



U.S. Citizenship  
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FILE: LIN 04 089 52188 Office: NEBRASKA SERVICE CENTER Date: SEP 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:



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 service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a software developer that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

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.

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 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 request for additional evidence; (3) the petitioner's response to the director's request; (4) the

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

The petitioner is seeking the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail designing software programs using techniques of computer science, engineering, scientific analysis, and mathematical models; designing, debugging, and implementing in C using Linux platform for PeerFS™; designing, developing, and maintaining Linux Kernel based core products; and evaluating new technology and assisting in the architecture and design of follow-on enhancements and products. The petitioner requires a bachelor's degree in computer science, engineering, or a related technical field.

The director determined that the proposed position is not a specialty occupation. The director stated that the petitioner failed to establish that it had H-1B level work for the beneficiary at its Colorado facility, as it had submitted no active contracts, statements of work, purchase orders, or related documentation that would show client requests for individual software applications, consulting, training, or technical support services in response to the request for evidence. According to the director, the evidence was insufficient to establish that the proposed position was not a computer programmer or computer support specialist, which are occupations that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) indicates do not require a bachelor's degree. The director determined that the record failed to establish that the petitioner had sufficient work for its five employees.

On appeal, counsel states that the petitioner is a wholly owned subsidiary of PeakData, Inc. Counsel states that in response to the request for evidence the petitioner submitted a contractual agreement entered into with the beneficiary, and a consolidated federal income tax return. Counsel asserts that the petitioner is financially viable based on the parent company, PeakData, Inc.; that the beneficiary is an employee of the petitioner; that the beneficiary will continue to will work on the PeerFS™ platform and will work on other software programs; and that the concept of speculative employment is not in the Act or regulations.

Upon review of the record, the petitioner has established that the proposed position is a specialty occupation.

The petitioner has established the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As described by the petitioner, the proposed duties are so specialized and complex as to require the knowledge associated with a bachelor's degree in computer science or software engineering. Furthermore, counsel on appeal explains that the beneficiary will work on the PeerFS™ platform and other in-house software projects; thus, the petitioner has H-1B level projects to engage the beneficiary's services as a software engineer.

The record establishes that the beneficiary is qualified for the proposed position as he holds a master's degree in computer science from Clemson University, South Carolina.

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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 sustained that burden.

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