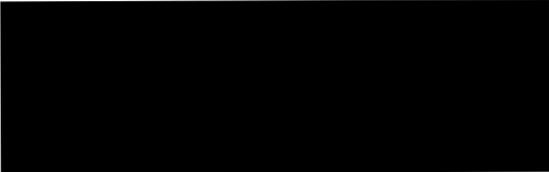


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FILE: WAC 04 132 51507 Office: CALIFORNIA SERVICE CENTER Date: MAY 08 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

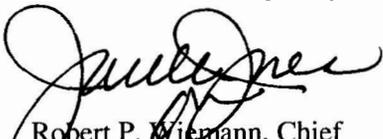
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is a computer software company that provides application development/support and strategic services. 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 petitioner is an agent and failed to furnish any itinerary of definite employment for the beneficiary, as evidenced by contracts with client companies that would utilize the beneficiary's services, and that it was therefore impossible to determine that the beneficiary would perform services in a specialty occupation. Without such contracts, the director stated, he was also unable to determine that the petitioner was in compliance with its labor condition application, certified by the Department of Labor, regarding the beneficiary's wages and work location.

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.

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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In a letter accompanying Form I-129, dated April 1, 2004, the petitioner described itself as a provider of "application development/support and strategic solutions, with a special emphasis on ERP and HCM [human capital management] systems, large scale IT project and program management." The petitioner stated that its business was established in 2000, had two employees and projected gross income of \$800,000 in 2004, and wished to hire the beneficiary as a programmer analyst for a three-year time period running from October 1, 2004 to September 30, 2007. The duties of the position were described as follows:

[The beneficiary] will be assigned various responsibilities including system design, development, implementation, testing and problem resolution for PeopleSoft systems; design the programs, write code, test and implement; analyze application fixes with users and apply as required; provide technical support for upgrading and certifying new versions of the code; develop and maintain interfaces from and to the PeopleSoft application.

According to the petitioner, the proffered position requires an individual with baccalaureate level education. The beneficiary is qualified for the position, the petitioner declares, by virtue of the bachelor of engineering in mechanical engineering he earned in August 1999 at the University of Madras, in India, together with the master of science in mechanical engineering he earned in May 2003 at the University of Bridgeport, in Bridgeport, Connecticut.

In response to the RFE, the petitioner stated that it was developing a software product called F1 Integration System (FINIT), and that the beneficiary would work in-house at the petitioner's business premises in Tracy, California, on the design, development, deployment, and enhancements of the product. The petitioner described the beneficiary's duties, at the various stages of the FINIT project, as follows:

- The beneficiary will work on gathering the requirements for the FINIT product and work on the Fit/Gap Analysis. The purpose of the Fit/Gap analysis is to determine project scope, communication expectations, milestones to be accomplished, points of integration, required resources, opportunity metrics to monitor, infrastructure analysis and recommendations for the implementation of the FINIT integration with PeopleSoft supply chain management This will position [the] FINIT team to progress into the implementation project with a plan and vision for how things will be accomplished
- The beneficiary will design the FINIT technical framework using technologies PeopleSoft Component Interface, Application Engine, Application Messaging, Integration Gateway, PeopleCode, Application Class, Java, COM, XML, PL/SQL, C, C++, HTTP, HTML, SOAP, and LDAP to develop server pages and using the JDBC API to connect to the database The beneficiary will develop technical specifications for FINIT and design application based on the technical specifications. He will design: networks, servers, and workstations; system interfaces; reports; application security; information architecture; workflow; knowledge base; and content management.

The beneficiary will be involved in the building and development of the application. His activities include the following: work in a team environment and provide technical expertise during design, development, and testing of PeopleSoft supply chain management FINIT application; investigate and propose architectural changes that improve system performance, organization, and structure; work with the conversion team to identify integration points with the archiving, applications, operations, and reporting teams; work with the operations team to coordinate and organize the various technical environments required for the FINIT project; participate in weekly production operations meetings; exhibit an understanding of business and technology; be responsible for the conceptual design of implementation strategies on assigned projects and the preparation of resource estimates, evaluations, and recommendations; develop and maintain the necessary documentation of systems, projects, and/or processes to ensure unified understanding of system details; develop technical architecture and customizations; build workflow, reports, and interfaces; and write and unit test code.

- The beneficiary will be involved in testing the product. His activities include the following: provide impact analysis of changes to the PeopleSoft applications teams; perform volume testing for hardware configurations and online volume testing, making necessary performance tuning recommendations to the application teams; coordinate user security and workflow testing; perform stress testing on application servers, web servers and network components; develop a system test plan, user test plan, parallel test plan, performance test plan, benchmark test plan and stress/load test plan; and create disaster recovery plans and go-live contingency plan.

The beneficiary will work on FINIT product maintenance and bug fixing, which includes the following: troubleshooting; code reviews, documentation; assisting with the research of technical issues; assisting application teams with estimating development work; coordinating and facilitating meetings between the application teams and the operations team; coordinating with operations and applications teams to troubleshoot processes where multiple components are involved – *i.e.* crystal problems via citrix; evaluating and participating in software evaluation for enterprise wide solutions, to provide support documentation for the technical advisory group; interfacing design and development; insuring compliance with the developer's reference guide; assisting all teams and end users with the agreed upon interface process; and coordinating interface sign-off documents.

As evidence that the petitioner's business was rapidly expanding, counsel indicated that its gross revenues for the first eight months of 2004 were \$312,516 (in comparison with gross receipts of \$52,260 for the entire year 2003); its staff of programmer analysts had increased from two to ten by October 2004; and its software consulting contracts during the year totaled thirteen. Documentary evidence was submitted to support these figures.

