



U.S. Citizenship
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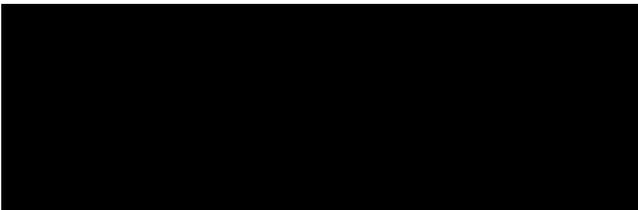
FILE: LIN 03 271 52888 Office: NEBRASKA SERVICE CENTER Date: **SEP 20 2005**

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

Robert P. Wiemann, Director
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 engaged in the business of providing computer software development and consulting services. 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 director denied the petition because the evidence of record does not establish that the job offered qualifies as a specialty occupation and that the petitioner will be the employer of the beneficiary. On appeal, counsel submits a brief and additional evidence.

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) counsel'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 full-time programmer analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail analyzing the communications, informational and programming requirements of clients; planning, developing and designing business programs and computer systems; designing, programming and implementing software application and packages customized to meet specific client needs; reviewing, repairing and modifying software programs to ensure technical accuracy and reliability of programs; training of clients on the use of software applications and providing trouble shooting and debugging support. The petitioner indicated that the proffered position requires a baccalaureate degree in computer science, electronics, or electrical engineering or the equivalent.

The director issued a request for additional evidence. The director requested recent contracts between the petitioner and its clients which will have need for the beneficiary's services. The director requested a list of contact names and telephone numbers. The director noted that the contracts should be specific as to the amount of time covered in the contract and contain a list of job duties. The director requested quarterly tax reports and an income statement. Additionally, the director requested the identity of the types of computer hardware and software that the beneficiary will be working with.

In response, the petitioner stated that it is a bona fide organization engaged in providing computer consulting services to major corporations in the United States. The petitioner indicated that it submitted copies of contracts between it and clients/vendors; a list of client names along with contact information; copies of invoices to clients/vendors; copies of payments received from clients; copies of quarterly tax reports; copies of contracts with sub-contractors and copies of invoices from sub-contractors.

The director noted that the petitioner submitted a subcontract showing the petitioner referenced as the "subcontractor" and is serving as a vendor to another independent consulting firm, Verinon Technology Solutions Limited, to supply services to a third party, identified by the work order as Walter Industries. The director noted that the work order submitted with the contract identifies the intended beneficiary to provide information technology consulting services to an end client identified as Walter Industries and the work site is that of Walter Industries and was dated December 17, 2003 subsequent to the initial petition that was filed September 19, 2003. The director noted that the I-129 and the certified labor condition application indicated that the work site of the beneficiary is listed as [REDACTED] Iowa. The director found that the petitioner does not have an independent contract to produce any tangible product or service to any client directly. The director determined that the petitioner's business is to provide temporary labor to a third party which is an unknown, unrelated entity that ultimately controls the key factors related to a proper employer-employee relationship. The director found that the petitioner has not established that it qualifies as an employer as contemplated by the regulations. The director found that the record did not establish that the petitioner had a specialty occupation position at the time of filing the present petition and that it cannot be concluded that the position qualifies as a specialty occupation.

On appeal, the petitioner states that it grossed more than \$440,000 in 2003 and currently employs 12 IT professionals. The petitioner contends that it has sufficient in-house and off-site business to employ the beneficiary. The petition states that "it is the direct employer and does have total control over its employees. It hires employees, puts them into in-house or off-site projects as it deems fit, and does have the right to evaluate and terminate employees." The petitioner explains that it offers services for Oracle application business development, business intelligence (BI), warehouse and distribution solutions, enterprise application

integration (EAI) and on-site/off-shore development. On appeal, the petitioner explains that it develops in-house computer and informational requirements. The petitioner asserts that it submitted a comprehensive list of the types of in-house projects in which their employees may be engaged. The petitioner explains that these projects are created to build a sophisticated system of tools that helps it in gaining a competitive edge and in developing the most economical and efficient systems and procedures to manage its own business. The petitioner contends that it always has consultants working on in-house projects. The petitioner states that it intends to place the beneficiary initially in the company head quarters and then when it decides to send the beneficiary to a client it will file a new Labor Condition Application (LCA) with the new location. The petitioner notes that many of the company's clients prefer that the work be done on a consulting basis with the employees available on-site. The petitioner explains that the contracts take the form of what is routinely referred to as a third-party contract. The petitioner states that the beneficiary would not always be working at its office. The petitioner states that it has an employer – employee relationship with the beneficiary and that it consultants “operat[e] under the direct supervision and control of the responsible manager.” Finally, counsel contends that CIS denied the petition without even sending a request for evidence.

The AAO notes that the petitioner indicated on the Form I-129 that it had a gross annual income of \$600,000 and on appeal indicated that had gross annual sales of \$441,777. The Form 1120 Federal Income Tax Return for the year 2003 indicated gross receipts or sales of \$441,777. 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 notes that the petitioner did not include working on in-house projects in the initial job description and added the job requirement of in-house projects on appeal. Although the petitioner stated that it submitted an extensive listing of in-house projects, the record does not support the statement. The record does not contain an extensive listing of in-house projects. 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)). Additionally, the petitioner indicated on the LCA that the place of employment was Oskaloosa, Iowa. In response to the director's request for evidence, the petitioner submitted a contract indicating that the beneficiary would be working at a client site for a period of six months with an option to extend. The contract was dated after the initial petition was submitted. The petitioner did not provide a new LCA for the new client job site. On appeal, the petitioner states that it intends to place the beneficiary initially in the company headquarters and then, when it decides to send the beneficiary to a client site; it will file a new LCA with the new location. The petitioner has not documented where the beneficiary will be working. 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*. The petitioner has not documented with an LCA filed prior to the filing date of the petition that the beneficiary will be working for an extended period outside of the Oskaloosa, Iowa SMSA, as indicated in some of the documents of record.

