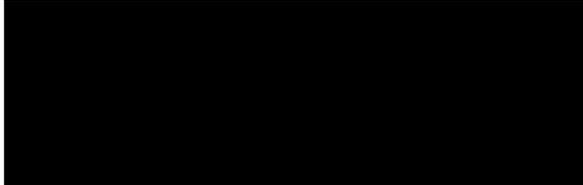


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*Dr*

FILE: WAC 04 187 50067 Office: CALIFORNIA SERVICE CENTER Date: **AUG 10 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:

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.

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 development and consulting business that seeks to employ the beneficiary as a software engineer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 he determined that the petitioner did not establish that it would have an employer-employee relationship with the beneficiary and because the proffered position is not a specialty occupation. On appeal, the petitioner submits a letter and additional evidence, including a BMC Software/Cybernet Software Systems Master Services Agreement, a letter from the vice president of engineering and customer support of BMC Software, and a list of the petitioner's present and former employees.

The AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

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 director found that a bona fide employer-employee relationship does not exist because the petitioner has not provided sufficient evidence that it will have clear control over the work of the beneficiary. The director found further that the petitioner failed to establish that it meets the regulatory requirements for an agent because its agreement with BMC Software does not cover the duration of the beneficiary's intended employment to October 1, 2007. On appeal, the petitioner states, in part, that it normally issues a standard "Offer of Employment" to its prospective employees. The petitioner states further: "The entire Project management and allocation of job duties is done by the petitioner and is in no way controlled by its customers." The petitioner also states: "[I]t may appear that BMC Software, Inc.'s commitment currently runs only upto [sic] October 31, 2006. However, going by our past experience, most of our Master Agreements have been successively extended by our customers."

The evidence of record, including the BMC Software/Cybernet Software Systems Master Services Agreement, quarterly wage reports, and federal income tax returns, establish that the petitioner will act as

the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for the beneficiary's employment itinerary specifying dates and locations of employment, and contracts between the petitioner and its clients. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request an employment itinerary specifying dates and locations of employment, and contracts between the petitioner and its clients. The itinerary submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

The AAO will now address the director's conclusion that the petitioner has not demonstrated that the proffered position is a specialty occupation.

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

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<sup>1</sup> 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).

- (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 software engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 18, 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: managing the technology-related designing and coding requirements; designing, developing, and implementing computer software applications and systems; and designing and developing Java-based applications. The petitioner indicated that the beneficiary is a qualified candidate for the job because he possesses a bachelor's degree in technology and relevant employment experience.

The director found that the proffered position was not a specialty occupation because the record contains no comprehensive description of the proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform such duties. The director also found a discrepancy in the amount of the petitioner's claimed gross annual income as opposed to the gross annual income that is reflected on the petitioner's 2003 income tax return. In addition, the director found that the petitioner's explanation unsatisfactory concerning the number of its previous H-1B petition submissions, as USCIS records reflect more than 100 petitions filed, 12 of which are still pending.

On appeal, the petitioner's CEO describes the proposed duties as designing and developing product software relating to the Marimba (now BMC Software, Inc.) products, and interacting with the petitioner's product development team based at Cybernet Software Systems Pvt. Ltd., India. He also states, in part, that the gross annual income that is reflected on the petition, \$4,700,000.00, is an unaudited number, and that the petitioner's 2003 federal income tax return reflects the post-audit amount of \$4,338,235. In regard to the number of the petitioner's H-1B petition submissions, the petitioner's CEO states that, as the petitioner filed most of its H-1B petitions during the technology boom years from 1999 to 2001, after which the bottom fell out of the market, there was no need to bring these beneficiaries to the United States. He states further that many other beneficiaries refused to take temporary employment in the United States due to uncertain market conditions, and that most of these H-1B approvals have long since expired and are no longer valid. As supporting evidence, the petitioner's CEO submits a list of nine pending petitions and a list of 41 H-1B approved petitions.

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 (DOL) *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. The AAO does not concur with the petitioner that the proffered position is a specialty occupation. Although a review of the Computer Software Engineers training requirements in the *Handbook*, 2006-2007 edition, finds that a computer software engineer may qualify as a specialty occupation, the evidence of record contains deficiencies and unexplained inconsistencies. In response to the director's request for letters of withdrawal of the approved beneficiaries no longer working for the petitioner, the petitioner submitted a list of 43 beneficiaries whose "petitions have either expired and are hence no longer valid or have been voluntarily withdrawn by us." The record, however, contains no evidence of the petitioner's claimed withdrawals. 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). Further, the list of approved petitions submitted by the petitioner on appeal reflects 41 beneficiaries, as opposed to the previously claimed 43. Also some of the beneficiary "status" information reflected on both lists contains conflicting information. For example, the list provided in the response to the RFE reflects the "status" [REDACTED] as "India," while the list provided on appeal reflects the "status" of [REDACTED] as "Trans to other US Co." The record contains no explanation for these inconsistencies. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner's description of the proposed duties and the letter from the petitioner's client naming the beneficiary to work at its site, are noted. The petitioner, however, does not provide a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, where the beneficiary will ultimately perform the proposed duties. Without this description, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. The petitioner bears the burden of establishing that the beneficiary will be coming to the United States to perform services in a specialty occupation. Absent a comprehensive description of the beneficiary's proposed duties as described above, the petitioner has not persuasively demonstrated that the proffered position is a specialty occupation, or that a specialty occupation exists for the beneficiary. 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). In view of the foregoing, the petitioner has not established that a baccalaureate or higher degree, or its equivalent, is required for the position described in the instant petition.

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position; and, as the record does not contain a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, as described above, the duties that comprise the proffered position do not establish the position as sufficiently unique or sufficiently complex to require a bachelor's degree level of knowledge in a specific specialty.

The petitioner, therefore, has 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 insufficient evidence of the petitioner's past hiring practices such as employment records and educational qualifications of former employees. Therefore, the petitioner has not met its burden of proof in this regard. 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)).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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, the duties do not appear 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. Absent a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, as described above, the petitioner does not establish specific work that the beneficiary would perform and how actual performance of that work would require the application of knowledge associated with the attainment of at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

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.