In his decision the director stated that the duties of the proffered position described by the petitioner showed that the position requires the theoretical and practical application of a body of highly specialized knowledge, as required to qualify as a specialty occupation. However, the director found that the petitioner was an agent, rather than an employer, of the beneficiary and had failed to furnish a complete itinerary of the beneficiary's services for the three-year period of requested H-1B classification, in accordance with the regulation at 8 C.F.R. § 214.2(h)(F)(2). The director noted that many of the petitioner's thirteen consulting contracts in 2004 had already expired; that one of them identified the beneficiary as the assigned consultant and indicated the work would be performed in Trevoze, Pennsylvania (not Tracy, California, as stated in the instant petition); and that none of the consulting

contracts showed that there was work for the beneficiary during the entire period of requested H-1B classification. Without valid contracts showing that the beneficiary would be performing the duties of a programmer analyst, the director concluded, the record did not establish that there was a specialty occupation in existence for the beneficiary. In addition, the absence of any consulting contracts showing where, for whom, and at what rate of pay the beneficiary would be employed made it impossible to determine whether the petitioner was in compliance with the wage and work location conditions of the Form ETA-9035 labor condition application (LCA) issued by the Department of Labor. For the foregoing reasons the director denied the petition.

On appeal counsel asserts that the director erred in denying the petition for failure of the petitioner to submit copies of consulting contracts involving the beneficiary, and an itinerary of the beneficiary's employment with client companies, because the beneficiary is not going to work for the petitioner's clients, but rather directly for the petitioner on the in-house project – FINIT – described in the response to the RFE. The thirteen consulting contracts were submitted as evidence of the petitioner's financial viability, counsel explains, not as evidence of the type of work the beneficiary would be performing in H-1B status for the petitioner. Since the LCA states that the beneficiary's work location is Tracy, California, the petitioner's home base, and that the beneficiary's rate of pay will exceed the prevailing wage of Tracy, California, counsel also contends that the petitioner is in compliance with the LCA.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the proffered position combines the duties of a programmer and a systems analyst, as described in the *Handbook*, 2006-07 edition:

Programmers write, test, and maintain the detailed instructions, called programs or software, that computers must follow to perform their functions. These specialized programs tell the computer what to do – for example, which information to identify and access, how to process it, and what equipment to use. Custom programmers write these commands by breaking down each step into logical series, converting specifications into a language that the computer understands Many programmers also customize a package to clients' specific needs or create better packages.

Professionals involved in analyzing and solving problems include *systems analysts*, who study business, scientific, or engineering data-processing problems and design new flows of information Systems analysts tie together hardware and software to give an organization the maximum benefit from its investment in machines, personnel, and business processes. To do this, these workers may design entirely new systems or add a

single new software application to harness more of the computer's power. They use data modeling, structure analysis, information engineering, and other methods. Systems analysts prepare charts for programmers to follow for proper coding and also perform cost-benefit analyses to help management to evaluate the system. These analysts also ensure that the system performs to its specifications by testing it thoroughly.

Based on the comprehensive job description of the work the beneficiary will perform on the FINIT project, the specialized and complex nature of the project, and the other documentation of record, the AAO determines that the proffered position requires baccalaureate or higher level knowledge in a computer-related specialty, and therefore qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO agrees with counsel, based on the evidence of record, that the petitioner is the beneficiary's employer, not his agent. "United States employer" is defined in the regulation at 8 C.F.R. § 214.2(h)(4)(ii), as follows:

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 AAO determines that the proffered position – in which the beneficiary will work directly for the petitioner on the in-house project, FINIT – establishes an employer-employee relationship between the petitioner and the beneficiary. The petitioner meets the definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii).

As pointed out by the director in his decision, one of the petitioner's 13 consulting contracts in 2004 – with Dibon Solutions – identified the beneficiary as the consultant who would provide services at a work location in Trevese, Pennsylvania. This contract, dated March 24, 2004, specified a start date of April 12, 2004 and indicated that work would continue until the project was complete, as determined by the client. According to the petitioner in its list of consulting contracts submitted in response to the RFE in October 2004, the contract with Dibon Solutions was completed in three months – on July 12, 2004 – which preceded the starting date (October 1, 2004) of the three-year H-1B classification period requested in the instant petition. Thus, the beneficiary's consulting work under the contract with Dibon Solutions is unrelated to, and did not overlap, the in-house work the beneficiary would perform for the petitioner pursuant to the instant H-1B petition. Likewise, the beneficiary's work location in Pennsylvania under the consulting contract with Dibon Solutions is unrelated to, and therefore not inconsistent with, the work location of Tracy, California under the instant H-1B petition.¹

¹ In his decision the director referred to another of the petitioner's consulting contracts – with S4 Consultants, Inc. ("S4") – as indicating that PeopleSoft is a client of S4 and that the beneficiary would be providing services to that entity at an unidentified location. These findings were erroneous. PeopleSoft is

As the record establishes that the beneficiary's work is to be performed in-house at the petitioner's business premises in Tracy, California, and that the beneficiary's rate of pay will exceed the prevailing wage in the locality, the petitioner is in compliance with the LCA.

The petitioner has overcome the grounds for denial discussed in the director's decision. The decision must therefore be withdrawn.

Since the director did not address the issue of the beneficiary's qualifications in his decision, the petition will be remanded for a determination as to whether the beneficiary is qualified to perform services in the specialty occupation under one or more of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(C). The director may afford the petitioner reasonable time to provide pertinent evidence, and shall then issue a new decision based on the evidence of record relating to the requirements of eligibility. 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 November 17, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision. If adverse to the petitioner, the decision shall be certified to the AAO for review.

a software program, not a client company. The consulting contract with S4 refers to PeopleSoft as "services to be performed" and identifies the assigned consultant as someone other than the beneficiary.