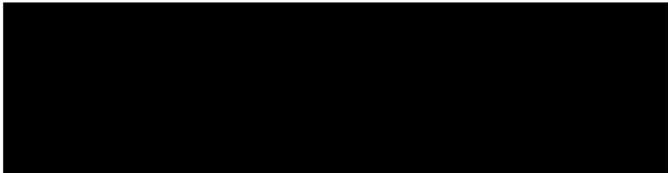




U.S. Citizenship
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Services

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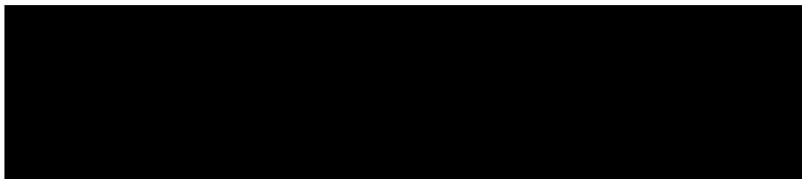
FILE: LIN 05 186 51490 Office: NEBRASKA SERVICE CENTER Date:

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 an information technology (IT) company and seeks to employ the beneficiary as a computer engineer. The petitioner endeavors to classify the beneficiary 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 determined that the proffered position did not qualify as a specialty occupation, and that the petitioner failed to establish that it had H1B level duties available for the beneficiary at the work location identified on the Labor Condition Application (LCA). On appeal, counsel submits a brief and additional information stating that the proffered position is a specialty occupation and that the record establishes that the beneficiary will be employed at the work location identified in the LCA.

The first issue to be determined is whether 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.

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.

The petitioner seeks the beneficiary’s services as a computer engineer. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to a summary of duties provided by the petitioner the beneficiary would:

- Confer with data processing and project managers to obtain information on limitations and capabilities of existing systems and capabilities required for data processing projects and projected workload;
- Analyze information to determine, recommend, and plan the layout for types of computers and peripheral equipment, or modifications to existing equipment and systems that will provide the capability for a proposed project or workload, efficient operation and effective use of allotted space;
- Evaluate factors such as the number of departments serviced by data processing equipment, reporting formats required, volume of transactions, time requirements and cost constraints, and the need for security and access restrictions to determine hardware configurations and the feasibility of expanding or enhancing computer operations;
- Enter data into computer terminals to store, retrieve, and manipulate data for analysis of system capabilities and requirements;
- Specify power supply requirements and configurations;
- Recommend purchase of equipment to control dust, temperature, and humidity in the area of system installation;
- Train users to use new or modified equipment;
- Answer client inquiries in person and via telephone concerning systems operation;
- Diagnose system hardware, software, and operator problems, and recommend or perform minor remedial actions to correct problems based on knowledge of system operation;
- Assign and coordinate work projects such as converting to new hardware or software, designate staff assignments, establish work priorities, and evaluate cost and time requirements;
- Review completed projects or computer programs to ensure that goals are met and that programs are compatible with other programs already in use;
- Conduct fault diagnostics and basic troubleshooting on desktop products, file server, web servers and e-mail servers;

- Install, test and configure desktop products including networked environments;
- Install, test and operate basic operating system software and standard applications;
- Perform integration tasks that include the installation/configuration of computer system hardware, operating system software, third party software, network related equipment, and ground-based satellite systems including functional tests of hardware/software systems and seek active resolution to problems;
- Evaluate and test vendor supplied software packages for standalone and networked computers to determine compatibility with existing systems, ease of use, and if software meets user needs;
- Consult with customers concerning maintenance of computer systems and coordinate installation of various system components;
- Assist in the technical support of strategic programs, and the design and definition of networked computer system requirements for complex customer systems, and
- Analyze existing networked computer systems and make recommendations for improvement of infrastructure, technology, operational capability, reliability and performance including troubleshooting, and root cause analysis.

The petitioner requires a minimum of a bachelor's degree in a computing related field for entry into the proffered position.

The beneficiary's position has been identified by the petitioner as a computer engineer, a position that is described by the Department of Labor's *Occupational Outlook Handbook (Handbook)* to generally require a baccalaureate level education. In response to the director's request for evidence, however, the petitioner submitted a copy of an installation services subcontract agreement with QualxServ, with an accompanying statement of work indicating that the beneficiary would be employed pursuant to the terms of that agreement. The duties to be performed by the beneficiary are set forth in the statement of work and, as stated by the director, bear little resemblance to the duties to be performed by the beneficiary as outlined by the petitioner in its job description for a computer engineer. When, as in this instance, the beneficiary will perform duties as a contractor at various work locations for a third-party who will be the end user of the beneficiary's services, it is the end user who will ultimately determine the actual duties the beneficiary will perform on a day-to-day basis.

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 (the petitioner's clients). The duties detailed by the end user (QualxServ) in this instance indicate that the beneficiary will basically make service calls to make repairs on QualxServ (or other clients) computer equipment. This is confirmed by the call information sheets submitted by the petitioner on appeal to show that the beneficiary was performing services for the petitioner in the Wichita, KS area designated on the LCA. Those information sheets indicate that the beneficiary made support calls to client locations to troubleshoot computer problems, and make physical repairs if possible by replacing defective parts, etc. The duties to be performed by the beneficiary, as detailed in the aforementioned statement of work and on the call sheets submitted on appeal, are not those of a computer engineer. They are duties performed by individuals who troubleshoot computer operational problems and make physical repairs. The *Handbook* does not indicate that individuals performing those duties require a baccalaureate level education, and the performance of those duties does not require the theoretical and practical application of a body of highly specialized knowledge. The petitioner has failed to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner states that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, and in support of that assertion references the *Handbook's* discussion of engineering positions. As previously noted, the proffered position is not that of an engineer, or a computer engineer as contended by the petitioner. Thus, the *Handbook's* discussion of the educational requirements for those positions has no application to the duties of the proffered position. The petitioner offers no additional evidence in support of its assertion, and it has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does not assert that it normally requires a degree in a specific specialty for the proffered position, and offers no evidence in this regard. It has, therefore, failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, there is no evidence of record to establish that the duties to be performed by the beneficiary are so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor does the record establish that the duties are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties to be performed by the beneficiary, as established by the end user of the beneficiary's services, are routinely performed by individuals with less than a baccalaureate level education. 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 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.¹ 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

¹ 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.

United States to perform 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.

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 failed to sustain that burden.

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