

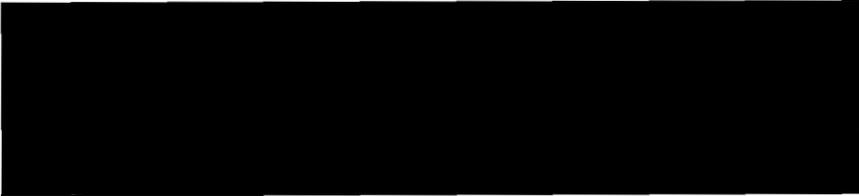


U.S. Citizenship
and Immigration
Services

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

PUBLIC COPY

D2



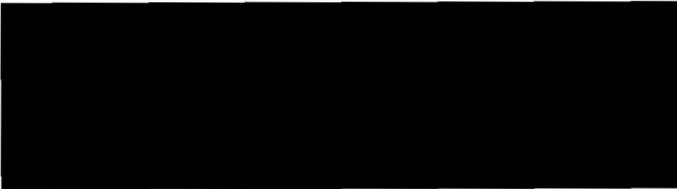
FILE: LIN 04 164 54874 Office: NEBRASKA SERVICE CENTER Date: JUN 16 2006

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.

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, was established in 1999, has annual gross income of \$350,000, and 3 employees. It provides contract employees for software development and implementation services to clients. It seeks to employ the beneficiary as a full-time programmer analyst 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 4, 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 (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.

The petitioner states that it is seeking the beneficiary’s services as a Programmer Analyst. Evidence of the beneficiary’s duties includes: the Form I-129, and petitioner’s response to the RFE. The petitioner indicated the duties of the proposed position as follows;

- Existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data;
- Prepare charts and diagrams to assist in problem analysis and submit recommendations for solutions;
- Prepare program specifications and diagrams and develop coding flowcharts; and
- Encode, test, debug and install operating programs and procedures in conjunction with user development.

The beneficiary's daily task activities would include:

- Design - 50%
- Support - 30%
- Testing - 20%

The director found that the proffered position could not be considered a specialty occupation because the petitioner failed to submit contracts between it and its clients. At the time of filing, the petitioner indicated that the beneficiary would be working at its offices in Columbus, Ohio. With its response to the RFE the petitioner stated that it negotiated a master service agreement with [REDACTED], a staffing firm, and that the beneficiary will be performing services in Tampa, Florida, for the University of South Florida, a client of [REDACTED].

CIS interprets the statute and the regulations to require the petitioner to show that the entity ultimately employing the beneficiary requires a bachelor's degree for all employees in that position. The degree requirement should not originate with the employment agency that seeks to hire the beneficiary for employment with the agency's client. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

Although the record contains an agency service agreement between the petitioner and [REDACTED] Inc., the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the University of South Florida where the beneficiary will be providing the services. With its response to the RFE the petitioner submitted a letter from the University of South Florida, indicating the existence of a contract for the beneficiary's services. However, the letter does not include a comprehensive description of the job duties, and therefore, it cannot be determined that the work that the beneficiary will perform at the University of South Florida will require the highly specialized knowledge of a 4-year degree or whether it will qualify as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To determine whether the duties described 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; 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 computer programmer. The 2006-2007 Internet version of the *Handbook's* description of computer programmer, at <http://www.bls.gov/oco/ocos110.htm>, states:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmers* are individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending on the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas whose solutions can only be approximated or that draw data from many existing systems may require more than a year of work. In most cases, several programmers work together as a team under a senior programmer's supervision.

Many programmers update, repair, modify, and expand existing programs. When making changes to a section of code, called a routine, programmers need to make other users aware of the task that the routine is to perform. ...

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct results. This process is called testing and debugging. ...

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a

program to track inventory within an organization. They also may revise existing packaged software or customize generic applications which are frequently purchased from vendors. *Systems programmers*, in contrast, write programs to maintain and control computer systems software, such as operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of the system handle the various jobs they have been given and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

Regarding training of computer programmers, the *Handbook* states:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

Employers primarily are interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to place more emphasis on previous experience.

The *Handbook* indicates that a baccalaureate degree in a specialty is not normally required to enter the occupation. The *Handbook* indicates that some programmers may qualify for certain jobs with 2-year degrees or certificates. The 2-year degree is a widely used entry-level credential for prospective computer programmers. Because the petitioner has failed to provide a description of the duties where the beneficiary will work, it cannot be determined whether a two-year or a four-year degree is required to perform the duties. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)

– a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position 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 computer programmers. 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 or its clients 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 programmer analyst positions, and stated that similar to other programmer analysts 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 petitioner's business or to the business of the beneficiary's ultimate work location at the University of South Florida. 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).

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 set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the Labor Condition Application (LCA) submitted for the Tampa, Florida work location was not timely filed. At the time of filing the petition the petitioner submitted an LCA valid for Columbus, Ohio. In response to the RFE, the petitioner submitted an LCA, certified after the filing date of the petition, for Tampa, Florida. 8 C.F.R. § 214.2(h)(4)(B)(1) requires that an LCA be certified prior to filing the petition. As the LCA for the intended work location, Tampa, Florida, was certified subsequent to the petition's filing date, it cannot be accepted. 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.