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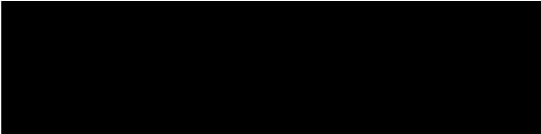


FILE: LIN 03 220 51824 Office: NEBRASKA SERVICE CENTER Date:

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:



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 The director's decision will be withdrawn.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 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, counsel 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.

In response to the director's request for evidence, the petitioner submitted a contract between it (as contractor) and the Midcom Corporation (broker) whereby the petitioner would provide the services of a computer programmer to work on a contract at Abbot Laboratories. From the record it is clear that the petitioner will be the actual employer of the beneficiary and will pay a brokerage (referral) fee to Midcom. 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 July 14, 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 and will actually be the employer of the beneficiary, as opposed to an agent that provides placement for employers seeking manpower. The petitioner is a software consulting company that provides specialized computer systems integration and development services to commercial organizations. It provides information technology to businesses and adapts existing computer technology to fit each company's unique requirements. The petitioner's contractor agreement states that the petitioner will use its independent skill and judgment, and the manner and means that appear best suitable to it in performing the work to be provided under the contract. The petitioner will provide employment for the petitioner on a project at Abbot Laboratories. 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: analyze software requirements to determine feasibility of design with time and cost constraints; consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and the operational and performance requirements of the overall system; formulate and design software systems using scientific analysis and mathematical models to predict and measure outcome and consequences of design; develop and direct software systems testing procedures, programming and documentation; consult with customers concerning maintenance of the software system; and coordinate installation of the software system. The petitioner requires a minimum of a bachelor's degree in computer 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 determined is whether the beneficiary is qualified to perform the duties of a specialty occupation. The record contains an evaluation from Multinational Education and Information Services, Inc. (MEI), a credentials evaluation service, that equates the beneficiary's foreign education to a three-year program of academic study in mathematics, which is transferable to an accredited university in the United States. MEI further stated that the beneficiary holds the equivalent of a bachelor's degree in Mathematics and Computer Science from an accredited university in the United States 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.