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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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JUN 15 2005

FILE: LIN 03 121 50404 Office: NEBRASKA SERVICE CENTER Date:

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:

SELF - REPRESENTED

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a software development and IT consulting company that seeks to employ the beneficiary as a programmer analyst. The petitioner 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 finding that the petitioner did not qualify as an employer under applicable regulation, and that the petitioner failed to establish that it had a programmer analyst position available for the beneficiary at the time of the filing of the Form I-129 petition. On appeal, the petitioner submits a brief stating that: the petitioner is the actual employer of the beneficiary; a specialty occupation was available for the beneficiary at the time the petition was filed; and the petition should be approved.

The petitioner submitted, on appeal, a contract between it (as sub-contractor) and [REDACTED] (contractor) whereby the petitioner would provide the services of a computer programmer to work on a contract with the [REDACTED]. From the record it is clear that the petitioner will be the actual employer of the beneficiary, not merely an agent who provides placement of employees for clients seeking manpower. The record also establishes that the petitioner did, in fact, have work available for the beneficiary at the time of the filing of the petition. The purchase order for the services to be provided is dated February 28, 2003, with the petition subsequently being filed on March 5, 2003.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The petitioner satisfies the requirements of the above cited regulation. It is a software development and IT consulting company that provides: integrated solutions to computer/operations systems; manpower consulting and technical services; and software development/product development to various clients. It will provide employment for the petitioner on a project with [REDACTED]. The contract clearly indicates that the petitioner will exercise independent skill and judgment in the performance of its duties with the client company and that the client does not have the right to interfere. The petitioner will maintain an employer – employee relationship with the beneficiary with the authority to hire, fire and otherwise control his work. The petitioner has an Internal Revenue Service Tax identification number. The director's findings to the contrary are accordingly withdrawn.

The second issue to be considered is whether the proffered position qualifies as 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)(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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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.

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 are 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) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request;

(4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties includes the I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would: design, develop, test and implement computer programs on behalf of the petitioner's clients; gather information from users, define work issues, and design systems of computer programs and procedures to resolve problems; develop complete specifications to enable computer programmers to prepare required programs; analyze subject matter operations to be automated, specify the number and type of records, files and documents to be used and the outputs to be produced; prepare work diagrams and data flow charts; coordinate tests of the system and participate in trial runs of new and revised systems; and recommend computer equipment changes to obtain more effective operations. The petitioner requires a minimum of a bachelor's degree in computers, engineering, science or some closely related field for entry into the proffered position.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those provided by computer applications software engineers in that the duties of the position involve the development of custom computer programs and applications. The duties are highly sophisticated. The *Handbook* notes that most employers prefer to hire persons for these positions who have at least a bachelor's degree and broad knowledge and experience with computer systems and technologies. Usual degree requirements are in computer science or software engineering. The petitioner has, therefore, established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree is normally the minimum requirement for entry into the offered position. Accordingly, the position qualifies as a specialty occupation.

The final issue to be considered is whether the beneficiary qualifies to perform the duties of a specialty occupation. The record contains an evaluation from the Foundation for International Services, Inc. (FIS), a credentials evaluation service that equates the beneficiary's foreign education to a United States degree in Electronics and Communication Engineering. FIS further stated that the beneficiary holds the equivalent of an undergraduate minor in Computer Science based upon his education and work experience. The record does not establish, however, that the credentials evaluator is authorized to perform an evaluation of the beneficiary's past work experience for educational equivalence purposes under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The director did not determine whether the beneficiary was qualified to perform the duties of a specialty occupation as the petition was denied on another ground. As such, this matter shall be remanded to the director to determine this issue. The director may request any additional evidence he deems necessary in rendering his decision.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director to enter a new decision commensurate with the directives of this opinion. The director shall certify the matter to the AAO should his determination be adverse to the petitioner.