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**U.S. Citizenship
and Immigration
Services**



DL

FILE: WAC 04 218 52090 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 2007

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.

[Handwritten signature]

Robert P. Wiemann, Chief
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 The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is involved in computer software development and seeks to employ the beneficiary as a software engineer. 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).

The director denied the petition stating, in part, that the beneficiary was not qualified to perform the duties of the proffered position, a software engineer. On appeal the petitioner submits a brief indicating that the beneficiary is qualified to perform the duties of the offered position.

The director's determination denying the I-129 petition was based on the beneficiary's qualifications to perform the duties associated with that occupation. The issue to be discussed in this proceeding is whether 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (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.

The offered position is that of a computer software engineer. The U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that most employers prefer to hire software engineers who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual degree concentration for applications software engineers is computer science or software engineering; for systems software engineers, it is computer science or computer information systems. Mathematics and systems design is increasingly important. The beneficiary holds a foreign degree in engineering which has been determined by a credentials evaluation service to be equivalent to a degree in structural engineering or a related field from an accredited college or university in the United States. The beneficiary's engineering degree includes studies in mathematics, design, and computer science, and is closely related to the duties of the proffered position. As such, the beneficiary is qualified to perform the

duties of the offered position as he satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The director's decision to the contrary is withdrawn.

The director also noted in his decision that the petitioner provided conflicting evidence concerning the number of employees it had and its gross revenues. The petitioner satisfactorily explained any perceived inconsistencies on appeal.

The petition may not be approved, however, as the record does not establish that the proffered position is a specialty occupation. The petitioner is a contractor who provides personnel to perform work on projects for third party clients. In his request for evidence, the director asked for copies of contracts between the petitioner and its clients for whom the beneficiary would perform services and an itinerary for the beneficiary's employment. In the Aytes memorandum cited in the footnote below, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request the contracts described above.¹ The evidence of record does not satisfy the regulation requiring an itinerary of employment.

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. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

The work order provided by the petitioner does not describe the duties to be performed by the beneficiary in sufficient detail to determine that the proffered position requires a baccalaureate level education in a specific specialty and that the proffered position qualifies as a specialty occupation. Further, the work order is not dated and is not signed by a representative of the end user of the beneficiary's services (Countrywide Home Loans, Inc.). The work order also appears to contain possible alterations in that the consultant's name (the beneficiary) and the estimated project time for the beneficiary's services appear in different type face than the remainder of the typed information on the work order. Under these circumstances, the director should exercise his discretion to request a work order signed by both the petitioner and the third party contractor who will ultimately make use of the beneficiary's services, and one that specifically describes the duties to be performed by the beneficiary for the third party contractor. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that the itinerary shall establish the dates and locations of employment. The director should request work orders fully describing the proposed employment covering the entire period of intended stay requested by the petitioner. The work order submitted by the petitioner establishes neither the duties nor the locations of proposed employment and does not satisfy the cited regulation requiring an itinerary of employment.

As the record does not contain sufficient documentation from the end user of the beneficiary's services that establishes the specific duties the beneficiary would perform under contract, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for

¹ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

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).

This matter shall be remanded to the director to issue a new decision determining whether the proffered position qualifies as a specialty occupation. The director may request such additional evidence as he deems necessary in rendering his opinion.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner is to be certified to the AAO for review.