

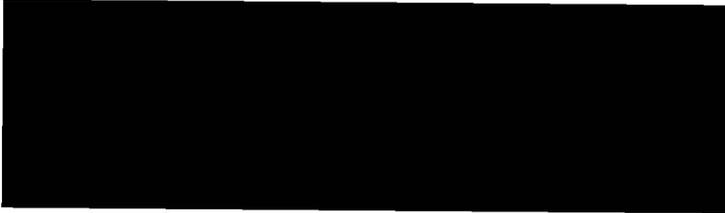
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U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 04 174 50019 Office: NEBRASKA SERVICE CENTER Date: **JUL 12 2006**

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:



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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the Nebraska Service Center 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 computer consulting firm, has annual net income of \$7,187, and 1 employee. It provides contract employees for software development and implementation services to clients. It seeks to employ the beneficiary as a full-time software engineer pursuant to 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). The director denied the petition based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE, dated October 18, 2004; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's brief and new and previously submitted evidence.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In order to determine whether a position is a specialty occupation, CIS must examine the ultimate employment of the alien. 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 (5<sup>th</sup> 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.

The petitioner states that it is seeking the beneficiary’s services as a Software Engineer. Evidence of the duties to be performed was submitted on the form I-129 and in a letter submitted in response to the RFE. According to this evidence, the beneficiary would: design and develop applications to meet the client’s business needs; perform workflow data analysis; generate functional specifications; perform data mapping; participate in system design development and testing; and develop test plans to test new system enhancements and integration.

The director found that the proffered position could not be considered a specialty occupation because the petitioner failed to submit a description of the duties the beneficiary will perform for its client. The petitioner indicated that the beneficiary would be working at its client’s office, in Naperville, IL pursuant to an agreement between the petitioner and [REDACTED] from January 10, 2005 to July 29, 2005.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at a client’s work location to perform services established by a contractual agreement for a third-party company. The petitioner provided an agreement with [REDACTED] stating that the beneficiary will work, as a consultant, at the office of [REDACTED]. The petitioner, however, has provided no work orders or statements of work from [REDACTED] describing the duties the

beneficiary would perform for [REDACTED]. The Agreement with [REDACTED] states only that: “the consultant shall perform the following services for [REDACTED]: COBOL, DD2, Oracle and Java.”

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.

As the record does not contain any documentation from the petitioner that establishes the specific duties the beneficiary would perform under contract for the petitioner’s client, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

To determine whether the duties described by the petitioner are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)& (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; the degree requirement imposed by the petitioner is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The AAO turns first to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the duties of the position, though generally described, are comparable to those of a software engineer, which generally requires a degree in a specialty. However, without a comprehensive description of the duties from an authorized representative of the client company, the petitioner has not established that the beneficiary will be performing the duties of a software engineer. The petitioner must do more than simply recite the duties of a software engineer as listed in the *Handbook*. The petitioner must have the client describe the duties to be performed in relation

to its particular business interests. The record contains no evidence of [REDACTED] business application needs, its existing business and operating systems, and other business requirements. Without a breakdown of the applications to be engineered, it cannot be determined whether the performance of the duties will require a baccalaureate degree in computer science or a related field. Thus the petitioner has not established eligibility under the first criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(1)

The AAO now turns to a consideration of whether the duties of the proffered position as described by the petitioner may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The AAO notes that the petitioner provided no documentation to establish that firms similar to the petitioner offering jobs similar to the proffered position employ individuals with a degree in the specialty. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *See 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)). No other evidence of record establishes the first prong of the second criterion. Therefore, the petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, the petitioner has generally described duties normally performed by software engineers. However, the duties of the proffered position, as listed, are so generic that they provide no meaningful description of the tasks that the beneficiary would perform for the petitioner's client on a daily basis. In its appeal brief, the petitioner simply asserted that the *Handbook* indicates that a degree is required by most employers for software engineer positions, and stated that similar to other software engineers the beneficiary will plan, develop, test, and document computer systems applications software. The AAO finds the petitioner to have provided no evidence that would support a finding that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner did not provide any such information.

Accordingly, the petitioner failed to establish its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, the petitioner contends that the duties of the proffered position satisfy the criterion's requirements. The AAO does not agree.

As previously noted, the AAO requires information regarding the specific duties of a proffered position, as well as the nature of the petitioning entity's business operations, to make its determination regarding the position's degree requirements, if any. In the instant case, the record offers a general description of the type of work to be performed, rather than a description of the proffered position's duties as they relate to the business of the beneficiary's ultimate work location for [REDACTED]. As the petitioner has provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the evidence of record, including the subcontractor agreement and the work order with [REDACTED] establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, hire, supervise, and otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). As the beneficiary will be placed at multiple locations established by contractual agreements between the petitioner and third-party companies, the petitioner is also an agent, as described at 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent...

The regulation governing agents at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires the submission of an itinerary of definite employment to cover the entire period of time requested in the position. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must also submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires a petitioner that is also an agent to submit an itinerary with the duties and locations of employment to cover the entire period of employment. The

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<sup>1</sup> 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).

record contains one work order covering the period from January 10, 2005 to July 29, 2005. The end date of the proposed employment is September 2007. The record does not contain an itinerary for the entire period of proposed employment. For this additional reason, the petition may not be approved.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.