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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 193 50541 Office: CALIFORNIA SERVICE CENTER Date: **JAN 18 2006**

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 The director's decision will be withdrawn and the matter remanded to the director for entry of a decision consistent with this opinion.

The petitioner is a computer consulting company seeking to employ the beneficiary as a systems analyst. 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, finding that the petitioner was not actually employing the beneficiary. The director found since the petitioner had not shown that it was an agent, and was not employing the beneficiary, "that the petitioner is ineligible to file for the beneficiary for the classification as an alien employed in a specialty occupation."

On appeal, counsel contends that the petitioner is in fact acting as the beneficiary's employer, that the petitioner meets the definition of an "employer" as set forth at 8 C.F.R. § 214.2(h)(4)(ii), and that the petitioner is therefore eligible to file the nonimmigrant visa petition.

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

8 C.F.R. § 214.2(h)(1)(i) states the following:

Under Section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer.

The term "employer" is defined at 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.

On appeal, counsel submits copies of quarterly tax returns, quarterly wage and withholding reports, an annual reconciliation return, quarterly unemployment reports, company profile master reports, company billing details, the beneficiary's form W-2, the beneficiary's federal and state income tax filings, and two employment letters, dated May 1, 2001 and July 31, 2003, as evidence of an employer-employee relationship.

The two letters of employment are from the petitioner, Whizz Systems, Inc. However, Whizznet, a separate entity with a separate internal revenue tax identification number, issued every other document.

As such, counsel has not satisfied the criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii). While the letters of employment issued by the petitioner lend weight to counsel's contention that the petitioner is employing the beneficiary, every other piece of evidence points to a different conclusion. For example, the petitioner did not file the quarterly wage reports, and the form W-2 indicates that Whizznet, not the petitioner, has paid the beneficiary. The evidence in the record overwhelmingly indicates that the beneficiary's employer is Whizznet, not the petitioner.

However, the AAO has determined that Whizznet is closely affiliated with the petitioner.¹ The two entities share an address, have similar names, and the same individual controls both organizations. Therefore, the AAO has determined that the petitioner does in fact control the employment situation and engages in an employer-employee relationship with the beneficiary.

Accordingly, the AAO concludes that the petitioner qualifies as a United States employer under 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner is a United States employer under 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO will withdraw the decision of the director.

However, the petition may not be approved at this time, as the AAO is unable to determine whether the proposed position qualifies for classification as a specialty occupation, and whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

¹ The AAO has researched through corporate information at <http://www.lexis.com>. The information found by the AAO includes information from the California Secretary of State, Experian Business Reports, and SmartLinX Business Summary Reports.

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 proposed position.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the proposed position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The duties of the proposed position fall within those noted for computer systems analysts, database administrators, and computer scientists, as the *Handbook* places the position of systems analyst within that occupational grouping.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor’s degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers seek applicants who have a bachelor’s degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master’s degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor’s degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, no such evidence has been presented.

Thus, the proposed position does not qualify under the first prong of the second criterion. The second prong of the second criterion will be discussed later in this decision.

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence has been presented. Therefore, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

Finally, the duties to be performed by the beneficiary do not appear so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The petitioner has not established that its proposed position is more complex than the one outlined in the *Handbook*, which does not require a four-year degree.

As they were briefly described in the petition, the duties of this position do not appear to be so unique or complex that they require the services of an individual with a bachelor's degree. As previously noted, not all systems analyst positions require a bachelor's degree, as some require only a two-year degree. Thus, the proposed position does not qualify as a specialty occupation under the second prong of the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), nor does it qualify under the fourth criterion of that regulation.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). However, as the director did not address this issue, the petition will be remanded for the director to enter a new decision. When determining whether the proposed position qualifies for classification as a specialty occupation, the director must also determine whether the enclosed evaluation from Morningside Evaluations and Consulting proves that the beneficiary is qualified to perform services in a specialty occupation. The director may afford the petitioner reasonable time to provide evidence relevant to the issues of whether the proposed position qualifies for classification as a specialty occupation, of the beneficiary's qualifications for the proposed position, as well as any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER:

The director's April 29, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.