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U.S. Citizenship and Immigration Services

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FILE: WAC 99 044 50639 Office: CALIFORNIA SERVICE CENTER Date: MAY 03 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was before the Administrative Appeals Office (AAO) on appeal. The AAO remanded the director's decision back to the service center for consideration of whether the petitioner had established that the proffered position was a specialty occupation and that the beneficiary was qualified to perform the duties of the position. The service center director again denied the petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a software consulting company that seeks to employ the beneficiary as a programmer/analyst. 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 the proffered position did not appear to be a bona fide position. Of concern to the director was the fact that the petitioner's operations were being run out of the apartment of its business manager, and that the petitioner had submitted numerous H-1B petitions for similar workers. On appeal, the petitioner submitted documentation as to the number of employees that it had hired as well as copies of contracts it had signed with various companies and software businesses to provide direct computer services or to serve as a subcontractor of computer services. Upon review of the appeal, the AAO determined that, prior to evaluating whether the petitioner had a bona fide position for the beneficiary, the director should examine the issues of whether the proffered position was a specialty occupation and whether the beneficiary was qualified to perform the duties of the proffered position. The AAO remanded the initial decision to the service center director. On April 19, 2002, the director requested further evidence from the petitioner with regard to these two issues. On July 15, 2002, counsel submitted eleven job vacancy announcements, copies of the beneficiary's educational credentials, a sample of the job description for the programmer analyst position purportedly used when recruiting such employees in 1998, and a new Labor Condition Application (LCA) to replace the previous one which had expired. In the new decision certified to the AAO, the director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D).

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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)(C), to qualify to perform services in a specialty occupation, an 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 record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's Notice of Intent to Deny, dated May 24, 1999; (3) the petitioner's response to the Notice of Intent to Deny, dated June 23, 1999; (4) the director's decision to deny the petition, dated February 24, 2000; (5) Form I-290B and supporting documentation, dated March 27, 2000; (6) the AAO decision to remand the decision back to the service center, dated December 11, 2001; (6) the director's request for further evidence, dated April 19, 2002; (7) the petitioner's response to the director's request for further evidence, dated July 15, 2002; and (8) the director's decision and notice of certification to the AAO dated May 16, 2003. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer/analyst. The petitioner indicated in its letter of support that it wished to hire the beneficiary because he possessed a bachelor of science degree from Calcutta University, diplomas from two other Indian associations, certificates in several professional courses in computing, and thirteen years of experience in the computer field. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in a computer-related field for the proffered position.

In his decision certified to the AAO, the director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by the occupation. In response to the director's notice of certification, counsel restates that the beneficiary is qualified for the position because he completed a bachelor of science degree from the University of Calcutta, has multiple certificates in computer work, other informal training, as well as over thirteen years of bachelor's level employment in the field of computer science. The petitioner also submitted further documentation on whether the proffered position was a specialty occupation.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a computer-related field. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(*1*) An evaluation from 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;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner submitted the following documents with regard to the petitioner's academic credentials:

The beneficiary's bachelor of science degree diploma obtained in a three-year program of studies from the University of Calcutta, India, dated 1982. The diploma indicates the beneficiary's major field of study was statistics.

A diploma in management from the All India Management Association, New Delhi, India, dated September 1987.

A document that states a diploma conferred by the Operations Research Society of India is recognized by the Ministry of Human Resources. This document does not identify the beneficiary as the recipient of a diploma. It does note specific elective coursework in operational research in marketing and in the theory of games and statistical decision theory. Although the petitioner and the evaluator of the beneficiary's education and work experience both mention a diploma from the Operations Research Society of India and evidence of coursework, despite a review of the file, no such documentary evidence was found in the record.

Five training certificates for specific computer programs or systems from the SAP Company. These certificates identify the beneficiary as having participated in specific computer training courses of primarily one-day duration.

The record also contains documentation of the beneficiary's secondary education, and of his coursework for a master's degree in a business administration program in Wellington, New Zealand.