The director found that the petitioner had not established that it was the employer pursuant to the definition of employer at 8 C.F.R. § 214.2(h)(4)(ii)(2) in that it did not have an employee-employer relationship with respect to the proposed beneficiary as indicated by the fact that it could not hire, pay, fire, supervise, or otherwise control the work of any such employee. The petitioner submitted several contracts indicating that the alien would work on-site of the third party. The AAO notes that several contracts indicated that the third

party would have a great deal of control over the petitioner's consultants such as the Master Consulting Agreement between the petitioner and Silicon Alley Group which noted that the petitioner would not be able to remove the consultant without written consent from the third party. The task order between KADS Tech, Inc. and the petitioner indicated that the third party client will have the option of removing the petitioner's consultant if the consultant does not meet the expectations of the client. Therefore, as noted by the director, the record does not establish that the petitioner will be the employer of the beneficiary pursuant to the regulations.

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 first considers 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 *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)).

In determining whether a position qualifies as a specialty occupation, 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The petitioner stated that the industry standard for educational requirements among computer scientists and systems analysts is that the candidate possess at least a bachelor's degree in computer science or a related area. The *Handbook* discloses that the duties of the proffered position are performed by a programmer analyst. Like the beneficiary, who will design, program and implement software application and packages customized to meet specific client needs, the *Handbook* reports:

Systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems—for example, business, accounting, or financial systems, or scientific and engineering systems—that vary with the kind of organization. Some systems analysts also are known as *systems developers* or *systems architects*.

In some organizations, *programmer-analysts* design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate statement on computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more commonplace, these analysts increasingly work with databases, object-oriented programming languages, as well as client-server applications development and multimedia and Internet technology.

The petitioner fails to establish the first criterion because the *Handbook* states the following about training and education requirements:

While there is no universally accepted way to prepare for a job as a systems analyst, computer scientist, or database administrator, most employers place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

For systems analyst, programmer-analyst, and database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS).

Although many employers prefer to hire persons who have at least a bachelor's degree and relevant work experience with a variety of computer systems and technologies, it is not a requirement for entry into the field. The *Handbook* specifically notes that despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment in these computer occupations. The level of education and type of training that employers require depend on their needs. One factor affecting these needs is changes in technology. Employers often scramble to find workers capable of implementing "hot" new technologies. The petitioner has failed to describe the proffered position with sufficient detail to find that the position of programmer analyst rises to the level that requires a baccalaureate degree as a minimum requirement for entry into the profession. The petitioner submitted contracts that it has with contractors who would then place the beneficiary with a third party. The petitioner has not provided a detailed description of the duties from the entity ultimately using the alien's services. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the aliens require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients.

Although the record contains an agency service agreement between the petitioner and a contractor who places the beneficiary with the third party, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the third party. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the third party will qualify as a specialty occupation. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The record does not contain sufficient evidence demonstrating that a degree requirement is the industry standard for this position, or that the beneficiary's duties are so unique that they can only be performed by an individual with abilities beyond the industry standard. The petitioner has not demonstrated a bachelor's degree is required because the job duties are so complex that someone may not perform them with the minimum educational background gained through a bachelor's degree program.

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 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. Once again, the *Handbook* indicates that some employers prefer to hire persons who have at least a bachelor's degree, but that it is not a requirement for an entry-level position in the field. The petitioner has not related the listed duties to its business. The petitioner indicated on the Form I-129 and the certified labor condition application that the beneficiary would work at the petitioner's place of business. The petitioner's support letter indicated that the beneficiary would work off-site at a client location as a consultant. As discussed above, the petitioner contends that it employs consultants in its office working on in-house projects and contends that it submitted a comprehensive list of the types of in-house projects in which its employees maybe engaged. However, upon review of the record, no such list was submitted. 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)).

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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. The petitioner has not shown, in relation to its business, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Although some computer programmer analysts positions may be considered specialty occupations, the petitioner's description of the duties associated with this position did not demonstrate that the preponderance of the beneficiary's duties would be so complex that they would require a baccalaureate degree in a specialty.

As indicated earlier, the petitioner's unsubstantiated estimate of specialization and complexity is not evidence. The evidence of record describes duties that generally comport with those of a programmer analyst. However, in light of the fact that, as indicated by the *Handbook*, not all programmer analyst positions require a bachelor's degree, those duties are too generally and generically described to establish that they would be usually associated with the attainment of a bachelor's degree as opposed to a lower level of knowledge.

The petitioner contends that the director erred in stating that the evidence failed to demonstrate that the petitioner was proffering a credible or bona fide position. An H-1B alien is allowed a temporary stay in the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has failed to establish that it will employ the services of a programmer analyst, with a bachelor's degree or the equivalent in computer science, information systems, or a related specialty.

Again, the *Handbook* reveals that the duties of the proffered position would be performed by a programmer analyst, an occupation that in this case has not been shown to require a specific baccalaureate degree. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, 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 on the ground that the proffered position does not qualify as a specialty occupation.

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.