

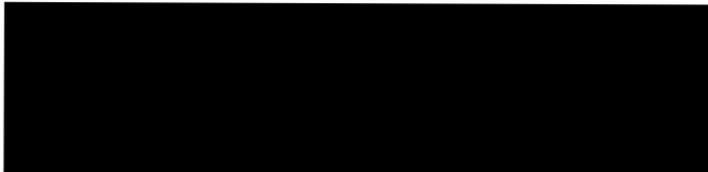
**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



D2

FILE: WAC 04 168 53694 Office: CALIFORNIA SERVICE CENTER Date: **MAY 24 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 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 development and consultancy business that seeks to employ the beneficiary as a full-time 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 petitioner had not demonstrated that an employer-employee relationship exists or that the proffered position is a specialty occupation. On appeal, the petitioner submits a letter and additional evidence, including a sample employment agreement, a sample employment application, articles of incorporation, and the company profile.

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 AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

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 denied the petition because the petitioner had not submitted sufficient evidence that it supervises or controls the work of the beneficiary, thereby failing to establish that an employer-employee relationship exists.

On appeal, the petitioner's president states that he is submitting a copy of the offer letter and a sample employment contract to demonstrate that it will be the beneficiary's employer. He states: "All prospective employees are required to accept the offer and fax a copy back to the company. They are required to review and sign the employment contract . . ."

The evidence of record reflects that the petitioner has filed a work petition on behalf of the beneficiary, the petitioner has employed the beneficiary, and the petitioner has a legitimate IRS tax identification number. In view of the foregoing, the petitioner has established an employer-employee relationship with the beneficiary. The petitioner, therefore, has overcome this portion of the director's objections.

The AAO will now address the director's conclusion that the proffered position is not 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.

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 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 petitioner is seeking the beneficiary's services as a full-time programmer analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's October 3, 2003 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 the following duties:

[P]lan, develop, test, and document computer programs, applying knowledge of programming techniques and computer systems. He will evaluate user request for new or modified programs. Consult with users to identify current procedures and clarify program objective. He will formulate plan-outlining steps required to develop program using structured analysis and design.

The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in computer science, mathematics, engineering, management information systems, or an equivalent thereof.

The director found that the proffered position was not a specialty occupation due to discrepancies in the record, such as the number of employees claimed on the petition, as opposed to its actual number of

employees. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states, in part, that the beneficiary will be providing specialized services, such as software customization and development, service solutions, and software maintenance, to the petitioner's clients. The petitioner states further that the discrepancies in the number of its employees have resulted, in part, because the petitioner is undergoing organizational changes, and many beneficiaries of approved petitions have not yet entered the United States.

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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the petitioner 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, information on the petition that was signed by the petitioner's managing director on January 9, 2004, reflects that the petitioner has five employees. The petitioner's quarterly wage report for the first quarter of 2004 reflects zero employees. The petitioner's assertion that the discrepancies in the number of its employees are due to organizational changes and employees not having entered the United States, is noted. Simply going on record without supporting documentary evidence, however, 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)). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted Internet job postings for computer-related positions. Some of the advertisements specify that related experience may be substituted for a bachelor's degree, while others do not specify a bachelor's degree in a specific specialty. This information is not convincing evidence that the position of a

programmer analyst is a specialty occupation in this case, based on the above discussion. Furthermore, a review of the job entry requirements in the *Handbook* finds that there are many training paths available for computer programmers, and the associate degree is a widely used entry-level credential. In view of the foregoing, the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty is the industry standard for the proffered position.

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.

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. Although the petitioner does not address this issue on appeal, the record contains a letter, dated October 11, 2004, from the petitioner's counsel listing the petitioner's current employees and the beneficiaries of the petitioner's approved petitions who never entered the United States, all with a bachelor's degree or higher. The record, however, does not contain sufficient supporting evidence of the petitioner's past hiring practices, such as copies of the said degrees, and, therefore, the petitioner has not met its burden of proof in this regard. 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 Obaigbena*, 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). Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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. 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).

---

<sup>1</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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.

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.