

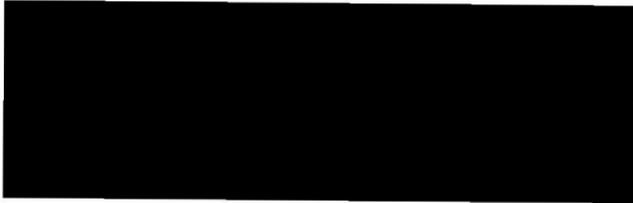
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-2

FILE: WAC 06 208 50116 Office: CALIFORNIA SERVICE CENTER Date: JAN 02 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

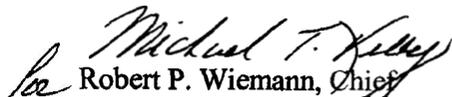
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 staffing business that employs software professionals to perform software development, maintenance, and testing activities at client sites. It seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, 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 record includes: (1) the June 21, 2006 Form I-129 and supporting documents; (2) the director's June 30, 2006 request for further evidence (RFE); (3) the petitioner's July 25, 2006 response to the director's RFE; (4) the director's August 11, 2006 denial decision; and (5) the Form I-290B and the petitioner's supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's United States employer. The director also determined that the petitioner had not provided sufficient evidence of the specific duties to be performed by the beneficiary while working for a third-party client, [REDACTED] located in Parsippany, New Jersey, and thus had not demonstrated the availability of a specialty occupation for the beneficiary. The director also found that the petitioner had not demonstrated its compliance with the terms and conditions of employment on the Form ETA 9035, Labor Condition Application (LCA), which identifies the beneficiary's work location as Richmond, Virginia.

On appeal, the petitioner's president submits a letter from [REDACTED] of the petitioner's third-party client, [REDACTED], who states that the beneficiary would continue his work on its Middleware Project at its site in Parsippany, New Jersey. The petitioner's president also submits a new LCA identifying the beneficiary's work location as Parsippany, New Jersey, and copies of the petitioner's 2005 federal income tax return and quarterly wage reports for two quarters in 2006, as supporting documentation.

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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

Pursuant to 8 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.

In a June 15, 2006 letter submitted in support of the petition, the petitioner described the proposed duties as follows:

- Plan, develop, test and document computer programs in GUI (graphical user interface) based Windows programming using SAP, ABAP 4, SAP Script, ALE IDCO, SAP BW, RDBMS, PL*SQL, SQL and Oracle other tools;

Evaluate user requests for new or modified programs, such as Business-to-Business applications;

- Consult with users to identify current operating procedures to clarify program objectives;
- Formulate planned steps required to develop program using structural analysis and design;
- Prepare flow charts and diagrams to illustrate sequence of steps program must follow and to describe logical operations involved;

Write documentation to describe program development, logic, coding, and corrections; and

- Oversee installation of hardware and software, and monitor performance of programs after installation.

The record also includes an LCA listing the beneficiary's work location in Richmond, Virginia, as a programmer analyst.

On June 30, 2006, the director requested additional evidence from the petitioner, including a copy of the specific contract between the petitioner and its client for whom the beneficiary would be performing services, along with any work orders/purchase orders.

In a July 25, 2006 letter submitted in response to the RFE, the petitioner's president stated that the beneficiary would be assigned to an onshore project for a client of E Business Staffing, Inc. (EBS), and work as part of a global IT team for the development and maintenance of a Cadbury Schweppes project. The petitioner's president submitted a consulting agreement between the petitioner and EBS, and described the following description of the beneficiary's proposed duties:

- Work closely with Cadbury EDI Groups in USA as part of Global IT Team;
- Attend daily conference calls to resolve production issues;

Work on Peregrine software, closing EDI production tickets on time;

- Work on different environments for Confectionary & Beverages;
- Set up partner profiles in SAP system, processing IDOCS;
- Work with SD EDI conversions, sales orders, INVOIC, IDOC documentation types and lists;

- Work with SD, SAP team and functional departments to increase received customer data integration for improved integrity, reliability and assurance of expected deliverables supporting Order to Cash flow;
- Assist SD, Order to Cash OTC, and SAP teams to provide processing efficiencies with expanded EDI available information, data integrity, and business management controls;
- Develop new maps ANSI UCSX12 version 5010: 875, 880, and 824;
- Coordinate with Trading partner for testing purposes and move to Production;
- “Strong UNIX Scripting skills modified existing Shell scripts to generate 824 Application and 820 Remittance Advice email reports”;
- Work on SAP Configuration, SAP process Control Manager on Gentran;
- Work closely with EDI Data Manager to resolve production and development issues; and

Set up New Trading Partners on request and document Mapping reports for future reference.

