

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 07 163 52599 Office: CALIFORNIA SERVICE CENTER Date: OCT 30 2008

IN RE: Petitioner:
Beneficiary:



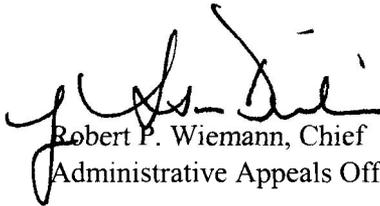
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides information technology and consulting services. It was established in 2004 and claims to employ ten personnel. It seeks to employ the beneficiary as a systems analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 25, 2007, the director denied the petition, determining that the petitioner: had not demonstrated that a reasonable and credible offer of employment existed for the beneficiary; had not established that it was an employer or an agent; and had not established the proffered position as a specialty occupation. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record of proceeding before the AAO includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's June 11, 2007 request for evidence (RFE); (3) counsel for the petitioner's August 30, 2007 response to the RFE; (4) the director's September 25, 2007 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal.

To meet its burden of proof in this regard, the 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 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.

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.

The petitioner seeks the beneficiary's services as a systems analyst. In a March 23, 2007 letter appended to the petition, the petitioner indicated:

As a Systems Analyst with [the petitioner], [the beneficiary] will be responsible for business process analysis, process flow mapping, discussing with module leaders and core team members and decide [sic] on organization structure, organizing testing of configuration, setting up base configuration, coordinating migration and upload of data, interacting with software engineers/programmers to develop data migration tools, creating processes for new, [sic] attending ad-hoc issues related to day-to-day activities, provide [sic] necessary end user training, scoping of rollout, periodical review [sic] of implementation status and report [sic] weekly task plan to the project management team for implementation of custom software.

The petitioner provided a copy of a Form ETA 9035E, Labor Condition Application (LCA) showing the beneficiary's work location in Santa Cruz, California as a systems analyst.

On July 11, 2007 the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties; and an itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested.

On August 30, 2007, counsel for the petitioner responded to the RFE. Counsel noted that the beneficiary would be working in-house at the petitioner's offices in Santa Clara, California. Counsel provided a copy of a February 1, 2007 agreement between the petitioner and Telephia, Inc. (Telephia) wherein the petitioner would provide services to Telephia as indicated on statements of work. Counsel also attached a statement of work effective May 16, 2007 detailing a project to build communication manager-like software solutions. The statement of work provided the amount payable upon Telephia's acceptance/completion of the project and indicated the key persons performing the services would consist of a business unit manager, a project lead, and two team members. The statement of work also listed the location of the work facilities as the petitioner's offices in Santa Clara, California. Counsel also provided the following description of the beneficiary's job duties:

The Beneficiary will be responsible for system front end implementation and system documentation, and she will also do functional and regression testing of releases provided to Telephia.

Analysis: 40% of Beneficiary's time will be spent [on] analysis as detailed below:

- Will be responsible for Business process analysis and [p]rocess flow mapping[;]
- Shall analyze and determine functional and technical specifications of the system need to automate or upgrade the existing computer systems;
- Discussing with module leaders and core team members and decide on organization structure, organizing testing of configuration, setting up base configuration, coordinating migration and upload of data;
- Review the existing systems to determine the effectiveness, limitations and determine if changes can be made within the existing system.

Documentation: 30% of Beneficiary's time will be spent on preparing the following documentation as detailed below:

- Will prepare a detailed report on the user needs and steps required to develop or modify the existing computer system[;]
- Develop time and cost estimates for completing the project;
- Prepare workflow charts, object model and database model diagrams of the system, functions to be performed by the equipment and the role of the personnel;

- Write the user documentation, technical manuals as documentation of the program development;
- Provide necessary end user training;
- Scooping of rollout, periodical review of implementation status and report weekly task plan to the project management team for implementation of the product.

Post Development Role: 25% of Beneficiary's time will be spent on post development analysis. She will work on improving the scalability, availability and load balancing of the new system. [She] will setup and recommend various parameters to optimize the performance and integrity of the system. She shall coordinate installation of computer programs and operating systems, and tests, maintain, and monitor computer system.

Miscellaneous: 5% of Beneficiary's time will be spent on miscellaneous ad-hoc issues related to day-to-day activities, including interacting with other members of the network analysis and development team.

On September 25, 2007, the director denied the petition. The director noted, in particular, that the statement of work provided by counsel in response to the RFE did not include the beneficiary's name and that the record did not include a contract between the beneficiary and the petitioner. The director determined, as such, that the record lacked a reliable evidentiary basis to determine that the petitioner's proffer was authentic. The director also determined that the petitioner had not established that it was either an employer or an agent, and thus had not established that it was qualified to file petitions for aliens to work in the United States as H-1B workers. The director lastly determined that the petitioner is an employment contractor and thus the entity ultimately using the alien's services must provide a description of conditions of employment, including a detailed description of the work the beneficiary would perform. The director found that the petitioner had not established that the duties of the proffered position comprised the duties of a specialty occupation or that the petitioner had sufficient work for the beneficiary to perform for the requested period of intended employment.

