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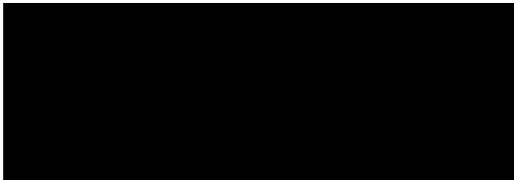
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FILE: EAC 03 259 56237 Office: VERMONT SERVICE CENTER Date: MAY 17 2005

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 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 acting director of the Vermont Service Center denied the nonimmigrant visa petition. 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-consulting firm, with four employees. It provides software development services to its clients and seeks to hire the beneficiary as a software engineer. The acting director denied the petition because she found that the record did not establish the beneficiary as qualified to perform the duties of 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; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's memorandum, and new and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 14.2(h)(4)(iii)(C), and requires the individual to:

- (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 beneficiary does not hold a degree from a U.S. educational institution, nor does the petitioner's employment require her to be licensed or certified to perform its duties. Therefore, at the time of filing, the petitioner submitted an evaluation of the beneficiary's educational background prepared by The Trustforte Corporation in New York to establish that she holds the equivalent of a U.S. baccalaureate degree in engineering and is qualified to perform the duties of its proffered position. In her denial, the acting director accepted the equivalency finding,

but did not find the record to establish that the beneficiary's degree in engineering was a degree required for employment as a software engineer.

On appeal, counsel contends that the director failed to consider the petitioner's response to her request for evidence, stating that this response "clearly stated how the beneficiary's education relates to the job duties." He also submits a statement from the beneficiary's former employer as evidence of her employment as a software engineer/developer between June 1, 1999 and October 31, 2000.

The AAO concurs with the director's finding that the beneficiary's engineering degree does not necessarily qualify as a degree related to duties of a software engineer. As stated in the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the resource on which the AAO routinely relies for information regarding occupations and requirements for employment, those seeking employment as "applications software engineers" generally have degrees in computer science or software engineering. Those who wish to work as "systems software engineers" have academic backgrounds in computer science or computer information systems. As the beneficiary's academic transcript identifies only two computer-related courses, it does not establish that her engineering education provided her with the skills required for employment as a software engineer. Therefore, the director correctly questioned whether the beneficiary's engineering degree was a degree in a field directly related to the proffered position, as required by the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C).

Counsel contends that the petitioner's response to the director's request for evidence establishes the nexus between the petitioner's degree and the duties of the proffered position. The AAO does not agree. It finds, instead, that the record fails to identify the actual duties of the petitioner's employment.

The petitioner is a company providing contracted software development services to a range of business clients. Petitioners that seek to employ H-1B beneficiaries for contract work with other businesses must submit the contracts and/or statements of work under which the services of these beneficiaries will be provided to allow for CIS review of their ultimate employment. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The petitioner has provided only a generic description of the types of duties to be performed by the beneficiary. It has submitted no contract/statement of work identifying the Rhode Island business where the beneficiary would work or the tasks to be performed by the beneficiary while under contract. As a result, the record lacks the required description of the beneficiary's ultimate employment.

Absent a contract/statement of work outlining the duties of the contracted position, the petitioner cannot establish that the beneficiary is qualified to perform those duties. It cannot prove that she has the appropriate foreign degree equivalency, as allowed for under the language at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), nor that she possesses a combination of education and experience that might constitute the equivalent of a degree in a field related to software engineering, as provided for under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, the AAO finds that the petitioner has failed to establish the beneficiary as qualified to perform the duties of a specialty occupation.

Beyond the decision of the acting director, the AAO also finds that the same lack of evidence that undermines the petitioner's ability to establish the beneficiary as qualified to perform the duties of a specialty occupation prevents it from establishing its proffered position as a specialty occupation. Although the acting director's

denial stated that the proffered position appeared to be a specialty occupation, the record does not support that conclusion.

To determine whether a particular job qualifies as a specialty occupation, 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 specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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.

As the record in this proceeding does not identify the Rhode Island client for which the beneficiary would provide services, nor provide a contract or statement of work identifying the duties the beneficiary would be required to perform for this client, there is no employment to analyze under the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; 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; the employer normally requires a degree or its equivalent for the position; or 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. Absent such an analysis, the petitioner cannot establish its employment as a specialty occupation. Accordingly, the AAO withdraws the director's finding regarding the nature of the proffered position.

On appeal, counsel expresses concerns about CIS' failure to request evidence of the beneficiary's past employment, when the absence of this evidence served as a basis for the acting director's denial of the instant petition. In response to counsel's concerns, the AAO has reviewed the acting director's reference to having no information regarding the beneficiary's employment and finds that counsel has misinterpreted the acting director's language. This reference indicated only that the record contained no employment-related information that would have required an evaluation of the beneficiary's qualifications under the requirements at 8 C.F.R. § 214.2(h)(iii)(C)(4). Had the petitioner submitted evidence regarding the petitioner's employment experience prior to adjudication, the director would have been required to consider whether the beneficiary had a combination of education, specialized training, and/or experience equivalent to a U.S. baccalaureate or higher degree in the specialty occupation, and whether she had received recognition of her expertise through progressively responsible positions directly related to the specialty. However, the AAO also notes that directors' requests for evidence need not cover all the issues on which they will base their denials. A director is required to issue a request for evidence only when initial evidence of eligibility is missing. In other cases, the issuance of a request for evidence is discretionary. 8 C.F.R. § 103.2(b)(8).

For the reasons already discussed, the AAO concurs with the director's finding that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of its proffered position. Therefore, it shall not disturb the director's denial of the petition.

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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.