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U.S. Citizenship  
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FILE: WAC 04 240 52000 Office: CALIFORNIA SERVICE CENTER Date: **JUN 26 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 materials 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a computer project services and software consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation 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 on the ground that the record failed to establish that the proffered 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.

As provided in 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 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.

To qualify to perform the services of a specialty occupation an alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C):

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

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 RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as an information technology company that offers software development, implementation, and maintenance services for e-business and enterprise applications. The petitioner states that it was established in 2003 and in January 2004 took over the employees and accounts of another IT company, Sigma Project Services, Inc. At the time of filing the petitioner indicated that it had 130 employees, projected gross annual revenues of \$13 million, and proposed to employ the beneficiary for three years, at an annual salary of \$45,000, as a programmer analyst with responsibility "for custom program design, development and implementation of software applications and systems to meet clients' needs and specifications." The duties of the proffered position were described as follows in a letter accompanying the petition:

[The beneficiary] will analyze user's requirements, procedures, and problems to automate processing or to improve existing computer systems. He will confer with personnel involved to analyze current operational procedures, and identify problems. He will write detailed description of user needs, program functions, and steps required to develop or modify computer programs. Further, he will review computer system capabilities, workflow, and study existing information processing system to evaluate effectiveness and develop a new system to improve productivity. Additionally, he will provide software support, which includes testing, debugging, and modifying software as per needs of the client.

The minimum educational requirement for the proffered position, the petitioner indicates, is a bachelor's degree in computer science, engineering, or mathematics, together with relevant experience. The petitioner declares that the beneficiary is qualified for the position by virtue of his bachelor of engineering/technology from Punjab Technical University in India, in June 2000, along with more than three years of work experience in the computer field.

In his decision the director indicated that, although the record contained a summary of the terms of employment indicating that the petitioner will pay the beneficiary's salary and provide an employee benefits package, as well as signed agreements for software development services between the petitioner and client companies, there was no written contract between the petitioner and the beneficiary describing his job duties and terms of employment, nor a comprehensive description of the job duties from an authorized representative of the client company where the beneficiary would work. Without such a description of the job duties, the director concluded, the petitioner had not demonstrated that the proffered position meets the statutory definition of a specialty occupation.

On appeal counsel reiterates that the petitioner is the employer, not the agent, of the beneficiary, and that the beneficiary would work mostly on in-house projects with occasional short-term onsite services to individual clients. While clients provide the jobs on which the beneficiary works, counsel explains, they do not set the specific duties to be performed. The job duties are determined by the petitioner's in-house project manager, who supervises the beneficiary to ensure that the client's project requirements are met. Counsel submits additional evidence – including the petitioner's offer of employment letter to the beneficiary, descriptions of the three types of software solution activities in which it is engaged, summaries of various ongoing client projects, and an itinerary of the beneficiary's work for the three year period of requested H-1B classification. In its offer of employment letter of August 9, 2004 (which predates the filing of the petition on August 27, 2004), the petitioner advised the beneficiary that “[y]our services will be utilized in developing/maintaining applications/systems at our office.” The petitioner's description of its software solution activities reads as follows:

[The petitioner] is a software solution provider and the technical staff . . . work on three different types of activities.

Provide ongoing customization, maintenance, enhancement, integration support for our product DOMAIN C/S which is an Enterprise Contract Management System. This work is carried out [at] our development center in Cerritos. As part of th[is] work some of the team members may be visiting clients for a period of one to two weeks. The job description is “to provide implementation and integration support to existing and new clients for this product using development tools like Visual Basic, Oracle, SQL Server, Crystal Reports, Winrunner, etc.” Please find attached some of the resource requirement plans (Annexure 1) related to this activity.

We undertake turnkey software projects in the area of Client Server, web development, data warehousing and testing. These projects come from our existing customers and new customers. We have ongoing contracts with customers and SOW [statement of work] . . . is issued separately for each project before project initiation. The development work for all these projects [is] done out of our Cerritos office. Employees may go to client site for discussion and implementation, which varies from two to three weeks for each project. The job description is “to develop, customize and web enable operations and existing applications using Java, Oracle, Weblogic, Winrunner tools.” Please find attached some of the resource requirement plans (Annexure II, III, and IV).

Provide onsite consulting services at customer's location. These are based on our existing contracts and specific SOWs are issued for each assignment. These assignments vary between four weeks and eight weeks. The job description for these consulting services is "to provide development, implementation, and integration support for custom applications developed using Client Server tools / Web tools / Database tools." These requirements are ongoing in nature and require persons with special skills to handle these job requirements. Please find attached some of the open requirements (Annexure V).

