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U.S. Citizenship
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Services

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FILE: WAC 03 089 53722 Office: CALIFORNIA SERVICE CENTER Date: JUN 26 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the petition remanded for entry of a new decision.

The petitioner is a software design and development company. It seeks to employ the beneficiary as a software engineer and to classify him 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).

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.

As provided in 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.

To qualify to perform the services of a specialty occupation an alien must meet one of the following criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C):

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

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 RFE; (4) the notice of decision; and (5) Form I-290B, a letter from the petitioner, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on several grounds unrelated to whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services thereof. The director found that the evidence failed to establish that the petitioner would be the beneficiary's employer, or whether the companies contracting with the petitioner for the software consulting services of the beneficiary would be his employer. If the petitioner were the beneficiary's agent, rather than his employer, the director indicated that CIS could not verify, based on the documentation of record, the validity of the labor condition application (LCA) certified by the Department of Labor (DOL) with respect to the location, wage rate, and conditions of the beneficiary's employment. Noting that the petitioner had filed numerous H-1B petitions in recent years and that many of the approved beneficiaries no longer worked for the beneficiary, the director concluded that the petitioner apparently "has a history of petitioning for H-1B nonimmigrants but not actually employing them." Without detailed information from the petitioner clarifying this issue, the director stated, the bona fides of the proffered position in the instant petition could not be determined.

On appeal the petitioner has submitted additional evidence – including pay stubs, an earnings statement, and a payroll register – showing that the beneficiary was already employed by the beneficiary in 2003. The AAO has also reviewed previously submitted evidence – including a Contingent Workforce Alternate Supplier Agreement between the petitioner (supplier) and one of its customers (which expressly states that: "The employee assigned to Customer under this Agreement shall remain employee of Supplier.") and a quarterly wage and withholding report (form DE 6) from the first quarter of 2003 listing the beneficiary as an employee of the petitioner. Based on the foregoing documentation, the AAO determines that the beneficiary would be an employee of the petitioner under the H-1B classification requested in the instant petition. In accordance with this determination the AAO also determines that the LCA in the record, which has been certified by DOL, is valid with respect to the location, wage rate, and conditions of the beneficiary's employment. As for its other H-1B petitions in recent years, the petitioner acknowledges that it has filed over 100 such petitions since January 2000, but that, due to the delay in processing and approval by CIS, many beneficiaries changed their minds and took other opportunities in their home countries. As explained by the petitioner, most of the applications were filed to extend the

status of its current H-1B employees or of H-1B visa holders switching their employment from other companies to the petitioner. Only around 15 new H-1B employees have come from overseas since the beginning of 2000. The petitioner has submitted lists of 29 current H-1B employees, 25 former H-1B employees, and 18 individuals for whom H-1B petitions were filed who either chose not to join the company or did not pursue their applications.

Based on all the evidence of record, the AAO determines that the petitioner has overcome the grounds for denial discussed in the director's decision. That decision must therefore be withdrawn. Before the petition can be approved, however, it must be established that (1) the proffered position qualifies as a specialty occupation under one or more of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A) and (2) the beneficiary is qualified to perform the services of the specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C). Neither of these issues was addressed in the director's decision.

The petition will be remanded for the director to determine whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services thereof. The director may afford the petitioner the opportunity to provide pertinent evidence. The director shall then issue a new decision based on the evidence of record. As always, the burden of proof rests with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of January 30, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.