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**U.S. Citizenship
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FILE: EAC 04 245 53808 Office: VERMONT SERVICE CENTER Date: **AUG 25 2006**

IN RE: Petitioner:
Beneficiary:



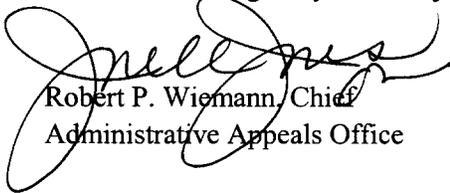
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an information technology company involved in consulting and third party placement of consultants who provide software solutions, system and Internet applications, database administration, networking and management consulting services. It seeks to employ the beneficiary as a programmer analyst. Accordingly, 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).

On September 27, 2004, the director denied the petition determining that the record did not establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, the petitioner asserts the beneficiary is qualified to perform the services of a programmer analyst, a specialty occupation and re-submits a letter it believed the director had overlooked when rendering her decision.

The issue in this matter is whether the petitioner has established that the beneficiary is qualified to perform the duties of 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)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

- (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) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's September 16, 2004 response to the director's request; (4) the director's September 27, 2004 denial letter; and (5) the Form I-290B with the petitioner's October 22, 2004 letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

In an August 26, 2004 letter submitted in support of the petition, the petitioner listed the specific duties of the position offered to the beneficiary as:

- Analyze, design and develop software applications, programming and implementing software applications & packages customized to meet specific client needs
- [Review, repair, and modify] software programs to ensure technical accuracy & reliability of programs
- Analyze the communications, informational, database and programming requirements of clients; plan, develop, design, test and implement appropriate information systems
- Review existing information systems to determine compatibility with projected or identified client needs; research and select appropriate systems, including ensuring forward compatibility of existing systems
- Train clients on use of information systems and provide technical and de-bugging solutions

The petitioner also allocated the beneficiary's time to his various duties as:

Analyze Project requirement & specification	20 %
<i>Project Planning and Scheduling</i> [sic]	5%
Design & development	30%
Programming & Implementation	25%
Defect analysis & modifying software application	10%
Management reporting	5%
Customer Relationship	5%

The petitioner noted that the beneficiary had technical skills including: "Operating Systems: Windows, Unix, Linux, Solaris, MS-DOS; Business Analysis/Project Management: Object Oriented Architecture and Design, RUP Methodologies, Data Analysis; Languages: Java, C, C++, VB, VBA, Matlab, SAS, SQL, XML, HTML, PHP, Java Script, Unix Shell Scripting; Software: Oracle, MySQL, Sybase, Tomcat, Apache, CVS, Text Pad; Applications: Rational Rose, MS Visio, Project, Access, Excel, Power Point, Outlook[,] Word[.]" The petitioner further noted that the beneficiary had been working for AllState Insurance Company in Illinois since he obtained his employment authorization status.

The petitioner provided among other items, a copy of the beneficiary's resume, a copy of the beneficiary's unofficial transcript and a copy of the Master of Arts degree issued by the Graduate School – New Brunswick, Rutgers, The State University of New Jersey in October 2003, a copy of the beneficiary's transcript and a copy of the beneficiary's Bachelor of Technology (Civil Engineering) degree issued by the Jawaharlal Nehru Technological University in June 2000, and copies of the beneficiary's payroll record for May, June, and July 2004 showing the beneficiary's employment with "Allstate."

The director, in a September 8, 2004 request for further evidence, noted that the beneficiary had earned a four-year degree in Civil Engineering with four classes in fields related to computers and that the beneficiary had earned a graduate degree in economics from a United States university that did not include any computer classes. The director noted further that the record included the beneficiary's resume but did not include employment letters to support the resume. The director requested original employment letters to show any experience that the beneficiary had gained in a computer-related field.

In a September 16, 2004 response, the petitioner claimed that four of the beneficiary's classes at Rutgers University, Advanced Economic Statistics, Econometrics, Financial Economics, and "Options" involved the use of SAS Programming in Unix Platform, the use of EXCEL VBA, SQL Server, Visio software, and MS Access, Perl, ASP, and Java. The petitioner provided an undated letter from the division manager at Allstate Insurance Company indicating that the beneficiary was currently employed and that his day-to-day work involved statistical model building, stress testing statistical models, and use of SAS, C++, and VBA. The petitioner submitted copies of the beneficiary's payroll record for the months of March through August 2004 showing the beneficiary's employment with "Allstate." The petitioner also submitted a September 14, 2004 letter signed by the Department Chairperson, Professor of Economics, Rutgers University indicating that the beneficiary had worked as a research assistant building an Internet-based application for experimental game theory involving the use of MS Access programming, ASP programming, and Java programming. The petitioner also included a September 14, 2004 letter from the Director of Graduate Studies, Rutgers University stating that the beneficiary had been employed as a teaching assistant from September 2000 to June 2001 and September 2001 to June 2002.

