written statement. The petitioner reiterates past assertions and states, in part, that the proffered position is a specialty occupation because: (1) the degree requirement is common to the industry in parallel positions among similar information technology consulting firms, and (2) the nature of the petitioner's operations and the duties of the position are so specialized and complex that knowledge required to perform the duties is associated with the attainment of a baccalaureate degree in computer science or engineering.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

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.

The petitioner asserts that the electronics engineer position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 (5th 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.¹ To interpret the regulations 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 into 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.

In its initial petition, the petitioner's support letter, dated February 27, 2002, detailed the job duties to be performed by the beneficiary as follows: "Assemble and disassemble computer components, configure hardware and software, and install network and cabling."

Subsequent to the filing of the petition, the director requested from the petitioner evidence that the proffered position qualifies as a specialty occupation. In response to this request, the petitioner provided the following job description:

Analyzes data processing requirements to plan data processing system that will provide system capabilities required for projected work loads, and plans layout and installation of new system or modification of existing system.

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- Confers with data processing and project managers to obtain information on limitations and capabilities of existing system and capabilities required for data processing projects and projected workload.
- Analyzes information to determine, recommend, and plan layout for type of computers and peripheral equipment, or modifications to existing equipment and system that will provide capability for proposed project or workload, efficient operation and effective use of allotted space.
- Evaluates factors such as number of departments

¹ 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.

serviced by data processing equipment, reporting formats required, volume of transactions, time requirements and cost constraints, and need for security and access restrictions to determine hardware configurations and feasibility of expanding or enhancing computer operations.

- Enters data into computer terminal to store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Specifies power supply requirements and configuration.
- Recommends purchase of equipment to control dust, temperature, and humidity in area of system installation.
- Trains users to use new or modified equipment.
- Answers client's inquiries in person and via telephone concerning systems operation. Diagnoses system hardware, software, and operator problems. Recommends or performs minor remedial actions to correct problems based on knowledge of system operation.
- Assigns and coordinates work projects such as converting to new hardware or software. Designates staff assignments, establishes work priorities, and evaluates cost and time requirements.
- Reviews completed projects or computer programs to ensure that goals are met and that programs are compatible with other programs already in use.
- Conducts fault diagnostics and basic troubleshooting on desktop products, file servers, web servers and e-mail servers. Installs, tests and configures desktop products including networked environments. Installs, tests and operates basic operating system software and standard applications.
- Performs integration tasks that include the installation/configuration of computer system hardware, operating system software, third party software, network related equipment, and ground-based satellite systems including functional tests of hardware/software systems and seeking active resolution to problems.

- Evaluates and tests vendor supplied software packages for standalone and networked computers to determine compatibility with existing system, ease of use, and if software meets user needs.
- Consults with customer concerning maintenance of computer system and coordinates installation of various system components.
- Assists in the technical support of strategic programs, design and definition of networked computer system requirements for complex customer systems, analyzes existing networked computer systems and makes recommendations for improvement of infrastructure, technology, operational capability, reliability and performance including troubleshooting, and root cause analysis.

In its elaborated description of duties for the proffered position, the petitioner required experience in a computer related field with at least two years of experience in computer hardware and networking systems. Additionally, the position's duties required supervising computer technicians. The petitioner also submitted four employment advertisements from an Internet job bank.

The director denied the petition because the proffered position was determined to be a computer technician, which is not a specialty occupation. The director stated that the petitioner's elaborated job description, submitted in response to the director's request for evidence, materially altered the petition by creating a new position and was therefore not given consideration. Additionally, the director denied the petition for failure to prove that a degree is common to parallel positions in similar industries because information was not available concerning the employers who placed the advertisements.

In the petitioner's motion to reconsider, it referenced the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, to assert that a degree requirement is common for parallel positions in similar organizations as follows: "the [H]andbook [sic] states [that] 'computer hardware engineers (the proffered position of the beneficiary) usually need [sic] a bachelor's degree in computer engineering or electrical engineering.'" Additionally, the petitioner reiterated its degree requirement by stating:

Being a computer-consulting firm, the skills

requirements for our staff vary from project to project. Typically, the nature of our projects is not only limited to one specific area but virtually covers almost every industry. Because the needs of clients are so varied coupled with the increasing complexity of the project tasks to be undertaken, the baccalaureate degree requirement is used as [sic] gauge to measure a person's ability to carry out complex systems design and programming tasks [sic] and therefore considered to be critical in our recruitment process.

Our educational level requirement for computer engineers is justified by the fact that extensive knowledge of a variety of operating system [sic], the ability to configure it [sic] to work with various hardware platforms, theoretical foundation [sic] required to analyze various hardware problems and conditions[,] and the ability to formulate cost-effective solutions are things that one can only be acquired [sic] from completing a baccalaureate degree.

The director determined that the motion to reconsider did not overcome the director's original denial grounds because the duties of the proffered position, as set forth in the petitioner's initial job description, resembled the duties of a computer technician or repairer, not a computer engineer.

On appeal, the petitioner asserts that the elaborated duties for the proffered position provided in its letter in response to the director's request for evidence were presented so that CIS would have full information concerning the position and that the duties of a computer technician only represent a small portion of the proffered position's duties.

The petitioner has not met any of the requirements to qualify the proffered position as a specialty occupation. The director was correct in characterizing the position as a computer technician, which is analogous to a computer support specialist position. The petitioner's elaboration of duties in response to the director's request for evidence materially alters the petition. The petitioner's initial description of duties - assembly, configuration, and installation - reflects a computer technician or support specialist position. The petitioner's elaborated description of duties expands the position into management, training, procurement, troubleshooting, maintenance and administration, duties that are still reflective of a computer technician or support specialist position but also encompass aspects of multiple computer positions, such as project managers, network systems and database communications analysts, software quality assurance analysts, or systems developers and

administrators. This substantial expansion of duties to broadly cover any information technology position materially alters the position proffered by the petitioner initially.