The petitioner submitted an educational and work experience evaluation from Dr. [redacted] identified as founding chair, and presently a professor in the computer science department at Long Island University, Brooklyn, N.Y. In his evaluation, Dr. [redacted] determined that the beneficiary's three years of studies at the University of Calcutta in statistics were equivalent to three years of studies at an accredited U.S. educational institution. Dr. [redacted] further determined that the beneficiary's coursework with the Operational Research Society of India was the equivalent of a year of further academic studies toward a bachelor of science degree at an accredited U.S. educational institution. Dr. [redacted] then examined the beneficiary's work experience in India and New Zealand. Dr. [redacted] determined that the beneficiary's studies in India, and his thirteen years of specialized work experience in computers were the equivalent of a baccalaureate degree in computer science from an accredited U.S. educational institution.

This evaluation document is viewed as problematic. First, as correctly noted by the director, the record is devoid of any information that Dr. [redacted] has the authority to grant college credit for any foreign studies, as described in 8 C.F.R. § 214.2(H)(4)(iii)(D)(*1*). Second, Dr. [redacted] evaluation is based upon the beneficiary's education, training and work experience. It appears that Dr. [redacted] provided the evaluation as a consultant for a group named ICETS. If this group is a credentials evaluation service, its evaluators may not evaluate an alien's work experience or training; they can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

> *(i)* Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[1];
>
> *(ii)* Membership in a recognized foreign or United States association or society in the specialty occupation;

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[1] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The documentation submitted by the petitioner with regard to the beneficiary's academic credentials does not establish equivalence to a baccalaureate degree in computer science, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). While the beneficiary has three years of studies towards a baccalaureate degree in science, specifically in statistics, the Operations Research Society of India documentation is insufficient to establish any further academic coursework in a computer programming or analysis field. The document does not contain any information relating to the number of courses undertaken, the length of these courses, and their equivalency to a fourth year of academic studies in computer science. In addition, the training certificates were for courses primarily of one-day duration, and the petitioner did not submit any independent evidence to illustrate how these training certificates relate to the completion of a baccalaureate degree in a computer-related field. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO now turns to the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. The petitioner submitted five letters of recommendation from former employers. As described by each employer, the beneficiary's duties varied from an initial position as programmer in 1984, to an assistant consultant position in 1995, to a one year position as senior analyst/programmer with a New Zealand company in 1997. Most positions appear to be consultant positions entailing work with different clients on various computer programs or systems. The employers describe the beneficiary's duties generically; no specificity to the beneficiary's daily activities or his level of responsibility is provided. Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge. Furthermore, the employers do not indicate that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

Finally, there is insufficient evidence that the beneficiary has recognition of expertise. While Dr. [redacted] did comment on the beneficiary's work experiences, his evaluation of the beneficiary's work experiences is not viewed as sufficient to meet the regulatory criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation. The record contains a summary of the terms of employment indicating that the petitioner will pay the beneficiary's salary and provide an employee benefits package. Even though the petitioner asserts that it is the actual employer and that a contract between the petitioner and the beneficiary is not required, as with employment agencies as petitioners, 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 critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[1] To interpret the regulations any other way would lead to absurd results: if CIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *See id* at 388.

In this case, although the record contains signed agreements for software development services between the petitioner and numerous software companies and other businesses, there is no written contract between the petitioner and the beneficiary as to his job duties and terms of employment. In its original petition, the petitioner simply stated that the beneficiary would work in software development in the Freemont, California area, and that upon completion of this initial assignment, the beneficiary would either work at the petitioner's office at [redacted] or he would be assigned to another client. There is also mention of a Freemont, California office with no further substantiation of the actual address of such an office. In addition, there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform the proposed duties. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation. However, as the AAO is dismissing the appeal on another ground, it will not examine this issue further.

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 director's May 16, 2003 decision is affirmed. The petition is denied.

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *Supra* at 387.