

identifying data deleted
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D 2



FILE: LIN 03 169 51837 Office: NEBRASKA SERVICE CENTER Date: **AUG 22 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion is granted, and the prior decision of the AAO is withdrawn. Upon consideration of the appeal, the appeal will be dismissed, and the petition will be denied.

The petitioner is an educational, cultural, social, religious and non-profit community center that seeks to employ the beneficiary as a database 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel subsequently filed a timely Form I-290B, but it did not identify specifically any erroneous conclusion of law or statement by the director. By a decision dated August 5, 2005, the AAO summarily dismissed the appeal because it had not received the brief and/or evidence that the Form I-290B stated would follow in 30 days. On motion, counsel has overcome the basis of the summary dismissal, by demonstrating that, prior to the AAO decision, she had filed the material specifying the grounds of the appeal. Accordingly, the AAO's previous decision will be withdrawn, and the AAO will consider the appeal.

On appeal, counsel contends that, contrary to the director's decision, the evidence of record establishes that the proffered position is a specialty occupation. Counsel's brief (in the form of a letter to the AAO dated May 10, 2004 with allied documents) is a description of documents submitted in response to the director's request for additional evidence (RFE) and the following presentation of grounds for recognizing the proffered position as a specialty occupation:¹

The evidence submitted establishes that this job qualifies as a specialty occupation for the following reasons:

1. The explanation of how the beneficiary uses the skills learned in his Master's degree program demonstrates that this job requires a degree for the reason that if one needs the skills learned in graduate [school] to perform the job, then logically the job requires a Bachelor's degree in the specialty (and more likely a graduate degree) to perform.
2. Other employers are requiring at least a Bachelor's degree to perform the same or similar job demonstrating that the degree is widespread in the industry.
3. The job involves analyzing user requirements and developing software based upon those requirements (designing) demonstrating that this job qualifies as a specialty occupation pursuant to the guidelines set forth by NSC Director Terry Way in his attached memorandum of February 14, 2001 in which he indicates that:

¹ This May 10, 2004 letter from counsel is substantially the same as the October 1, 2003 letter that counsel submitted in response to the RFE.

“if the duties described in the petition primary [sic] constitute analysis/design/modification of software or hardware, that fact should be sufficient to establish eligibility. We will no longer require a petitioner to establish that the analysis duties will constitute a majority of the proposed duties in order for the position to qualify.”

The petition is shown to be within the law and imminently worthy of approval. Accordingly, we respectfully request that the H-1B petition be approved.

The director’s decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the director’s RFE; (3) the materials submitted in response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief and its allied documents.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

Included in the allied documents enclosed with the brief are copies of the following items that had been submitted into the record of proceeding prior to the director’s decision: (1) a two-page document, on the petitioner’s letterhead, that outlines the petitioner’s educational, cultural, social, and religious activities and services; (2) a single-page document in which the beneficiary outlines the “skills in my job, which I learned in my Master’s degree”; (3) a single page, also on the petitioner’s letterhead, which is subdivided into sections on the complexity of the proposed duties and a description of the proposed day-to-day use of the beneficiary’s time; (4) job advertisements from Bank One Corporation, SynQor, Inc., and SYNYGY; (4) two letters from Kmart, a former employer of the beneficiary; and (6) the aforementioned February 14, 2001 memorandum from the service center director regarding adjudication of H-1B petitions for computer-related positions. Each of these items will be addressed separately.

The petitioner's two-page document outlining the petitioner's educational, cultural, social, and religious activities and services briefly address the petitioner's technical workshops and its computer center. The section on the technical workshops states:

Technical Workshops: All year round [the petitioner] organizes many educational workshops, which supports [sic] the center and the community needs; such as personal and community health, management skills, speech skills, [sic] etc.

The section on the computer center states:

Computer Center: [The petitioner] has established a computer center to provide information technology training and provide the opportunity for all community members to practice on different software applications. Also, the computer center is designed to provide system support to all different projects in the center.

This document does not address the specific computer uses or the educational requirements that would be required for the beneficiary to perform his work with computers. Neither this document nor any other evidence of record describes the computer components of the computer center or the specific database upon which the beneficiary would work.