On September 27, 2004, the director denied the petition determining that the evidence submitted with the initial filing and in response to the director's request for further evidence failed to establish that the beneficiary qualified for the position offered. The director observed that the beneficiary had not attended any specific computer programming courses and had gained no substantial experience as a programmer. The director concluded that the petitioner had not established that the beneficiary had acquired the knowledge necessary to perform a specialty occupation in computers.

On appeal, the petitioner asserts that: (1) the beneficiary obtained a foreign degree equivalent to a United States Bachelor of Science degree in engineering, completing course work in a technology program that included Cobol Programming, Cobol programming laboratory, computing techniques, computing techniques laboratory, C++, data structure, C++ laboratory, database management systems, and database management systems laboratory; (2) the beneficiary completed a certificate course in C, C++, and Java with a private institute in India; (3) the beneficiary's master degree program in economics involved the use of SAS software; (4) the beneficiary's employment as a teaching assistant allowed him to gain experience with MS Access, ASP and Java; and (5) the beneficiary's employment with "Allstate" allowed him to gain experience with SAS, C++, SQL Server, and PERL. The petitioner also submitted a Foreign Academic Credentials Equivalency Evaluation from International Credentials Evaluation and Translation Services (ICETS) indicating that the Bachelor of Technology Degree awarded to the beneficiary in 2000 was equivalent to a Bachelor of Science Degree in Engineering.

At the time of filing the petition, the petitioner indicated that the degree requirement for the proffered position is a bachelor's of science degree in computer science, electronics, information systems, or a related area. The record does not, however, indicate that the beneficiary holds a United States baccalaureate or higher degree in any of these fields, as required to establish his qualifications under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). The U.S. degree held by the beneficiary is in economics.

The Foreign Academic Credentials Equivalency Evaluation prepared by ICETS found that the beneficiary had earned a degree equivalent to a Bachelor of Science Degree in Engineering, without identifying any specialization within the field. The Department of Labor's *Occupational Outlook Handbook (Handbook)*, the resource on which the AAO routinely relies for information regarding the education and training required for particular occupations, does not report that an engineering degree is among the degrees usually held by programmer analysts. Instead, it indicates that such individuals hold degrees in computer science, information science, or management information systems. As the petitioner has not submitted documentary evidence establishing that the beneficiary's degree equivalency in engineering is a degree required by the proffered position, that degree does not demonstrate that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The occupation does not require licensing or certification; thus the petitioner may not establish the beneficiary's qualifications under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(3). Neither does the record contain documentary evidence that the beneficiary has received sufficient specialized training, and/or progressively responsible experience, or recognition of expertise as a programmer analyst through progressively responsible positions directly related to the work of a programmer analyst. 8 C.F.R. § 214.2(h)(4)(iii)(C)(4); 8 C.F.R. § 214.2(h)(4)(iii)(D).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities¹ in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner has submitted a letter from [REDACTED] Department Chairperson, Professor of Economics, Rutgers University, to establish that the beneficiary's employment as a teaching assistant allowed the beneficiary to work on MS Access programming, ASP programming, and Java programming and that his current employment allowed the beneficiary to gain experience with SAS, C++, SQL Server, and PERL. However, there is no evaluation of this experience by an official who has authority to grant college-level

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinion, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(i)(C)(ii).

credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Neither does the record contain results of recognized college-level equivalency examinations or special credit programs nor evidence of certification or registration from a nationally-recognized professional association or society for the specialty. 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2) and (4). As observed above, the evaluation service recognized that the beneficiary had obtained the equivalent of a Bachelor's of Science Degree in Engineering, a discipline not directly related to the requirements for the proffered position.

Accordingly, the AAO will consider whether the beneficiary's work experience coupled with his education is sufficient to establish that he is qualified to perform the duties of the specialty occupation. In this matter it is not. The letters from the beneficiary's former employers and from his current employer, Allstate, do not provide the requisite information regarding the beneficiary's actual duties or describe the beneficiary's peers, supervisors, or subordinates' credentials. Further, the record contains no evidence to indicate that the beneficiary's expertise has been recognized in one of the ways discussed above. Thus, the record is insufficient to establish that the beneficiary's training and/or work experience includes the theoretical and practical application of specialized knowledge required by a specialty occupation; that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or degree equivalent in a specialty occupation; or that the beneficiary's "expertise" in a specialty occupation has been recognized.

The petitioner has not submitted argument or documentation on appeal sufficient to overcome the director's decision on this issue. The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this reason, the petition will not be approved.

Beyond the decision of the director, the record indicates that the petitioner is an employment contractor and will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner has not provided contracts, work orders, or statements of work describing the duties the beneficiary would perform for its clients. The court in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See*

Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 not sustained that burden. Accordingly, the AAO will not disturb the director's denial of the petition.

ORDER: The appeal is dismissed. The petition is denied.