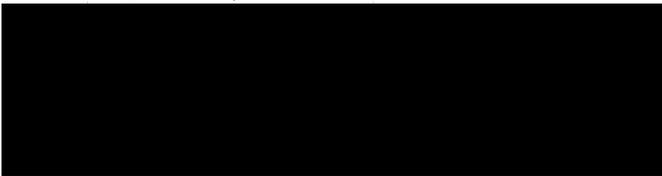




U.S. Citizenship
and Immigration
Services

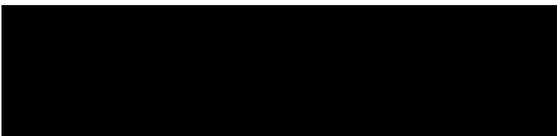
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FILE: LIN 02 092 54854 Office: NEBRASKA SERVICE CENTER

Date: SEP 01 2004

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)

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.

Mari Johnson

6 Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The service center director denied the nonimmigrant visa petition and 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 involved in computer software development and consulting. It seeks to employ the beneficiary as a computer programmer analyst, and endeavors 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).

The director denied the petition because the beneficiary did not qualify to perform the duties of a specialty occupation. The director also denied the petitioner's application for an extension of stay on the basis that the underlying petition upon which the application was based was denied, and because the beneficiary's previously awarded status had expired before the application for extension of stay was filed. On appeal, the petitioner submits a brief and additional evidence stating that the beneficiary qualifies to perform the duties of a specialty occupation, and that Citizenship and Immigration Services (CIS) should exercise its discretionary authority and excuse the late filing of the application for extension of stay because the delay in filing was due to extraordinary circumstances beyond the applicant's control.

The first issue to be discussed in this proceeding is whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) 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, 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and 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;
- (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 [CIS] 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 offered position is that of a programmer analyst, which the director found to be a specialty occupation. The duties of the position are essentially those of a computer software engineer. The U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that computer software engineers generally possess degrees in computer science, software engineering, computer information systems, or a closely related field.

The petitioner seeks to qualify the beneficiary by establishing that the beneficiary meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). In support of this assertion, the petitioner submitted an evaluation from Elegant Business Services, Inc. wherein the beneficiary's education and work experience was reviewed by a three person

committee of evaluators who determined that the beneficiary's prior education and work experience was equivalent to a bachelor of science degree in information technology from an accredited institution of higher learning in the United States. The evaluation was signed by M.A. Jafry, secretary of the committee. As noted in the above-cited regulation, credential evaluation services may only evaluate educational credentials, not prior work experience. An individual's prior work experience may only be evaluated, for the purpose of determining degree equivalence, by 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. 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The subject experiential evaluation was not provided by an evaluator with that authority. As such, the evaluation is of little evidentiary value. It should further be noted that the petitioner submitted an evaluation of the beneficiary's foreign education dated April 22, 1998, from [REDACTED] Vice President of Academic and Professional International Evaluations, Inc. [REDACTED] noted that the beneficiary's foreign education was equivalent to a Bachelor of Science degree in Civil Engineering from an accredited college or university in the United States. That degree, however, is not closely related to degrees in computer science, software engineering, computer information systems or a closely related field which would qualify an individual to perform the duties of a computer software engineer. The petitioner has also failed to establish that the beneficiary is qualified to perform the duties of the proffered position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

CIS may itself determine whether the beneficiary is qualified to perform the duties of the specialty occupation. That determination may be made pursuant to 8 C.F.R. § 214.2 (h)(4)(iii)(D)(5), which provides:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. . . . 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;
 - (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
 - (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 petitioner submitted, on appeal, substantial documentation of the beneficiary's prior work experience in the field for which he is seeking H-1B qualification. The documentation of record, however, does not meet all regulatory requirements to permit the AAO to determine that the beneficiary is qualified to perform the duties of a specialty occupation. The record does not establish that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, or that the alien has recognition of expertise in the specialty as determined by designated regulatory criteria. The AAO cannot, therefore, determine that the beneficiary is qualified to perform the duties of the specialty occupation.

It should be further noted that the director's denial of the beneficiary's application for extension of stay is not subject to appeal. 8 C.F.R. § 214.1(c)(5). The beneficiary's only recourse to an adverse ruling in this regard is to file with the director a motion to reopen or reconsider.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.