The director's original denial of the petitioner's nonimmigrant visa petition stated the following:

[T]he petitioner is not revising or clarifying the duties as previously described, but is actually providing a completely new job description. The petition may not be a proved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make a material change to a petition that has already been filed in an effort to make an apparently deficient petition conform to [CIS] requirements. The instant petition has been analyzed on the basis of the original documents and any revisions that corrected the original inconsistencies. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 13, 1998).

Because of the material change to the proffered position's duties, the AAO affirms the director's reasoning for analyzing the petition based only on the initial description of duties. Thus, the position is most similar to a computer technician or support specialist position.

Also supporting the decision to categorize the petitioner's proffered position as a computer support specialist position is the petitioner's misstatement concerning the position when broadening the position's duties and responsibilities. In addition to materially altering the position by inordinately expanding its duties, the petitioner also stated in its motion to reconsider, in a parenthetical explanation, that the position is also a computer hardware engineer position. A computer hardware engineer, however, researches, designs, develops, tests, and supervises the manufacture and installation of computer hardware, such as computer chips, circuit boards, keyboards, modems, and printers, none of which were mentioned by the petitioner. See *Handbook* at pages 109-110. Contrary to the petitioner's assertion, the *Handbook* does not list training and educational requirements for computer hardware engineers and does not specify a baccalaureate degree in computer engineering or electronic engineering. Thus, the petitioner's proffered position is not a computer hardware engineering position. Even if the position were a computer hardware engineering position, the *Handbook* does not evidence that a baccalaureate degree or higher or its equivalent in a specific field is required.

The *Handbook*, 2002-2003 edition, at page 172 describes the duties to be performed by a computer support specialist as follows:

Computer support specialists provide technical assistance, support, and advice to customers and other users. This group includes technical support specialists and help-desk technicians. These troubleshooters interpret problems and provide technical support for hardware, software, and systems. They answer phone calls, analyze problems using automated diagnostic programs, and resolve recurrent difficulties. Support specialists may work either within a company that uses computer systems or directly for a computer hardware or software vendor.

A review of the *Handbook* at page 173 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a computer support specialist:

Due to the wide range of skills required, there are a multitude of ways workers can become a computer support specialist or a systems administrator. While there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs; however, other jobs may require only a computer-related associate degree.

The *Handbook* clearly shows that a computer support specialist does not require a bachelor's degree in a specific field of study to enter into the position. Instead of specifying a specific field of study required to enter into the field, the *Handbook* delineates a multitude of educational backgrounds that could be accepted by prospective employers. The *Handbook* demonstrates that an individual with an associate degree or a two-year post-secondary school degree, could obtain a computer support specialist position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that employers of computer support specialists require a degree. The record does not contain any evidence concerning an industry professional association or expert affidavits.

The four employment advertisements submitted by the petitioner from an Internet job bank do not establish that a degree requirement is common to the information technology industry for parallel positions among similar organizations. The first advertisement sought candidates with associate degrees for a "computer technician/customer engineer" position, which is completion of a two-year post-secondary school program, and did not require a bachelor's degree in a specific field. The advertisement also stated that it would accept military experience in lieu of a degree altogether. The same advertisement only identified the employer through its industry, which is manufacturing. The petitioner is not involved in manufacturing, so it is doubtful they are similar organizations. The second advertisement was for a "computer systems engineer" for a "nationally . . . recognized leader among homebuilders." Homebuilding organizations are not similar to the petitioner's organization. This second advertisement required a bachelor's degree in an information technology-related major and described a position involving network and system administration and maintenance duties, which are dissimilar to the duties of the computer support specialist position proffered by the petitioner. The third advertisement was for an "electronics engineer" and required a bachelor's degree in electrical or electronics engineering. This advertisement only provided the name of the employer, Tyco Healthcare/Kendall, and did not provide information concerning its industry. The duties listed in the third advertisement - design, development, implementation, and testing of electronic products - are very different from the duties of the computer support specialist position proffered by the petitioner. The fourth advertisement did not identify the employer or industry and advertised for an "electronics engineer" with a bachelor of science in electronics engineering. The advertisement did not provide a description of duties so it is impossible to determine if it is similar to the petitioner's proffered position. There is no evidence in the record that the employers who placed the advertisements are similar to the petitioner and that the positions listed in the advertisements are parallel to the position proffered by the petitioner. Therefore, there is no evidence in the record to support that a degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h) (4) (iii) (A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. Aside from its statement in its motion to reconsider that it only hires individuals with bachelor's degrees, the petitioner offered no evidence concerning its past hiring practices for the proffered position. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner asserted that it requires bachelor's degrees for those staff members holding positions similar to the proffered position. However, the record contains no evidence concerning the names of the petitioner's employees assuming such positions, the title and description of duties of the positions held by them, as well as copies of their resumes and academic credentials. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties are usually associated with the attainment of a baccalaureate or higher degree. The petitioner's operations are similar to the employers described in the *Handbook* for computer support specialists. Thus, there is nothing to differentiate the petitioner from other employers in similar information technology industries. Additionally, the position, as described in the petitioner's initial job description, involves technical ability to put together and take apart computer parts, arrange software and hardware, and set up a network and cables. These are not duties that require the theoretical and practical application of a body of highly specialized knowledge. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.