

DR

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

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

[REDACTED]

FILE: LIN-02-116-51568

OFFICE: NEBRASKA SERVICE CENTER

DATE: OCT 29 2003

IN RE: Petitioner:
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:

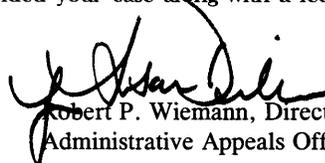
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, Nebraska Service Center, 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 a private vocational school that employs eight full-time and ten part-time persons and has a gross annual income of \$3 million. It seeks to employ the beneficiary as a [REDACTED] instructor. The director denied the petition because the record failed to establish that the offered position qualified as a specialty occupation.

On appeal, counsel submits a brief and additional evidence. Counsel states the following: (1) the Immigration and Naturalization Service (Service), now Citizenship and Immigration Service (CIS), acted improperly by denying the petition before the deadline to submit evidence had expired; and (2) the position satisfies at least one criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a bachelor's degree or higher or its equivalent is normally the minimum requirement for entry into the particular position.

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.

The first issue to be discussed in this proceeding is whether the Service, now CIS, had acted improperly by denying the petition before the deadline to submit evidence had expired. The second is whether the offered position qualifies as a specialty occupation.

On appeal, counsel states that the Service had acted arbitrarily and unfairly when it denied the I-129 petition before the deadline to submit evidence had expired. The record shows that on page two of the request for evidence, the director stated that the petitioner's response was due by May 20, 2002, and that within this period, the petitioner may:

- (1) Submit all of the evidence requested;
- (2) Submit some or none of the evidence requested and ask for a decision based upon the record; or,
- (3) Withdraw the application or petition.

Most important, the director also stated:

You must submit all of the evidence at one time. Submission of only part of the evidence requested will

be considered a request for a decision based upon the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied.

As stated on page two of the request for evidence, the petitioner was instructed to submit all of its evidence at one time, and if some of the evidence, but not all, were submitted, the director would consider the partial submission as the petitioner's request for a decision based upon the record. Thus, the director considered the petitioner's submission of evidence received on May 3, 2002, as its request for a decision based upon the record; the director did not act arbitrarily or unfairly by adjudicating the petition before the deadline to submit evidence had expired on May 20, 2002.

The second issue is whether the offered position qualifies as 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.

In the initial I-129 petition, the duties of the offered position were described as maintaining the CISCO CCNA/CCNP and CCIE lab, troubleshooting CISCO routers and switches, and instructing classes for CCNA/CCNP and CCIE curriculum.

On February 25, 2002, the director requested that the petitioner submit evidence that would show it satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and provide the following:

- (1) A detailed description of the duties to be performed by the beneficiary and the percentage of time spent on each duty;
- (2) An organizational chart for the petitioner's business, listing the names of all employees, the title of their positions, their job description, their salaries, and their academic backgrounds;
- (3) Copies of the bachelor's degrees or other formal post-secondary education granted to the above referenced employees, including certified English translations for foreign language documents;
- (4) The petitioner's latest annual report, federal tax return, or audited financial statements;
- (5) Copies of the petitioner's quarterly federal tax form for the most recent quarter; and
- (6) Copies of the state unemployment compensation report form for the most recent quarter, listing all employees and their respective wages.

In response to the request, the petitioner submitted a letter dated, April 25, 2002, stating the percentage of time the beneficiary would spend on each duty. According to the letter, about 60 percent of his time would involve teaching lab classes for

CCNA and CCNP; mentoring and counseling students; creating scenarios and simulating exam environments; and setting up labs and configuring routers, switches and other equipment. Then, the letter stated that about 15 percent of the time would entail preparing and grading assignments, and the remaining 25 percent would involve upgrading, maintaining, and troubleshooting existing equipment, and installing and configuring new equipment. The letter also listed the names and qualifications of four faculty members whose duties reflected those of the offered position.

In response to the request for evidence, the petitioner also submitted copies of its audited financial statement, its quarterly federal tax return, its payroll tax report, one of its instructor's credentials, and a copy of the Illinois State Board of Education's (ISBE) instruction qualification record form.

On May 13, 2002, the director denied the petition, finding that the petitioner failed to establish that the offered position [REDACTED] instructor, qualified as a specialty occupation. The director first examined whether the petitioner's instructors held bachelor's degrees. The director stated that the petitioner had submitted a copy of the ISBE's instruction qualification record form and it showed that persons with less than a bachelor's degree in a specific field could qualify for vocational instructor positions. The director further stated that the petitioner's payroll tax report listed fourteen employees, and its letter identified five faculty members who held bachelor's degrees; however, because none of the five were on the payroll tax report, the director concluded that they were not the petitioner's employees. The director also stated that the petitioner did not list its employees' positions nor did it submit copies of their degrees or diplomas, or both. Thus, the director determined that the petitioner failed to establish that its instructors possess a bachelor's degree in a specific field.

Second, the director evaluated the duties of the offered position and referred to the 2000-2001 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for guidance. The director stated that, under the *Handbook*, the offered position, [REDACTED] instructor, resembled a vocational computer instructor, and under the *Handbook* the training requirements for instructors and teachers varied by state and by subject. In general, however, the *Handbook* stated that teachers require work or other experience in their field and that some fields require a license or certificate for full professional status. Thus, the director stated that, under the *Handbook*, vocational instructors are not required to hold a bachelor's degree or higher in a specialized area. Moreover, the director stated that the State of Illinois does not require a bachelor's degree for such a position. The director concluded that the petitioner had not established that the offered position qualified as a specialty occupation under the regulations.