The director denied the petition finding that the petitioner is a staffing business that has contracts with various clients, including EBS, who, in turn, has an agreement with a third party, Cadbury Schweppes. The director found that the record contains insufficient evidence that the petitioner has control over the beneficiary’s work. The director determined that the petitioner had failed to provide sufficient documentation of the specific duties to be performed by the beneficiary while working for the third-party end client, and that the petitioner had not demonstrated its compliance with the terms and conditions of employment on the Form ETA 9035, Labor Condition Application (LCA), which identifies the beneficiary’s work location as Richmond, Virginia.

On appeal, the petitioner’s president submits a letter from [REDACTED] of the petitioner’s third-party end client, Cadbury Schweppes, who states that the beneficiary would continue his work on its Middleware Project at its site in Parsippany, New Jersey. The petitioner’s president also submits a new LCA identifying the beneficiary’s work location as Parsippany, New Jersey, and copies of the petitioner’s 2005 federal income tax return and quarterly wage reports for two quarters in 2006.

Preliminarily, the AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the employment agreement, dated July 12, 2006, between the beneficiary and the petitioner.¹ See 8 C.F.R. § 214.2(h)(4)(ii). However, the court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir.

¹ 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).

2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a 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.

Thus, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. As discussed above, the record contains a letter from [REDACTED] of the petitioner's third-party end client, Cadbury Schweppes, who states that the beneficiary would continue his work on its Middleware Project at its site in Parsippany, New Jersey. Although [REDACTED] provides a list of the beneficiary's proposed duties, these duties, which are similar to those of a systems administrator, do not establish the position as a specialty occupation. The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. No evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for computer systems administrator jobs. Many employers seek applicants with bachelor's degrees, although not necessarily in a computer-related field. Further, [REDACTED] does not submit sufficient information about the proposed "development activities for EDI requests from Customers" for the AAO to determine that such duties require a 4-year degree. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Thus, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the described duties are the duties of a computer systems administrator, duties that are not associated with a bachelor's degree in a specific discipline. The petitioner has not identified any specific duties that

elevate the position to one that would require the education obtained through a four-year university program. The petitioner has not established that a baccalaureate or higher degree or its equivalent is common to the industry in parallel positions among similar organizations or, in the alternative, is so complex or unique that it can be performed only by an individual with a degree in a specific discipline. The petitioner has failed to establish the either of the alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. In response to the director’s RFE, the petitioner submitted a list of all of its H-1B nonimmigrant employees. The record, however, contains no evidence that any of these employees are employed by the petitioner in the capacity of computer systems administrator. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner’s self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not sufficiently described the duties of the proffered position or provided other documentary evidence that would establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 them is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of a systems administrator, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. Without a meaningful list of duties related to the beneficiary’s work on the Middleware Project at Cadbury Schweppes, the petitioner has not established that the generally described duties have the level of specialization and complexity required to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Therefore, the evidence does not establish that the proffered position is a specialty occupation under this criterion.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor’s degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The director also found that the petitioner had not demonstrated its compliance with the terms and conditions of employment on the LCA, which identifies the beneficiary’s work location as Richmond, Virginia.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . .

On appeal, the petitioner's president submits a new certified LCA identifying the beneficiary's work location as Parsippany, New Jersey. Nevertheless, that application was certified on August 30, 2006, a date subsequent to June 21, 2006, the filing date of the visa petition. Regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) provide that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. (Emphasis added.) Since this has not occurred, for this additional reason the petition may not be approved.

In view of the foregoing, the petitioner has not overcome the director's objections.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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