The beneficiary will be working mostly in activit[ies] 1 and 2 and [from] time-to-time may have to perform activity 3.

The beneficiary's expected work itinerary reads as follows:

- |  |                                    |
|--|------------------------------------|
| ▪ Domain C/S Implementation Support, at Cerritos         | January to December 2005           |
| ▪ Wellpoint / Sellcore Insurance Application Maintenance | January to September 2006          |
| ▪ Domain C/S Support                                     | October to November 2006           |
| ▪ Onsite Services  | December 2006 to<br>September 2007 |

Based on the foregoing documentation and the entire record in this proceeding, the AAO determines that the petitioner will be the beneficiary's employer with respect to the work projects listed above, and that the beneficiary meets the definition of a U.S. employer at 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 petition cannot be approved, however, unless the petitioner can establish that the proffered position qualifies as a specialty occupation. In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

Based on the petitioner's description of the proffered position, the AAO determines that it combines the duties of a computer programmer and a computer systems analyst, as described in the *Handbook*, 2006-07 edition. Computer programmers are described, in pertinent part, as follows:

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 . . . .

[P]rogrammers write programs according to the specifications determined primarily by computer software engineers and systems analysts. After the design process is complete, it is the job of the programmer to convert that design into a logical series of instructions that the computer can follow. The programmer codes these instructions in a conventional programming language . . . [or] an artificial intelligence language . . . or one of the most advanced object-oriented languages . . . .

Many programmers update, repair, modify, and expand existing programs . . . .

*Handbook*, at 104-05. With respect to the educational requirements of the occupation, the *Handbook* states as follows:

Although there are many training paths available for programmers . . . 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 two-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers.

. . . .

Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, inventory control, or another area of business . . . . As indicated by the following tabulation, more than two-thirds of computer programmers had a bachelor's or higher degree in 2004.

High school graduate or less	8.3%
Some college, no degree	14.1%
Associate degree	10.2%
Bachelor's degree	49.1%
Graduate degree	18.3%

*Id.* at 105-06. As the foregoing information indicates, a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into a computer programming position. One-third of computer programmers have either a two-year associate degree, some college courses but no degree, or a high school education or less. Moreover, some baccalaureate degree holders earned their degrees in disciplines not directly related to the computer field. Accordingly, a computer programmer does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Computer systems analysts are described in the DOL *Handbook*, 2006-07 edition, as follows:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems – for example, business, accounting, or financial systems, or scientific and engineering systems – that vary with the kind of organization . . . .

Systems analysts . . . use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan the system. They specify the inputs to be accessed by the system, design the processing steps, and format the output to meet users' needs. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology will be financially feasible.

When a system is accepted, systems analysts determine what computer hardware and software will be needed to set the system up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then, they work with programmers to “debug” or eliminate errors from the system . . . .

*Handbook*, at 116. With respect to the educational requirements of the occupation, the *Handbook* states as follows:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS) . . . . Employers are increasingly seeking individuals with a master's degree in business administration (MBA), with a concentration in information systems, as more firms move their business to the Internet.

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system analysts. The level of education and type of training that employers require depend on their needs . . . .

*Id.* at 117. The foregoing information indicates that, while a baccalaureate or master's degree in a computer-related specialty is favored by many employers of computer systems analysts, it is not the normal minimum requirement for entry into such a position. Some companies still accept baccalaureate degrees which are not

closely related to the computer field, if the individual has acquired sufficient computer knowledge through work experience, and some companies may accept relevant work experience in lieu of any baccalaureate degree. Accordingly, a computer systems analyst does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1).

Based on the foregoing analysis, the AAO determines that the proffered position – a combination computer programmer and computer systems analyst – does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) because a baccalaureate or higher degree in a specific specialty, or its equivalent,<sup>1</sup> is not the normal minimum requirement for entry into the position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Nor does the evidence of record show that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree. Accordingly, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), there is no documentation in the record indicating that the petitioner normally requires a specialty degree or its equivalent for the programmer analyst position. Accordingly, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that knowledge usually associated with a baccalaureate or higher degree is required to perform them. The job duties do not appear to be more specialized or complex than those of a typical programmer analyst position, which the *Handbook* indicates does not normally require baccalaureate level knowledge in a specific specialty. The record does not show that the duties of the proffered position could not be performed by an individual with less than baccalaureate level knowledge in a specific specialty. Accordingly, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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<sup>1</sup> The "or its equivalent" language of the regulation (and the Act) only comes into play if there is no baccalaureate program and specialty degree offered in a particular field, and the employer therefore requires a degree in a related field in addition to specialized experience or training. *See Tapis International v. INS*, 94 F.Supp. 2d 172, 176 (D.Mass. 2000).

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