

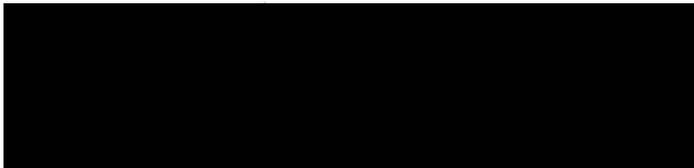
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: WAC 07 148 54352 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2008**

IN RE: Petitioner:
Beneficiary:



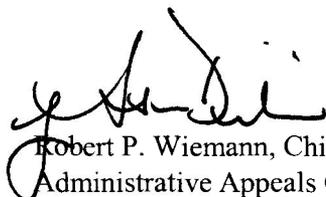
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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, 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 software designing, development and consulting services. It was established in 2004 and claims to employ three personnel. It seeks to employ the beneficiary as a programmer 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 19, 2007, the director denied the petition, determining that the petitioner had not established that it was an employer or an agent and had not established the proffered position as a specialty occupation. On appeal, the petitioner submits a letter 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 4, 2007 request for evidence (RFE); (3) the petitioner's August 21, 2007 response to the RFE; (4) the director's September 19, 2007 denial decision; and (5) the Form I-290B and the petitioner's letter and documents 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 programmer analyst. In an April 2, 2007 letter appended to the petition, the petitioner provided the following description of the beneficiary's duties as a programmer analyst:

She will plan, develop, test, and document computer programs, applying knowledge of programming techniques and computer systems. She will evaluate user requests for new and modified programs and find solutions to complex business requirements. She will also be required to design, install and test system integration. This position also requires her to develop and perform management of E-Commerce applications. She will also be required to develop and deliver high quality solutions to clients with regards to their complex business requirements as well as perform assigned technical tasks such as study, analyze, design, product installation, test and system integration. She will also be required to design and develop tools and methodologies to manage, analyze, design and implement technical solutions. In performing her duties [she] will be dividing 25% of her time in systems

analysis, 20% in systems design, 30% in developing programs, 15% in unit and systems testing and 10% in attending meetings, and customer interaction.

The petitioner noted that the beneficiary would be expected to work only in Naperville, Illinois. The petitioner provided a copy of a Form ETA 9035E, Labor Condition Application (LCA) showing the beneficiary's work location in Naperville, Illinois as a programmer analyst. The petitioner also submitted a copy of a March 1, 2007 agreement between the petitioner and the beneficiary (the beneficiary signed the agreement March 11, 2007) that indicated the beneficiary's start date would be "day one on the first project at the client site."

On June 4, 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 21, 2007, the petitioner stated that the beneficiary would be placed on the petitioner's in-house project – Employee Online Database Management System, that the position is a specialty occupation, and that the beneficiary was qualified for the specialty occupation. The petitioner provided the same March 1, 2007 agreement between the petitioner and the beneficiary which the beneficiary had signed March 11, 2007 and a copy of the project plans for the Employee Online Database Management System application. In an August 21, 2007 letter, which the petitioner described as an itinerary of the beneficiary's services, the petitioner indicated the Employee Online Database Management System is a web application that automates HR business transactions, workflow, and planning and that the beneficiary would begin work on this project on October 1, 2007, the duration would be for three years, and the "project will be executed as an in-house project on [the petitioner's] premises." The petitioner also provided copies of its job announcements for lead developer, ERP Consultant, Database and Business Intelligence Consultants, Quality Assurance and Control. Each occupation listed the skills needed for the position and an indication that all positions required a bachelor's degree in computer science or a related field.

On September 19, 2007, the director denied the petition. The director determined that the petitioner had not established that it is an employer or an agent, thus the petitioner had not established that it is qualified to file petitions for alien H-1B workers. The director also determined that the petitioner is in the business of placing workers at third party companies and would not be the beneficiary's ultimate employer. The director noted that the agreement entered into between the petitioner and the beneficiary indicated that the beneficiary's start date would be "day one on the first project at the client site." The director found that this statement confirmed that the beneficiary would work for a third party company at a client site and that as the petitioner's client had not provided a description of the beneficiary's actual duties, the petitioner had not established that the proffered position qualified as a specialty occupation.

On appeal, the petitioner provides a revised agreement between itself and the beneficiary dated March 19, 2007. The petitioner asserts that when it decided to use the beneficiary for its in-house project, it revised the agreement with the beneficiary to indicate her start date would be "day one in our in-house project." The petitioner also provides a copy of the project plan for the Employee Online Database Management System. The petitioner asserts that it is the beneficiary's employer, that it has offered the position of programmer analyst to the beneficiary, and that the beneficiary will work on the in-house project until its release date and then will continue to work for the petitioner while in H-1B classification to make sure the systems are devoid of glitches.

