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**U.S. Citizenship  
and Immigration  
Services**

FEB 06 2004

FILE: LIN 02 204 57702 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

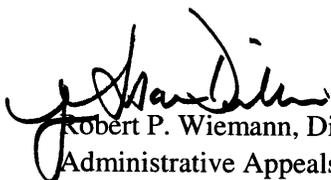
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

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, Director  
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 an Internet/software development business that seeks to employ the beneficiary as a senior programmer. 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, as the proffered position is that of a senior software developer rather than a senior programmer, as reflected on the petition and on the labor condition application, the petitioner had not complied with the conditions of the labor condition application. The petitioner further found that the petitioner had not demonstrated that the proffered position is a specialty occupation. On appeal, the petitioner submits a brief.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation . . . .

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.

Information on the petition and on the labor condition application indicates that the petitioner is seeking the beneficiary's services as a senior programmer. The petitioner's July 9, 2002 letter, however, indicates that the proffered position is that of a senior software developer. Evidence of the beneficiary's duties includes: the I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence, the proposed duties were initially described as "software programming." In response to the director's request for evidence, however, the petitioner described the proposed duties as: designing and developing innovative software applications; providing coherent and methodical documentation of design and code; and identifying potential risks and developing contingency plans.

The director found that the instant petition could not be approved, in part, because the petitioner does not have a labor condition application that covers the position of senior software developer.

On appeal, the petitioner's CTO states that the proffered position combines the duties of a programmer and software developer. He further states that, within the petitioner's business, the two terms are used interchangeably. As the petitioner's July 9, 2002 letter describes the proffered position as being primarily that of a software developer with duties that include designing and developing innovation software applications, however, the proffered position therefore appears to be primarily that of a software developer.

The petitioner has provided a certified labor condition application. Nevertheless, that application was certified for a "senior programmer" position. Regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since the record does not contain a certified labor condition application for a senior software developer position, it is concluded that the petition may not be approved.

The director also found that the proffered position does not qualify as a specialty occupation. However, as the AAO is dismissing the appeal because the petitioner has not complied with the conditions of the labor condition application, it will not discuss the specialty occupation issue.

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. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.