The beneficiary's statement of the skills that he uses on the job reads as follows

I am using the following skills in my job, which I learned in my Master's degree:

➤ CIS 520 Software Requirements: (University of Detroit Mercy (UDM))

Skills Learned – Concentrates on requirements specification and development of a Software Requirements Specification (SRS).

Present Job – Working on designing and reviewing the functional business requirements for [the petitioner's] database.

➤ CIS 530 Software Quality Assurance and Testing: (UDM)

Skills Learned: - management of a quality system in software production. Comprehensive coverage of Unit, Module, System, and Acceptance Testing. Principles, methods, models. [S]tandards and software tools used in the process of testing.

Present Job – Performing all the quality assurance testing on all new developments and maintenance of database.

➤ CIS 540 Software Process Management: (UDM)

Skills Learned – Principles and practices of software production management. Software product management, change management, Standards, metrics and models, software maturity/capability. Tools for configuration management, integrated software environments and software factories.

Present Job – Using the software development lifecycle methodology on all phases of developing a new application.

➤ CIS 555 Database Design: (UDM)

Skills Learned – A detailed examination of the database design process and technology like: data modeling, logical and physical design, data administration, enterprise modeling, data warehouses, Standard Query Language (SQL), ORACLE, and database design tools.

Present Job – Using the SQL skills in the majority of the application and data testing, and developing queries to create data reports.

This document consists of generalized language and unexplained technical terminology, and it provides no insights into the specific tasks that the beneficiary performs. Therefore it does not provide a factual basis for finding that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The page that was submitted as evidence “to show that the position is so complex and requires a qualified person with at least a bachelor degree to perform the duties of the job” has no significant evidentiary value. It provides no information that demonstrates that any of the beneficiary’s specific tasks would require the application of at least a bachelor’s degree level of highly specialized knowledge in a specific specialty. The petitioner opens this document, with the following statement:

The Database Analyst position requires a highly knowledgeable candidate and capability to perform analytical tasks and duties. And since the center has ongoing educational projects and [is] serving the community in various areas of activities, it required hiring a candidate with a minimum of a bachelor degree computer science or equivalent.

However, as evident in the remainder of the document, below, the document’s information is generalized and abstract, and therefore does not substantiate the petitioner’s claim about the educational requirements for the position:

[T]he duties of the job are:

1. Reviewing, evaluating, designing, implementing, and designing the center's database.
2. Writing codes for database access, modifications and constructions including stored procedures.

The following is [sic] the day-to-day duties to be performed by [the beneficiary]:

1. Maintaining the center's database. 30%
2. Designing and reviewing the fundamental functional business requirements. 15%
3. Coding and testing all new database developments. 55%

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The three job advertisements from other firms are not probative, as the evidence of record does not establish that the day-to-day tasks and the related educational requirements of the advertised positions are substantially similar to those of the proffered position.

The Kmart letters are not relevant to the specialty occupation issue before the AAO: they deal with the beneficiary's former employment.

The service center director's February 24, 2001 memorandum is not binding on the AAO, which is not subject to the supervision or direction of service center directors. As stated in its subject line, the memorandum was published only as internal guidance to CIS adjudicators at the Nebraska Service Center. Furthermore, the memorandum does not have the force of law or regulation, and it may not be relied upon to create any right or benefit.

The totality of the evidence in the record is insufficient to establish that the proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

CIS recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.² The *Handbook* has extensive sections on computer-related occupations. However, as abstract and generalized as it is, the evidence of record about the proffered position and its duties does not establish that the beneficiary would be employed in any occupational category for which the *Handbook* indicates a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty. As the evidence fails to establish that the duties of the proffered position comport with those of any occupation that normally requires at least a bachelor's degree, or its equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)). As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted attestations from other persons or firms in the industry or from a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty. As noted, the job advertisements from other firms have no probative value.

As the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The consistently generic and generalized nature of the petitioner's evidence does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

² The AAO consulted the 2004-2005 edition of the *Handbook*.

LIN 03 169 51837

Page 9

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 appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.