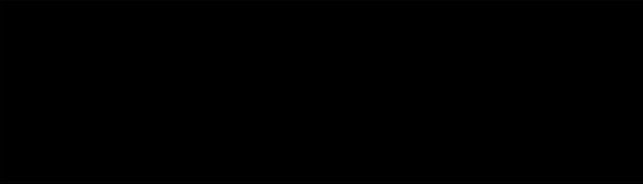


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U.S. Citizenship  
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*Dr*

FILE: LIN 04 211 53227 Office: NEBRASKA SERVICE CENTER Date: **AUG 18 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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the Nebraska Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a computer consulting and staffing firm, was established in 1998, and states on the I-129 that it has annual gross income of \$2 million, 25 employees. It provides contract employees for software development and implementation services to clients. It seeks to employ the beneficiary as a full-time programmer analyst 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE, dated February 10<sup>th</sup> 2005; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's brief and new and previously submitted evidence.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

In order to determine whether a position is a specialty occupation, CIS must examine the ultimate employment of the alien. 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 (5<sup>th</sup> 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 states that it is seeking the beneficiary’s services as a Programmer Analyst. Evidence of the beneficiary’s duties includes: the Form I-129, and petitioner’s response to the RFE. The petitioner indicated the duties of the proposed position and the percentage of time allocated to each function as follows:

- Analyze project requirements from the business requirement document, specifications, system limitations and software preference for clients; work closely with clients to formulate a solution. Analyze system resources, software resources and finalize the control flow of the software system. (30%);
- Design and document software modules. Based on the pre-documented project plan, divide the project architecture into modules and document the modular approach for every module showing flow charts and sequencing diagrams. Document the high-level system design, coding conventions and standards and version compatibility of modules. (25%);

- Coding of software system. Write software programs with appropriate software and language according to the coding conventions and standards provided in design documentation. Use database management systems as and when required by the system. Provide efficient reports [as] a user outputs to see if the system is performing to the level. (30%); and
- Test developed software modules as per the standards of business requirements documents and specifications. Perform the module (unit) testing as well as integrated system testing. Identify and report the bugs, if found, and debug the modules. (15%).

The director found that the proffered position could not be considered a specialty occupation because the petitioner failed to submit contracts between the petitioner and its clients. At the time of filing, the petitioner indicated that the beneficiary would be working at its offices in Utica, Michigan.

CIS interprets the statute and the regulations to require the petitioner to show that the entity ultimately employing the beneficiary requires a bachelor's degree for all employees in that position. The degree requirement should not originate with the employment agency that seeks to hire the beneficiary for employment with the agency's client. *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000).

The AAO notes that the record does not contain any agreement for services between the petitioner and any of its clients. The record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of any of the petitioner's clients and therefore, it cannot be determined that the work that the beneficiary will perform for the petitioner's clients will require the highly specialized knowledge of a 4-year degree or whether it will qualify as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the duties of the position, though generally described, are comparable to those of a computer programmer. The 2006-2007 *Handbook's* description of computer programmer, states:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmers* are individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending

on the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas whose solutions can only be approximated or that draw data from many existing systems may require more than a year of work. In most cases, several programmers work together as a team under a senior programmer's supervision.

...

Many programmers update, repair, modify, and expand existing programs. When making changes to a section of code, called a routine, programmers need to make other users aware of the task that the routine is to perform. ...

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct results. This process is called testing and debugging. ...

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications which are frequently purchased from vendors. *Systems programmers*, in contrast, write programs to maintain and control computer systems software, such as operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of the system handle the various jobs they have been given and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

Regarding training of computer programmers, the *Handbook* states:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

Employers primarily are interested in programming knowledge, and computer programmers can become certified in a programming language such as C++ or Java. College graduates who are interested in changing careers or developing an area of expertise also may return to a 2-year community college or technical school for additional training. In the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to place more emphasis on previous experience.

The *Handbook* indicates that a baccalaureate degree in a specialty is not normally required to enter the occupation. The *Handbook* indicates that some programmers may qualify for certain jobs with 2-year degrees or certificates. The 2-year degree is a widely used entry-level credential for prospective computer programmers. Because the petitioner has failed to provide a description of the duties from the client for whom the beneficiary will work, it cannot be determined whether a two-year or a four-year degree is required to perform the duties. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Factors considered by the AAO when determining this criterion include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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 notes that the petitioner provided no documentation to establish that firms similar to the petitioner offering jobs similar to the proffered position employ individuals with a degree in the specialty. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. See *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)). No other evidence of record establishes the first prong of the second criterion. For instance, the petitioner has not submitted evidence from individuals, firms, or professional associations in the industry attesting to educational requirements common to the industry's recruiting and hiring practices for the type of position here proffered. Therefore, the petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations, as required by the first alternative prong of C.F.R. § 214.2(h)(4)(ii)(A)(2).

Next, the petitioner has not satisfied the second alternative prong of C.F.R. § 214.2(h)(4)(ii)(A)(2) as the evidence of record does not establish that the position is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a related specialty.

As noted above, the petitioner has generally described duties normally performed by computer programmers. However, the duties of the proffered position, as listed, are so generic that they provide no meaningful description of the tasks that the beneficiary would perform for the petitioner or its clients on a daily basis. In its appeal brief, the petitioner asserts that the *Handbook* indicates that a degree is required by most employers for programmer analyst positions, and that similar to other programmer analysts, the beneficiary will plan, develop, test, and document computer systems applications software. As the evidence of record does not distinguish the proffered position as more complex than or unique from programmer analyst positions the *Handbook* indicates can be performed by persons with less than a bachelor's degree or equivalent in a specific specialty, the AAO finds the petitioner to have provided no evidence that would support a finding that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. See *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)). Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree.

The AAO next considers 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. To determine the petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner did not provide any such information. Accordingly, the petitioner failed to establish its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, the petitioner contends that the duties of the proffered position satisfy the criterion's requirements. The AAO does not agree.

As previously noted, the AAO requires information regarding the specific duties of a proffered position, as well as the nature of the petitioning entity's business operations, to make its determination regarding the position's degree requirements, if any. In the instant case, the record offers only a general description of the type of work to be performed, rather than a description of the actual work that the beneficiary would perform. As specified in the petitioner's duty descriptions copied earlier in this decision, the petitioner described the proposed duties in generalized terms that do not establish that they are any more specialized and complex than programmer analyst duties that the *Handbook* indicates are performed by

persons with less than a bachelor's degree in a specialty. As the petitioner has provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for 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.