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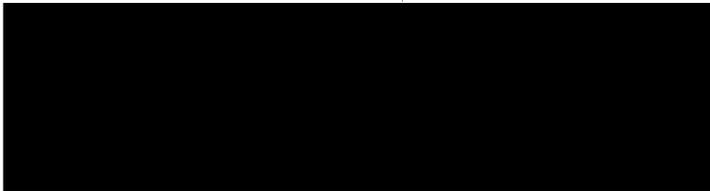
FILE: WAC 06 187 51650 Office: CALIFORNIA SERVICE CENTER Date: DEC 26 2007

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:



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.

James Blunzinger, for

Robert P. Wiemann, Chief
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 The decision of the director will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a software development and information technology consulting business that seeks to extend its authorization to employ the beneficiary as a computer programmer and 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 because the petitioner had not demonstrated that the proffered position is a specialty occupation or that it had complied with the terms of the labor condition application (LCA).

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

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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.

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) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary's services as a computer programmer and analyst. Evidence of the beneficiary's duties includes: the petitioner's May 23, 2006 letter in support of the petition and the petitioner's June 30, 2006 response to the director's RFE. As stated by the petitioner, the proposed duties are as follows:

Implement computer operating system software and tune system for optimum throughput and resource availability; test, integrate, maintain and modify job control and similar programs; analyze performance indicators to ensure efficient use of resources and attainment of operating objectives; provide technical assistance and training to system users; install and modify network applications and systems; diagnose software and operation problems and take remedial actions or recommend procedural changes; load and configure operating systems and applications; develop portal website and database management systems; analyze specific methods and procedures; identify problems and document specific input and output requirements.

The record also includes an LCA submitted at the time of filing listing the beneficiary's work location in Sterling, Virginia as a computer programmer and analyst.

On June 16, 2006, the director requested additional evidence from the petitioner, including copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or an itinerary for the beneficiary.

In a June 30, 2006 response, the petitioner's in-house legal counsel stated that the beneficiary has been employed as a computer programmer since December 2, 2003, pursuant to a contractual agreement between the petitioner and [REDACTED], located at [REDACTED] New Jersey [REDACTED] and pursuant to the accompanying schedules, which dispatch the beneficiary to perform services at the worksite of [REDACTED] client Unisys Corporation, located at [REDACTED] Reston, Virginia [REDACTED]. The petitioner's in-house legal counsel submitted an independent contractor services agreement, entered into on June 7, 2002, between the petitioner and [REDACTED] indicating that the petitioner would provide professional consulting and programming services to Hexaware Technologies, Inc. on behalf of its client, according to the stipulations outlined in the applicable schedule. The petitioner also submitted three Schedule A forms, the most recent of which is dated January 6, 2006, naming the beneficiary to provide consulting services for [REDACTED] Virginia, commencing on January 5, 2006 for two months "and is extendable."

The director denied the petition determining that the petitioner had not provided a contract between the petitioner and actual business where the beneficiary will ultimately perform the proposed duties. The director also determined that without such a contract, the petitioner had not established that it had complied with the terms of the LCA.

On appeal, counsel states that the petitioner is the beneficiary's actual employer, as the petitioner pays and provides benefits to the beneficiary, has sole authority to fire him, and supervises him from its Virginia district office. Counsel submits copies of previously submitted documentation, including the contractual agreement between the petitioner and Hexaware Technologies, Inc., and corresponding Schedule A forms, the most recent of which names the beneficiary to provide consulting services for [REDACTED] in Reston, Virginia, commencing on January 5, 2006 for two months "and is extendable." Counsel also submits a letter from the project manager of Unisys with a description of the beneficiary's duties as a database/programmer analyst on its GSA PBS project.

The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

In this case, the proffered position is that of a computer programmer and analyst for the petitioning entity, which is a software development and information technology consulting business with 280 employees and a 2004 gross annual income of more than \$10 million. The record contains a signed contract between the petitioner and [REDACTED] and corresponding Schedule A forms, the most recent of which

names the beneficiary to provide consulting services for ██████████ in Reston, Virginia, commencing on January 5, 2006 for two months "and is extendable." The record also contains a letter from the project manager of ██████████ the beneficiary's duties as a database/programmer analyst on its GSA PBS project.

The AAO notes that not all computer programmer and analyst positions, or positions that employers designate as computer programmer and analyst positions, require a bachelor's degree, or the equivalent, in computer science or a related specialty. In the context of the record of this particular proceeding, however, the cumulative weight of the details that the petitioner presented about the proposed duties from the third party client are decisive. It is sufficient to establish that the nature of the duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of at least a U.S bachelor's degree, or the equivalent, in computer science, or a related specialty. Therefore, the petitioner has satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will now address the director's conclusion that the petitioner did not establish that it has complied with the terms of the LCA.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

Upon review of the record in its entirety, the AAO finds that the LCA filed by the petitioner is valid. The LCA submitted at the time of filing lists the work location as Sterling, Virginia. The record establishes that the beneficiary will work in Reston, Virginia, which is within the same standard metropolitan statistical area (SMSA) as Sterling, Virginia and is subject to the same prevailing wage for the occupation in both locations. Thus the LCA is valid for the work location.

In view of the foregoing, the petitioner has overcome the objections of the director. The petition may not be approved, however, because the director has not determined whether the beneficiary is qualified to perform the services of a specialty occupation. It is noted that the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of the proffered position, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As

always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's July 20, 2006 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.