

identifying information deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: WAC 04 073 53465 Office: CALIFORNIA SERVICE CENTER Date: OCT 26 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: Self-represented

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 The director's decision will be withdrawn and the petition remanded for entry of a new decision.

The petitioner is an information technology company. It seeks to employ the beneficiary as a programmer/analyst and 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 on the grounds that the record failed to establish that the petitioner is the beneficiary's employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii), or the beneficiary's agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), or that the petitioner is in compliance with the terms of the labor condition application (LCA) filed with the Department of Labor.

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.

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

- (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 record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In its initial documentation, including Form I-129 and an accompanying letter, the petitioner stated that it is an information technology (IT) company, in business since 1993 (originally as a computer hardware reseller), with 25 employees and gross annual income of approximately \$1.93 million. The company provides technical assistance in implementing information systems, the petitioner explained, servicing clients with needs in the areas of contract programming, systems integration, and IT assessments. The petitioner indicated that it wished to hire the beneficiary as programmer/analyst and would be responsible for paying, hiring, supervising and controlling the beneficiary from its home office in San Jose. The duties of the proffered position were described in the petitioner's letter as:

. . . analyzing and evaluating the following: existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data. The Programmer/Analyst will prepare charts and diagrams to assist in problem analysis and submit recommendations for solutions. [H]e will prepare program specifications and diagrams and develop coding logic flowcharts. Furthermore, [h]e will be responsible for encoding, testing, debugging and installing operating programs and procedures in conjunction with user development. [The beneficiary's] daily tasks will include: systems analysis – 50%; prepar[ing] diagrams and charts – 15%; program[ming] – 15%; test[ing] and cod[ing] – 10%, and install[ation] – 10%.

The minimum educational requirement, the petitioner stated, is a bachelor's degree or the equivalent in a job-related field. The beneficiary is qualified for the position, the petitioner indicated, by virtue of his master of science degree, with a major in computer science, from Oregon State University in March 2003, in addition to the bachelor's and master's degrees in physics he previously earned in 1997 and 1999 from the Indian Institute of Technology at Kharagpur.

In the RFE the director requested, among other things, evidence clarifying whether the beneficiary would be working at the petitioner's work site or, if the beneficiary would be providing consulting services to client companies at their work sites, copies of the contractual agreements between the petitioner and those companies. In response to the RFE the petitioner stated that the beneficiary would be working in-house on a product identified as the MPEG-4 Streaming Server application (mStreaming). The petitioner described the product as "the first open comprehensive multimedia content presentation standard" that "will support many multimedia industries." Key features of the product were listed as follows:

- Support open standards like RTSP, RTP/RTCP & IETF recommendation rfc3036 for IP payload for MPEG-4.
- Able to stream on UDP or HTTP tunneled IP packets (for viewers behind firewall).
- Unicast streaming for video on demand & multicast streaming for broadcasting.
- SNMP based remote monitoring & control of streaming servers, located in different geographical locations.
- Can stream to MPEG-4 compliant TVs for different vendors.
- Highly scalable and less than 2% error resiliency.
- Supports LAN, WAN & extranet streaming.
- Supports for linux 7.0, Windows XP, Solaris & MacOS-X.

The petitioner indicated that the project would last until the end of the requested H-1B validity period. The petitioner also submitted additional documentation including quarterly wage statements, an organizational chart, its articles of incorporation, a website profile of the company, federal income tax returns, and a list of the company's 21 other H-1B employees with their job titles, annual salaries, educational degrees, and petition receipt numbers.

The director found that the petitioner failed to establish that it was the employer or the agent of the beneficiary, as required under the regulations. The director referred to its request for additional evidence clarifying whether the petitioner has contracts with companies for whom the beneficiary would be providing computer-related services, and stated that the petitioner had not submitted the requested evidence. "The petitioner does not employ computer programmers to complete computer programming projects at its place of business," the director stated, and without the contracts between the petitioner and its client companies (client contracts) the petitioner could not show that it would exercise control over the work being performed by the beneficiary, which is the most important factor in determining the identity of the beneficiary's employer. The director concluded that the petitioner did not meet the definition of a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii). Likewise, failure to furnish the client contracts precluded a finding that the petitioner was an agent performing the function of an employer of the beneficiary within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). Finally, the director stated that without the contracts between the petitioner and its clients it was not possible to verify whether the petitioner was in compliance with the terms of the LCA in regard to the beneficiary's wage rate and work location.

On appeal the petitioner reiterates that the beneficiary will be working exclusively on in-house projects – in particular, the MPEG-4 Streaming Server application – not on outside consulting projects. Accordingly, there are no client contracts applicable to the beneficiary or affecting the employment relationship between the petitioner and the beneficiary. The petitioner cites language in its employment contract with the beneficiary indicating its intention to utilize the beneficiary's services wherever needed,

including in-house. The LCA designates San Jose, California – the petitioner’s home office location – as the area of intended employment for the beneficiary. Finally, the petitioner points out that CIS has approved other H-1B petitions it has filed for similar positions on behalf of individuals with comparable educational backgrounds to that of the beneficiary in this petition.

Based on the entire record, the AAO is persuaded that the petitioner would be the beneficiary’s employer. The petitioner’s response to the RFE provided detailed information about the in-house project on which the beneficiary will be working during the requested period of H-1B classification. Since the beneficiary will be working on an in-house project, the petitioner will exercise control over his work and maintain an employer-employee relationship with him. The LCA identifies San Jose, California, as the beneficiary’s primary work location. Though it also lists San Francisco as “additional or subsequent work location,” the AAO does not find that submission incompatible with the petitioner’s subsequent statement, in response to the RFE, that the beneficiary would actually work only at the home office location in San Jose. The annual salary specified in the beneficiary’s employment contract is consistent with the prevailing wage indicated in the LCA. The AAO determines that the petitioner is in compliance with the terms of the LCA. The AAO concludes, therefore, that the petitioner qualifies as a “United States employer” under 8 C.F.R. § 214.2(h)(4)(ii) and has overcome that ground for denial.

The petition cannot be approved, however, as it has not been determined whether the proffered position qualifies as a specialty occupation under one or more of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A), and whether the beneficiary is qualified to perform the services of a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

As the director has not addressed these issues, the director’s decision will be withdrawn and the petition will be remanded for a determination as to whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services thereof. The director may afford the petitioner the opportunity to provide pertinent evidence. The director shall then issue a new decision based on the evidence of record. As always, the burden of proof rests with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision of June 1, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.