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 director's decision to the contrary. The AAO has reviewed the record and also finds that the petitioner has submitted evidence of an in-house project. The petitioner, however, has not submitted sufficient documentary evidence to establish that the beneficiary will work on the assigned project in a specialty occupation position.

The petitioner initially submitted a broad statement describing the duties of the occupation of a programmer analyst, without the specifics necessary to establish that the proffered position is a specialty occupation. The petitioner did not provide further information relating specific duties to the petitioner's in-house project in response to the director's RFE. In addition, the petitioner submitted the same employer-employee agreement that indicated that the beneficiary would start work at a client's site in response to the RFE. The record thus contained ambiguities regarding the beneficiary's actual work location and the beneficiary's actual assignment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO acknowledges the petitioner's submission of a revised employer-employee agreement and an explanation on appeal. However, evidence that appears after CIS points out an inconsistency in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven.

Even if considering that the beneficiary would work only in-house on the petitioner's Employee Online Database Management System project, the record does not include evidence establishing that the work would comprise the work of a specialty occupation.

The AAO first considers the criteria 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

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).

about the duties and educational requirements of particular occupations. Regarding the occupation of a programmer analyst, under the title *Computer Programmers*, the *Handbook* reports: "[i]n some organizations, workers known as *programmer-analysts* are responsible for both the systems analysis and programming."

Under the same title, the *Handbook* indicates:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. With the help of other computer specialists, they figure out which instructions to use to make computers do specific tasks. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools, for example—have redefined the role of a programmer and elevated much of the programming work done today.

The *Handbook* provides the following regarding the educational requirements for the occupation of a computer programmer:

A bachelor's degree commonly is required for computer programming jobs, although a two-year degree or certificate may be adequate for some positions. Employers favor applicants who already have relevant programming skills and experience. Skilled workers who keep up to date with the latest technology usually have good opportunities for advancement.

Education and training. Most programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs. 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, finance, or another area of business.

Regarding the occupation of a 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.

As referenced above, the petitioner in this matter provided a general and confusing statement of the beneficiary's proposed duties indicating that the beneficiary would "develop and deliver high quality solutions to clients with regards to their complex business requirements as well as perform assigned technical tasks such as study, analyze, design, product installation, test and system integration." The petitioner does not reference the beneficiary's specific duties in connection with its Employee Online Database Management System project. The description of duties provides an overview of the occupation of a programmer analyst but does not provide the necessary detail to enable an analysis of the beneficiary's actual daily duties. The petitioner has not described specific tasks relative to the beneficiary's assignment working on the petitioner's in-house project that would elevate the proffered position to a position that would normally require a baccalaureate or higher degree in a specific discipline.

In addition, 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." When discussing programmers, the *Handbook* reports: "[m]ost programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs." First, the AAO has long found that employer preference is not synonymous with the "normally required" language of this criterion. Second, based on the *Handbook's* statements, a baccalaureate or higher

degree or its equivalent in a specific discipline is not the normal minimum requirement for entry into the particular position. Third the petitioner has not provided sufficient information regarding the duties of the proffered position to establish whether the duties of the proffered position require an individual with a baccalaureate or higher degree in a specific discipline or whether the duties could be performed by an individual with an associate degree or training certificates in particular computer languages.

The petitioner in this matter has failed to provide a definitive description of the duties that the beneficiary would perform on its in-house project and has not detailed 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)(1).

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 programmer analyst. In this matter, the petitioner has not provided such evidence. The description provided, 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 acknowledges the advertisements submitted by the petitioner to show that it normally requires a bachelor's degree in a specific discipline to perform the duties of a programmer analyst. The advertisements, however, do not include an advertisement for a programmer analyst. In addition, the advertisements do not provide descriptions of the actual duties the incumbents would be required to perform, but rather list the skills in various computer languages or platforms that the petitioner would expect the successful applicant to have obtained. The AAO finds that it is not the skills of a particular individual that make a position a specialty occupation; it is the

duties of the position and whether the position incorporates the use of a theoretical and practical application of a body of highly specialized knowledge that is associated with the attainment of a bachelor's or higher degree in a specific specialty. Further, 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. The petitioner's description of the duties of the proffered position, for example, 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 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.