

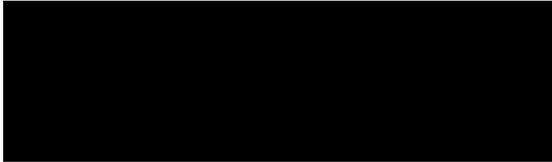
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U.S. Citizenship
and Immigration
Services

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Dr

FILE: WAC 04 224 53812 Office: CALIFORNIA SERVICE CENTER Date: **AUG 07 2006**

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition 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 software consulting and development business that seeks to employ the beneficiary as a programmer analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, the petitioner submits a brief and a work order from the petitioner's client iTech describing the beneficiary's proposed project and duties.

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.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The director found that the evidence of record contains no written contract between the petitioner and the beneficiary describing the beneficiary's proposed duties and the terms of employment, nor does it indicate where the beneficiary will perform the proposed duties. The director found further that the evidence of record contains no comprehensive description of the beneficiary's proposed duties from an authorized representative where the beneficiary will ultimately perform the proposed duties. The director concluded that the petitioner had not established that the beneficiary would work in a specialty occupation.

On appeal, the petitioner states, in part, that the beneficiary will be its full-time employee in accordance with the terms of the labor condition application. The petitioner submits a work order from its [REDACTED] and states that the beneficiary will work [REDACTED] pursuant to the terms of this work order, or, in the alternative, the beneficiary will work on in-house projects at its corporate office in Santa Clara or on "other projects."

Noted in the evidence of record are the petitioner's payroll records indicating that the petitioner engages persons to work in the United States; the Form I-129 indicating that the petitioner has an Internal Revenue Service Tax Identification Number; and the work order [REDACTED] the site of the beneficiary's ultimate employment. The petitioner demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, or otherwise control the work the beneficiary would perform.

Citizenship and Immigration Services (CIS) interprets 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's August 5, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing and evaluating existing and proposed computer programs, systems, and related procedures to process data; preparing program specifications and diagrams; developing coding logic flowcharts; and encoding, testing, debugging, and installing operating programs and procedures in conjunction with user departments. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (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)).

At the outset, the record contains deficiencies regarding the claimed earnings of the petitioner's employees. Specifically, the wages reflected on the petitioner's quarterly wage reports do not appear to be consistent with the annual salaries reflected on the "Payroll as of December 02, 2004/List of I-129 Petition" document. For example, some of the quarterly wages of petitioner's H-1B employees are as follows: [REDACTED] \$4,400.00 in California and \$2,240.00 in Michigan; [REDACTED] - \$2,973.46; [REDACTED] \$640.00; [REDACTED] \$7667.50. It is noted that the annual salaries for these employees, as reflected on the "Payroll as of December 02, 2004/List of I-129 Petition" document are as follows: \$43,000; \$38,700; \$55,000; and \$50,000, respectively. 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 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. A review of the Computer Programmers job qualifications in the *Handbook*, 2006-2007 edition, finds that there are many training paths available for computer programmers, and the associate degree is a widely used entry-level credential. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a programmer/programmer analyst job. Further, although the petitioner indicates that the beneficiary will work for its client iTech, the record contains no comprehensive description of the proposed duties from an authorized representative of the petitioner's iTech, where the beneficiary will ultimately perform the proposed duties. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Without a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, where the beneficiary will ultimately perform the proposed duties, it cannot be determined whether the beneficiary will work in a specialty occupation.

As noted above, the evidence of record, including the subcontractor agreements and work order from iTech, establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for the beneficiary's employment itinerary specifying dates and locations of employment, and contracts between the petitioner and its clients. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request an employment itinerary specifying dates and locations of employment, and contracts between the petitioner and its clients. The itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position; and, as the record does not contain a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, as described above, the duties that comprise the proffered position do not establish the position as sufficiently unique or sufficiently complex to require a bachelor's degree level of knowledge in a specific specialty.

The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As the petitioner does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Absent a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, as described above, the petitioner does not establish specific work that the beneficiary would perform and how actual performance of that work would require the application of knowledge associated with the attainment of at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the Labor Condition Application (LCA) filed by the petitioner is not valid. The LCA lists the work location as Santa Clara, California, where the petitioner has its corporate office. The petitioner's statements and the work order from the petitioner's client iTech, however, indicate that the beneficiary will work both on-site and off-site. When the beneficiary is off site at iTech's premises in Burlington, Vermont, he will not be working within the geographical area covered by the LCA. The petitioner also submitted contracts with businesses in various locations including Pennsylvania and Florida. To the extent that the beneficiary will provide services off-site at locations in Pennsylvania and Florida, the work would not be covered by the Santa Clara location on the LCA. For this additional reason, the petition may not be approved.

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.