On appeal, counsel for the petitioner asserts: that the petitioner has a qualifying project and the need for an H-1B employee; that the petitioner will have full control over the beneficiary's work; and that the petitioner is a qualified United States employer. Counsel resubmits the contract between the petitioner and Telephia and the statement of work. Counsel contends that the statement of work details the project and the location of the project work as at the petitioner's offices, and that the beneficiary will be one of the team members on the project.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the

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).

director's decision to the contrary. The AAO has reviewed the record and also finds that the contract entered into between the petitioner and a third party is evidence that the petitioner has contracted to perform work for the third party. The statement of work provided is also sufficient to establish that the work will be performed at the petitioner's premises in Santa Clara, California. Although the statement of work is dated subsequent to the filing date of the petition, the contract between the petitioner and the third party is dated prior to the date of the petition. In this matter, the AAO finds that the petitioner's obligations pursuant to the February 1, 2007 contract as further detailed by the statement of work is sufficient to demonstrate that the petitioner had work to be performed and thus a need for the services of particular employees. The AAO does not find, however, that the petitioner has offered sufficient evidence to establish that the proffered position is a specialty occupation.

The petitioner initially submitted a broad statement describing the duties of the occupation of a systems analyst, without the specifics necessary to establish that the proffered position was a specialty occupation. In response to the director's RFE, counsel provided a more detailed description of the duties of the position, but again did not provide the necessary information to demonstrate that the duties comprised the duties of a specialty occupation.

The AAO first considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. Regarding the occupation of computer systems analyst, the *Handbook* reports:

All organizations rely on computer and information technology to conduct business and operate efficiently. Computer systems analysts help organizations to use technology effectively and to incorporate rapidly changing technologies into their existing systems. The work of computer systems analysts evolves rapidly, reflecting new areas of specialization and changes in technology.

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems' resources to additional tasks.

*

*

*

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it 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.

*

*

*

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. . . . As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

One challenge created by expanding computer use is the need for different computer systems to communicate with each other. Systems analysts work to make the computer systems within an organization, or across organizations, compatible so that information can be shared. Many systems analysts are involved with these "networking" tasks, connecting all the computers internally, in an individual office, department, or establishment, or externally, as when setting up e-commerce networks to facilitate business among companies.

Upon review of the petitioner's description of the specific duties of the proffered position, the AAO finds that the petitioner has provided a description of duties that corresponds to the rudimentary tasks set out in the *Handbook's* discussion of the occupation of a systems analyst. The petitioner has not described tasks that elevate the proffered position to a systems analyst position that would normally require a baccalaureate or higher degree in a specific discipline. The AAO notes that the *Handbook* indicates: [t]raining requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree." The *Handbook* also states: "[r]elevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience;" and "[w]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree." The AAO has long determined, however, that employer preference is not synonymous with the "normally required" language of this criterion. In addition, based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the particular position. The *Handbook* recognizes: "[d]espite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation." The petitioner in this matter has failed to provide a definitive description of the duties the beneficiary would perform on the petitioner's project for Telephia. The description provided, although corresponding to some of the generally stated basic tasks of a systems analyst, does not ascribe specific tasks associated with the project that would require a baccalaureate or higher degree or its equivalent in a specific discipline as the normal minimum requirement for entry into position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: 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 petitioner in this matter has not submitted letters from similar organizations regarding their requirements, if any, for individuals employed in positions that are parallel to the proffered position. As the record does not include information that would establish a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations, the petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In the alternative, the petitioner may submit evidence under the second criterion to establish that the duties of the proffered position are more specialized and complex than those of a typical systems analyst. In this matter, the petitioner has not provided such evidence. The petitioner's description, again, does not provide the level of detail required to establish that the duties of the proffered position are so specialized and complex that only an individual with a bachelor's degree or higher in a particular discipline would be able to perform the duties. The petitioner has not described a position that is distinguishable as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The petitioner has not established that the proffered position is a specialty occupation pursuant to the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO observes that the petitioner, although established in 2004 and employing ten personnel, has not provided evidence that it requires a degree or its equivalent in a specific discipline as a requirement for similar work. As such, it is not possible to confirm that the petitioner has previously required a degree or its equivalent for this or a similar position. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, than 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. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. When assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. Again, the AAO observes that the petitioner's description of the duties of the proffered position as those duties relate to the petitioner's specific requirements and business needs is not sufficiently defined. For example, the petitioner's description of the duties of the proffered position does not describe specific elements that would demonstrate that the individual in the proffered

position would use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure plans are efficient and complete or would be responsible for both programming and systems analysis or would perform other specialized and complex duties. Without a meaningful list of duties related to the beneficiary's assigned project that detail specialized and complex aspects of the proffered position, the petitioner has not established that the individual in the proffered position is required to have knowledge associated with the attainment of a baccalaureate or higher degree in a specific discipline. It is not possible to conclude from the evidence in the record regarding the proffered position as it relates to the petitioner's business that the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established 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.