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FILE: WAC 03 266 50652 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a producer and developer of computer software products. It seeks to employ the beneficiary as a software quality assurance engineer and to amend her classification 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 on the grounds that the record failed to establish (1) that the company with which the petitioner contracted to provide software engineering services was still in existence and (2) that the beneficiary would actually be working in the geographical location stated on the petitioner's labor condition application (LCA).

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) 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.

As provided in 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's two requests for evidence (RFEs); (3) the petitioner's responses to the RFEs; (4) the notice of

decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a company that produces, markets, and provides consulting services relating to Java and C++ development libraries, utilities, and other software products which serve as tools for simplifying and expanding the existing Java, EJB, CORBA, and XML technologies used for web-enabled businesses and scientific research applications. The company was established in 2002 and had two employees at the time the instant petition was filed. The petitioner originally hired the beneficiary as a software engineer in April 2003 and her H-1B classification was approved in June 2003, valid until May 15, 2005. The instant petition was filed in September 2003 because of a material change in the beneficiary's job duties, which the petitioner described as "work[ing] with internal/external customers to manage the whole life cycle of business solutions" as well as "creat[ing] and maintain[ing] project documentation including technical specs, site maps, flow charts, project schedules, and content collection checklists" and testing the system(s). In response to the initial RFE the petitioner listed the specific duties of the position – which he termed a software quality assurance engineer – and the estimated percentage of the beneficiary's time required by each duty as follows:

- Performing integration testing with other system components – 30%.
- Participating in the day-to-day bug fixing activity and performing the system compilations – 20%.
- Developing interface specification for new features – 10%.
- Writing test plans for the product – 10%.
- Designing, executing, and maintaining manual and automated test – 10%.
- Developing test cases based on functional specifications and design documents – 10%.
- Participating in the product development cycle – 5%.
- Maintaining defect-tracking and test case databases for multiple projects – 5%.

According to the petitioner the position requires an individual with a degree in computer science or engineering (computer/electronics or a related field) and two years of relevant experience. The petitioner asserts that the beneficiary is qualified to perform the job by virtue of her bachelor of engineering degree in electronics engineering from Bangalore University in India in July 1994 and subsequent work experience as a software engineer and developer in India and the United States from 1997 to 2003.

In his decision, issued on March 1, 2004, the director determined that the duties of the proffered position were those of a systems engineer requiring the theoretical and practical application of a body of highly specialized knowledge. After noting that the petitioner contracted with client companies to provide computer services, however, the director cited public records indicating that the client company – for which the beneficiary was to provide systems engineering services – had been "merged out" and "dissolved." Without a valid service contract between the petitioner and the client, the director concluded, the record did not establish that there would be a systems and software engineering position, and thus a specialty occupation, for the beneficiary to fill. The director also determined that the petitioner's labor condition application (LCA) was defective because the record did not support the wage and work location conditions indicated therein. The LCA listed the work locations as San Jose and Sunnyvale, California (the petitioner's main office), the director noted, but not Foster City, California, where the client company was situated. In the director's view, the record failed to show that the contract

work would be performed at the locations indicated in the LCA. Moreover, without a valid service contract with the client company CIS could not determine whether the petitioner met the wage conditions of the LCA. Because the record failed to demonstrate the petitioner's compliance with the wage and work location conditions listed in the LCA, the director concluded that the petitioner had failed to establish the beneficiary's eligibility for H-1B classification.

On appeal counsel has submitted a brief and additional documentation that overcome the bases for denial discussed in the director's decision. The record shows that the client entity – Applied Biosystems Group (ABG) – was an independent company before entering into a 50/50 joint venture with another company in 2001 and becoming an operating group of Applera Corporation (which is the recapitalized successor of PE Corporation). Though it gave up its status as a separate legal entity, ABG maintains its own stock, which is listed on the New York Stock Exchange, and has its own operating management. ABG currently has two offices in Massachusetts and two offices in California, which are located in Foster City and San Jose. A letter from ABG confirms that it has contracted with the petitioner for the beneficiary's services at its San Jose office. Thus, the client entity is still in existence and has a contractual relationship with the petitioner for software engineering services to be provided by the beneficiary at the San Jose office. The prevailing wage and work location on the certified LCA is San Jose. Accordingly, the LCA is valid for the petition.

The record indicates that West Valley Staffing Group (West Valley) is a firm utilized by ABG for the recruitment, placement, and on-site service and management of its contingent workforce, and that ABG contracted with the petitioner through West Valley for the software engineering services of the beneficiary. ABG pays the petitioner for the beneficiary's services, and the petitioner is responsible for the beneficiary's work performance. Though ABG informs the beneficiary of the general requirements of the work assignment, the beneficiary remains an employee of and is paid by the petitioner. Thus, the petitioner (not West Valley or ABG) is the beneficiary's employer. Based on the foregoing analysis, the AAO determines that the petitioner has overcome the grounds for denying the petition.

The AAO concurs with the director's finding that the proffered position of computer software engineer is a specialty occupation in this proceeding.

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

- (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 earned a bachelor of engineering degree in electronics engineering from Bangalore University in India in July 1994 and, as previously noted, was previously granted H-1B classification in June 2003 for employment with the petitioner as a computer software engineer. Based on the transcripts in the record the AAO determines that the beneficiary's degree is equivalent to a U.S. baccalaureate degree in electronics engineering, that the degree is in a field related to the software engineering position at issue in this petition, and that the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) to perform the services of the specialty occupation.

Thus, the record establishes that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the services of that occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will sustain the appeal and approve the petition.

**ORDER:** The appeal is sustained. The petition is approved.