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U.S. Citizenship
and Immigration
Services

D2

FILE: EAC 03 175 52591 Office: VERMONT SERVICE CENTER Date: DEC 15 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 director of the Vermont Service Center 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 a corporation providing software and consulting services, with more than 30 employees. It seeks to employ the beneficiary as a programmer/analyst 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 he found 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) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The only issue before the AAO is whether the beneficiary is qualified to perform the duties of the proffered position. In determining whether an alien is qualified to perform the duties of a specialty occupation, Citizenship and Immigration Services (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. § 214.2(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 possess a U.S. baccalaureate degree required by the specialty occupation. He does, however, hold a foreign degree that the petitioner contends is the equivalent of such a degree. To establish this equivalency, the petitioner has submitted a copy of the beneficiary's degree in mechanical engineering from Aligarh Muslim University in Aligarh, India, signed by the university's vice chancellor, as well as a transcript of

the course work completed toward that degree; and an evaluation of these materials prepared by Foreign Credential Evaluations, Inc.(FCE) in Roswell, Georgia. The FCE evaluation finds the beneficiary's mechanical engineering degree to be the equivalent of the same degree awarded by a regionally accredited U.S. university.

The director concluded that while this evidence establishes that the beneficiary holds the equivalent of a U.S. degree in mechanical engineering, it does not prove that he is qualified to perform the duties of the proffered position of computer programmer/analyst. As he also found the record to contain no evidence to establish that the beneficiary's work experience, when combined with his education, would provide him with the equivalent of a baccalaureate degree directly related to the proffered position, the director denied the petition.

On appeal, counsel contends that that a degree in mechanical engineering is a degree that is directly related to the work of a programmer analyst and that CIS has previously approved programmer/analyst petitions filed on behalf of individuals with engineering degrees. As proof, he points to the copies of H-1B approval notices, degree certificates and academic evaluations provided by the petitioner in response to the director's request for evidence.

While the AAO finds the record to contain the materials referenced by counsel, it does not find such evidence to establish that CIS has previously found mechanical engineering degrees to be directly related to the work of computer programmer/analysts or to provide a basis for approving the instant petition. The materials submitted by counsel do not indicate that the individuals approved for H-1B status were to be employed as programmer/analysts or that the positions for which they were hired imposed the same duties as those described in connection with the instant petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaiqbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.), *aff'd*, 248, F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, counsel also contends that the petitioner has provided not only a detailed description of the proffered position's duties, but an explanation of the direct relationship between the specific courses taken by the beneficiary and the duties of the proffered position, and why a degree in mechanical engineering prepares an individual for employment as a programmer/analyst. Counsel also notes his own response to the director's request for evidence, which, he asserts, further clarified the direct connection between the beneficiary's education and the proffered position.

Again, the AAO notes that the record contains the explanations and statements referenced by counsel. However, these explanations and statements, in the absence of independent documentation, do not constitute evidence for the purposes of these proceedings. Although the petitioner has indicated that it finds the

academic training of mechanical engineers to prepare individuals for employment as programmer/analysts, the record contains no expert opinion or other evaluation to support this opinion. Simply going on record without supporting documentation is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's statements regarding the programming skills and knowledge provided by a degree in mechanical engineering also fail to establish it as directly related to the employment of a computer programmer/analyst. As already noted, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Having reviewed the evidence of record, the AAO finds the duties of the proffered position of programmer/analyst, based on the petitioner's description of those duties, to be closely aligned to those performed by computer software engineers, discussed at page 100 of the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The *Handbook*, the resource on which CIS relies for information concerning occupations and their educational requirements, indicates that those who work as computer software engineers generally have degrees with concentrations in computer science, including software engineering or computer information systems. The AAO notes that the FCE evaluation of the beneficiary's educational background, which finds him to hold the equivalent of a U.S. degree in mechanical engineering, does not indicate that any concentration in the area of computer sciences. Nor has it found such a concentration in its own review of the beneficiary's transcripts. Therefore, while the beneficiary may hold a foreign degree that is the equivalent of a U.S. degree, it is not the equivalent of a degree required by the proffered position. Accordingly, it cannot establish him as qualified to perform the duties of a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C).

Although the petitioner has submitted no other evidence regarding the beneficiary's qualifications to perform the duties of a specialty occupation, the AAO turns to the record before it to determine whether the beneficiary's previous employment, when combined with his education, might provide him with a degree equivalency under the fourth and final criterion at 8 C.F. R. § 214.2(h)(4)(iii)(C) – has the 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.

For the purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), equivalence to a U.S. baccalaureate or higher degree shall mean the 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 requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D):

- (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 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.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. The record must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, that this experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation and that the beneficiary's expertise in the specialty has been recognized, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The AAO finds the record to contain no evidence, beyond that related to the beneficiary's engineering degree, that responds to the requirements just noted. On appeal, counsel acknowledges that the petitioner has not submitted evidence regarding the beneficiary's previous employment as an information technology engineer and software engineer. He contends that the petitioner need not provide such documentation as it has established the beneficiary's qualifications based on his degree in mechanical engineering. Counsel is correct that a petitioner need satisfy only one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C) to establish a beneficiary's qualifications to perform the duties of a specialty occupation. However, as the record does not establish the beneficiary holds the appropriate degree for employment as a programmer/analyst, the petitioner's failure to submit evidence of the beneficiary's prior employment has precluded the AAO from determining whether that employment, when combined with his education, would provide him with the equivalent of a U.S. baccalaureate degree in computer sciences. Accordingly, the petitioner has failed to

establish the beneficiary's qualifications to perform the duties of the proffered position under the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C).

For reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the director's decision, the AAO finds the record fails to establish the proffered position as a specialty occupation. It notes that the petitioner, in its May 19, 2003 letter of support, indicated that the beneficiary would be assigned to work for one of its clients, the Parametrics Corporation. While the petitioner generally described the duties that the beneficiary would perform for Parametrics, the record offers no independent evidence from Parametrics of the duties to be performed at the client site. Without specification of the duties to be performed by the beneficiary, there is no proof of the nature of his ultimate employment by Parametrics. Accordingly, the duties listed by the petitioner cannot establish the proffered position as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In *Defensor v. Meissner*, the court found that the degree requirement should not originate with the employment agency that brought the prospective workers to the United States, but with the entity ultimately employing such workers.

As the record does not establish that the petitioner would employ the beneficiary in a specialty occupation, the petitioner has failed to prove that the beneficiary was coming to the United States to perform services in a specialty occupation. An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). For this reason as well, the petition must be denied.

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 met that burden.

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