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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-00-208-52842 Office: Vermont Service Center

Date: SEP 25 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, Director
Administrative Appeals Office

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

The petitioner is a software development and computer consulting business with 45 employees and a stated gross annual income of \$7 million. It seeks to employ the beneficiary as a software engineer for a period of two years and eight months. The director determined that the petitioner had not established that the proffered position was a specialty occupation and that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, counsel submits a statement and additional documentation.

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.

The director denied the petition because the beneficiary does not hold a baccalaureate degree related to the proffered position. The director also determined that the proffered position was not a specialty occupation because the position was that of a computer consultant for business applications, rather than the more technical position of software engineer. On appeal, counsel acknowledges that the petitioner does not require a baccalaureate degree in computer science, programming, or management information systems for employment in the proffered position. Counsel contends that the petitioner does require the equivalent of such a degree and that all of its software engineers possess either a baccalaureate degree in the specialty area or its equivalent.

Counsel asserts that the beneficiary is qualified to perform services in the offered job because of his education and experience in the computer field.

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.

A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 169-171, finds that the usual requirement for employment as software engineer is a baccalaureate degree in computer science, software engineering, or computer information systems. The beneficiary holds a bachelor of arts degree in German from Oklahoma Baptist University in Shawnee, Oklahoma. The beneficiary's academic transcripts reflect that he took seven courses specifically related to computers and their applications at this institution. While such coursework is within the disciplines noted above, the beneficiary was not awarded any type of a degree or its equivalent for completing these courses. Accordingly, it is concluded that the petitioner has not demonstrated that the beneficiary is qualified to perform services in the specialty occupation based upon education alone.

In response to a subsequent Service request for an evaluation of the beneficiary's education and work experience, the petitioner's business manager submitted a statement and two employment letters. The petitioner's business manager declared that the petitioner did not require a bachelor's degree in any particular discipline,

"...[a]s long as a candidate can make a minimum showing as to his or her academic and intellectual prowess by possessing a bachelor's degree, we are more concerned with the candidate's ability to perform the tasks required in the position."

The petitioner also included two employment letters to support claims of employment listed on the beneficiary's resume. In the first of these letters, Ms. Carol Morrison, Computer Lab Supervisor at Oklahoma Baptist University, stated that the beneficiary had worked at this institution's computer lab assisting students, faculty, and staff from August 1995 to spring of 1999. Ms. Morrison indicated that the beneficiary had extensive knowledge of several software packages such as Microsoft Word, Excel, Access, Corel Wordperfect, Quattro Pro, Presentations, and others, as well as the ability to work with both the Windows PC based platforms and Macintosh based platforms. In the remaining letter, Mr. Michael DiCenzo, vice president of NetTek Technology Consultants, Inc., declared that the beneficiary began a project with this enterprise as a software consultant in March 2000. Mr. DiCenzo indicated that the beneficiary possessed skills in Windows NT, Windows 95, Windows 2000, Windows 3.1, Macintosh Operating Systems, and Microsoft's Office Suite.

While the beneficiary's resume contains a listing for his period of employment at Oklahoma Baptist University's computer lab, the resume does not include a corresponding listing for his claimed employment at NetTek Technology Consultants, Inc., in March 2000. The record does not contain any explanation as to why such employment was not listed on the beneficiary's resume if it had purportedly occurred prior to the filing of the initial I-129 petition on May 30, 2000. Additionally, it must be noted that the record does not contain any evidence that would tend to corroborate the remaining claims of employment listed on the beneficiary's resume; an IT consultant for Putnam Investments from August 1999 through the filing of the initial petition on the date noted above, and a programmer/intern for Aluminum of Canada in August 1998.

On appeal, counsel submits the requested evaluation of the beneficiary's education and work experience. The evaluator concludes that the beneficiary's combination of "...theoretical and practical coursework, in conjunction with his workplace experience, indicate to me that [the beneficiary] is qualified to do the work of an entry-level software engineer." While it is evident that the evaluator has utilized the beneficiary's academic transcripts to come to this conclusion, the evaluator has failed to state the source of information relied upon in reviewing the beneficiary's work experience. In addition, the evaluator merely concluded that the beneficiary was qualified to do the work of an entry-level software engineer, without providing any opinion as to the degree

equivalent he possessed by virtue of his education and employment experience.

This Service uses an independent evaluation of a person's education, training, and work experience in terms of degree equivalence as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. See Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988).

As noted above, the beneficiary holds a bachelor of arts degree in German from Oklahoma Baptist University. The record does not contain an evaluation expressly stating that the beneficiary's education, training and work experience are the equivalent of a bachelor's degree in any area related to computer science, software engineering, or computer information systems. Additionally, no evidence has been submitted to demonstrate that the evaluator is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Furthermore, the record contains insufficient evidence that the beneficiary's work experience was experience in a specialty occupation or that it is sufficient to overcome the beneficiary's lack of a degree in a specialized and related field of study. Accordingly, the evaluation is accorded little weight. Consequently, the petitioner has not established that the beneficiary possesses the equivalent of a degree in the specialty occupation or a related area.

The beneficiary is not a member of any organizations whose usual prerequisite for entry is a baccalaureate degree in a specialized area. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes him to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary is qualified to perform services in the proffered position.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter that accompanied the initial I-129 petition, the petitioner's business manager described the duties of the offered position as follows:

- * Systems analysis and design of the systems
- * Documenting technical specifications
- * Develop the system
- * Diagnostic evaluation testing of software requirements.

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 foregoing description is insufficient to establish that the proffered position is a specialty occupation. There is sufficient information to characterize the proffered position as essentially that of computer programmer for business purposes with some entry-level computer engineering. The Handbook, 2002-2003 edition, at pages 166-169, describes the job duties of a computer programmer as follows:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers

must follow to perform their functions. They also conceive, design, and test logical structures for solving problems by computer....

Computer programs tell the computer what to do, such as which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending upon the type of information to be accessed or generated.

The Handbook does not list any requirement of a baccalaureate or higher degree in a specialized area for employment as a computer programmer. While bachelor's degrees are commonly required, some programmers may qualify for certain jobs with 2-year degrees or certificates. Employers are primarily interested in programming knowledge; computer programmers are able to get certified in a language such as C++ or Java. Furthermore, the petitioner's business manager directly acknowledged that the proffered position does not require a bachelor's degree in any particular discipline. Thus, the petitioner has not shown that a bachelor's degree in a specific specialty or its equivalent is required for the position being offered to the beneficiary.

Counsel contends that the petitioner does require that all of its software engineers possess either a baccalaureate degree in the specialty area or its equivalent. However, the petitioner has failed to submit any evidence to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as computer science, for the offered position.

The petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions.

Finally, the petitioner has not established that the proffered position is of such complexity that a baccalaureate degree in a specific specialty, as distinguished from familiarity with computer programming or a less extensive education, is necessary for the successful completion of its duties. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the 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 not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.