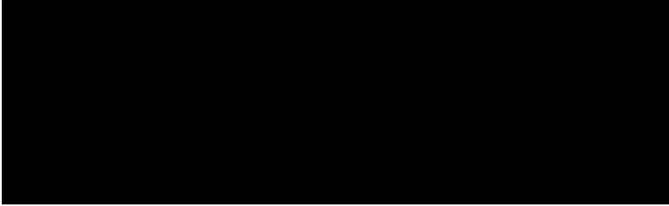


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U.S. Citizenship
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Services

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Dn

FILE: LIN 04 186 50900 Office: NEBRASKA SERVICE CENTER Date: **JUL 14 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 consulting company that seeks to employ the beneficiary as a systems analyst. 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 denied the petition because the petitioner did not establish it had a specialty occupation available for the beneficiary to fill at the time the petition was filed. On appeal, counsel submits a brief.

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 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 petitioner is seeking the beneficiary's services as a systems analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 10, 2004 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 duties that entail: designing software modules and integrated software systems to accommodate multiple business information functions and Internet data transactions; consulting with management to prepare a cost-effective design plan, after studying and analyzing the company's management information needs, their data port capacities, their electronic data processing requirements and their computer hardware specifications; preparing detailed specifications from which programs will be written; designing, coding, testing and debugging and documenting those programs; generating and supervising the continued generation of fundamental reports; analyzing user requirements and proposing alternative solutions; developing a thorough knowledge of existing electronic data processing operations, including data structures and usage; analyzing the design, software structure, administration of information systems and their adaptation to the specific requirements; analyzing operating systems, identifying bottlenecks, configuration and networking issues; studying requests for enhancements and new business functions and determining what new or adapted software and hardware would best fit the proposed software solutions; designing schematics of the proposed system and directing development teams to translate it into hardware, software, networking and operating system specifications; consulting with management regarding design of software modules; designing data models for technical reference and a process for functional reference; determining database level changes for enhancements of new programs; designing scripts to perform database changes, design of software modules, design of integrated software systems and development of prototypes; preparing designs for the creation of necessary graphical user interfaces; creating forms, queries, functions and menus; designing testing methodology for and implementing testing for individual software modules, systems, programs, reports, queries and filters; coding the required security constraints within the programs; writing scripts to load data for testing or for regular production use; testing and debugging the programs; creating high-level test data and completing the execution of all follow-up test plans which are required; ensuring proper analytical and design communications with management; and designing and implementing management information and administrative functions, including necessary management information systems. The petitioner stated that a qualified candidate would possess a bachelor's degree in a field related to computer science.

In the request for evidence, the director requested that the petitioner provide evidence related to its "contracts, agreements or work orders to verify the availability of H-1B level work at the location identified in the Labor Condition Application, [LCA] Form ETA 9035 at the time of filing of the petition." The record reflects that the petitioner did not provide this evidence. In his decision, the director found that, in the absence of this evidence, the petitioner did not establish that it had or will have a specialty occupation position available for the beneficiary in the location identified in the LCA. On appeal, counsel states that there is "ample proof of availability of H-1B work available for the beneficiary," and submits copies of several contracts and work orders.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that

clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The AAO will base its decision on evidence that was before the director.

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. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The *Handbook* states:

While there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. . . . Despite employers' preference for those with technical degrees, person with degrees in a variety of majors find employment as systems analysts.

As noted above, 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 *Handbook* clearly indicates that one can enter this field with less than a baccalaureate degree, and there is no requirement for a degree in a specific specialty.

In response to the director's request for evidence, the petitioner submitted a December 22, 2000 memorandum from the director of the Nebraska Service Center of the former Immigration and Naturalization Service, now CIS, providing guidance for adjudicating computer-related positions. It states that CIS would recognize most programmers and systems analysts as specialty occupations. It also states, however:

[T]hat examination for eligibility as a specialty occupation is not based on the job title, but is centered on reviewing the actual duties to be performed. A careful review of the duties to be performed should be the focus of attention when determining whether or not the position offered qualifies as a specialty occupation.

As discussed previously, the petitioner has not established where the beneficiary would be working, or in what capacity. The petitioner provided no evidence beyond the Service Center memorandum regarding parallel positions among similar organizations.

The AAO notes that CIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. The director referred to the petitioner's lack of response to the director's request for contracts, agreements or work orders to establish the availability of work in a specialty occupation. There is no evidence in the record regarding the business where the beneficiary would ultimately work. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) found that absent a contract with the actual employer stating the duties to be performed pursuant to the contract, CIS cannot determine that a position qualifies as a specialty occupation. The court found that a petitioner that is an employment contractor is merely a "token employer." The entity ultimately employing the alien or using the alien's services is the "more relevant employer." *Defensor v. Meissner, id.* In other words, the employment contractor's client is the "more relevant employment," whether the alien will be working within the employment contractor's operations on projects for the client or whether the alien will work at the client's place of business.

Thus, when a petitioner is an employment contractor, the petitioner 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 the entity ultimately employing the alien or using the alien's services. 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.¹ As the petitioner did not submit a contract or job description from the entity where the beneficiary will be working, CIS is unable to determine that the job duties to be performed will require a baccalaureate degree in a specialty, or that the position will qualify as a specialty occupation.

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.

The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, 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. The record contains no evidence of the petitioner’s previous hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(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, and combined with the evidence of record, the duties do not appear to be 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. The AAO notes, once again, that the petitioner has not established where the beneficiary would be working or what duties he would be performing. The petitioner has not related the listed duties to the business operations of the entity where the beneficiary will be working, and CIS cannot determine that a baccalaureate degree will be required to perform the duties. Counsel states that the beneficiary will perform complex tasks, requiring software design and analysis, and which require at least a bachelor’s degree in a field related to computer science. The *Handbook* reveals that the duties of the proffered position would be performed by a computer systems analyst, an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Therefore, for the reasons related in the preceding discussion, 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.