



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 261 52031 Office: Vermont Service Center Date: **MAR - 7 2001**

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)

IN BEHALF OF PETITIONER: [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

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DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner, Examinations, on appeal. The appeal will be sustained.

The petitioner is a software development company. It seeks to employ the beneficiary as a programmer analyst for a period of 35 1/2 months. The director determined that the petitioner had not established that it is a viable on-going business and that a realistic specialty occupation job is available for the beneficiary.

On appeal, the petitioner argues that the offered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner also argues that it has complied with pertinent regulations regarding submission of evidence. The petitioner submits a balance sheet for the firm as of November 30, 1999 establishing that the firm is a viable and on-going business.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have 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.

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, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

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

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 holds a Bachelor of Engineering degree conferred by an Indian institution. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the offered position.

The term "specialty occupation" is 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.

The duties of the offered position are described as follows:

Beneficiary will research and evaluate user requests for new or modified programs in areas such as finance and human resources. He will be responsible for satisfying the client/user in terms of the specific deliverables in the project. He will create detailed design documents, including program specifications and test plans from higher level design and functional documents. He will also deliver tested, bug-free and documented programs.

The beneficiary will participate in the testing process and ensure the successful implementation and use of the system. He will take on any additional responsibilities as decided by the Team/Project Leader. He will hold consultations with the objective of clarifying program objectives and determine feasibility, cost effectiveness and capabilities. Beneficiary will make recommendations for modifications as required and carry out such modifications.

Beneficiary will keep himself updated with latest developments in the field by studying technical manuals, periodicals and reports. He will utilize this knowledge to develop programs to meet customized requirements. He will formulate plans outlining steps required to develop programs, using structured analysis and design and submit plans to management for approval and implementation.

Beneficiary will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and to describe logical operations involved by making use of his knowledge of computer science. He will prepare write-ups to describe installation and operating procedures and also test software programs.

The proffered position is that of a programmer/analyst. The Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at pages 111-112 finds that the usual requirement for employment as a computer scientist or engineer is a baccalaureate degree in computer science, information science, or management information systems. It is concluded that the petitioner has demonstrated that the offered position is a specialty occupation within the meaning of regulations.

The director has introduced the concept of "speculative employment" into this proceeding. There is no support for the exploration of this concept per se in either statute or regulations.

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 sustained that burden.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.