On appeal, counsel asserts that the offered position qualifies as a specialty occupation. Counsel maintains that the petitioner employs instructors on both a contract and full-time basis, and because of the shortage of CISCO-certified instructors, the petitioner would employ an instructor who did not possess a bachelor's degree if the person had completed 350 hours of classroom training and passed six examinations to become a certified CISCO instructor. Counsel maintains that the petitioner's requirement establishes the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a bachelor's degree or higher or its equivalent is normally the minimum requirement for entry into the particular position. Counsel asserts that the complexity of the subject matter and the time expended to become a CISCO-certified instructor is equivalent to attaining a bachelor's degree in the field. Counsel also maintains that the petitioner's documentation reflects this high standard and, further, that some of the petitioner's instructors hold at least a bachelor's degree. Counsel states that the petitioner employs instructors on both a contract and full-time basis, and its payroll, submitted with this appeal, reflects both categories.

Based upon the record, the petitioner has failed to establish at least one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel claims that the petitioner has established the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it requires that a candidate hold a bachelor's degree in computer science, engineering, or mathematics. Counsel's claim is without merit. 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

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.

otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

CIS often looks to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) to determine whether a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. In the 2002-2003 edition of the *Handbook*, on page 197, the duties of postsecondary vocational-technical education teachers resemble those performed by the offered position. According to the *Handbook*, postsecondary vocational-technical education teachers are described as providing instruction for occupations that do not require a college degree. These teachers have many of the same responsibilities as college and university faculty: they prepare lessons, grade papers, attend faculty meetings, and keep abreast of developments in their field.

The *Handbook*, on page 199, states that the training requirements for vocational-technical education teachers vary by state and by subject. The *Handbook* further states that, in general, teachers require a bachelor's degree or higher plus work or other experience in their field. However, the *Handbook* also states that in some fields a license or certificate that demonstrates one's qualifications may be all that is required.

In its letter, dated May 30, 2002, the petitioner states that the ISBE's guidelines require a candidate to either possess a bachelor's degree or have several years of experience to qualify as an instructor. Thus, persons with less than a bachelor's degree in a specific field may qualify for vocational instructor positions. Moreover, the petitioner's letter states that it has a past practice of accepting candidates who do not hold a bachelor's degree. Thus, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The record fails to establish the second criterion under 8 C.F.R. § 214.2(h)(4)(iii)(A) - that the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the offered position is so complex or unique that it can be performed only by an individual with a degree. Again, under the ISBE's guidelines a candidate may either possess a bachelor's degree or have several years of experience to qualify as an instructor. Thus, persons with less than a bachelor's degree in a specific field may qualify for vocational instructor positions in Illinois.

On appeal, counsel asserts that the petitioner has satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it normally requires a degree or its equivalent for the offered position. Counsel states that the petitioner employs instructors on both a contract and full-time basis, and because of the

shortage of CISCO-certified instructors, the petitioner would employ a candidate who does not hold a bachelor's degree if the person had completed 350 hours of classroom training and passed six examinations to become a CISCO-certified instructor. Counsel asserts that the requirement for CISCO certification establishes the third criterion under 8 C.F.R. § 214.2(h)(4)(iii)(A) because the complexity of the subject matter and the time expended to become a CISCO-certified instructor is equivalent to the attainment of a bachelor's degree in the field. Thus, counsel declares that the petitioner normally requires a degree or its equivalent (CISCO certification) for the offered position.

Counsel's assertion that CISCO certification is equivalent to a bachelor's degree is groundless: there is no evidence in the record to support such a claim. 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). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In its May 30, 2002 letter, the petitioner states that it has satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it normally requires a degree or its equivalent for the offered position. In the letter, the petitioner states that it prefers a candidate to hold a bachelor's degree or higher; however, if the candidate does not, then the petitioner requires the candidate to hold certification in the subject to be taught and have a minimum of three years of work experience in the area of instruction. The petitioner considers its requirement as being equivalent to a bachelor's degree.

The petitioner fails to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has stated that it will employ, in the offered position, candidates who do not hold a bachelor's degree or higher. In addition, the petitioner misinterprets the language "or its equivalent" in 8 C.F.R. § 214.2(h)(4)(iii)(A) because this language does not apply to the petitioner's situation. The language "or its equivalent" is interpreted in *Tapis Int'l v. Immigration and Naturalization Serv.*, 94 F. Supp. 2d 172 (D. Mass. 2000). In *Tapis*, the Immigration and Naturalization Service (Service), now Citizenship and Immigration Service (CIS), had denied the plaintiff's petition because the offered position did not require a bachelor's degree or higher in a specialized field. The court had stated that the INS, now CIS, was reasonable in interpreting the guidelines to demand that an employer require a degree in a specific field, and the court stated that the guidelines in 8 C.F.R. § 214.2(h)(4)(iii)(A) also allow for its equivalent. 94 F. Supp. 2d at 176. The court determined that the language "or its equivalent" applied whenever a position would be unable to

satisfy the specialty occupation requirements because a specific degree was not available in the field.

The record fails to establish that the petitioner satisfies the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that 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 record shows that the petitioner has employed candidates who do not hold bachelor's degrees as CISCO instructors, and it shows that ISBE's guidelines permit persons with less than a bachelor's degree to qualify for vocational instructor positions.

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.