

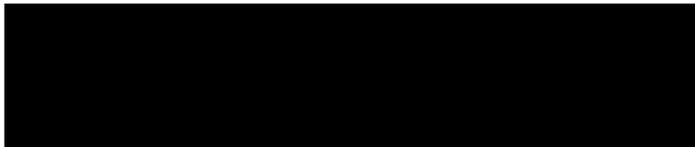
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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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FILE: EAC 06 157 50495 Office: VERMONT SERVICE CENTER

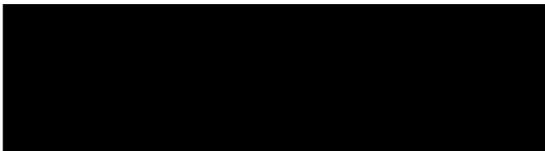
Date: OCT 04 2007

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.

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 The director's decision will be withdrawn.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 an IT firm that seeks to employ the beneficiary as a programmer analyst. 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 determined that the beneficiary was not qualified to perform the duties of a specialty occupation, and accordingly denied the petition. On appeal, the petitioner submits a brief and additional information stating that the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be determined 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 petitioner seeks to qualify the beneficiary to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). The director determined that evidence of the beneficiary's work experience was insufficient to establish that she had sufficient qualifying experience, in addition to her formal education, to qualify her to perform the duties of a specialty occupation. The following credentials evaluations were submitted by the petitioner in support of the beneficiary's qualifications:

- [REDACTED] Vice Chair of CIS Dept., [REDACTED] College of the City University of New York

[REDACTED] opined that the beneficiary's foreign education was equivalent to 3 years and one semester of bachelor's level studies leading to a bachelor's degree in computer science from a college

or university in the United States.¹ Professor Robotham states that according to the equivalency ratio of three years of work experience for one year of college training promulgated by CIS for degree equivalence purposes, it would be necessary for the beneficiary to demonstrate "a bit less" than one year and six months of qualifying experience to possess the equivalent of a bachelor's degree. The evaluator states, and the record reflects, that the beneficiary has sufficient qualifying experience, in addition to her formal education, to satisfy the requirements of a bachelor's degree in computer science from an accredited college or university in the United States. Further, the record reflects that: the City University of New York (Medgar Evers College) is an accredited university; has a program for granting college-level credit based on students' employment experience; and [REDACTED] has authority to make determinations concerning the granting of such credit.

- [REDACTED] Professor of Computer Science, Princeton University

[REDACTED] opined that the beneficiary's foreign education was equivalent to at least 3 years and one semester of bachelor's level studies leading to a bachelor's degree in computer science from a college or university in the United States. [REDACTED] states that according to the equivalency ratio of three years of work experience for one year of college training promulgated by CIS for degree equivalence purposes, it would be necessary for the beneficiary to demonstrate one and one-half years of qualifying experience to possess the equivalent of a bachelor's degree. The evaluator states, and the record reflects, that the beneficiary has sufficient qualifying experience, in addition to her formal education, to satisfy the requirements of a bachelor's degree in computer science from an accredited college or university in the United States. Further, the record reflects that: Princeton University is an accredited university; has a program for granting college-level credit based on students' employment experience; and [REDACTED] has authority to make determinations concerning the granting of such credit.

- [REDACTED] Appel - Professor, Department of Statistics and Computer Information Systems, Baruch College, City University of New York

[REDACTED] opined that the beneficiary's foreign education was equivalent to at least 3 years and one semester of bachelor's level studies leading to a bachelor's degree in computer science from a college or university in the United States. [REDACTED] states that the beneficiary has completed at least three years and three months of qualifying employment experience and training in computer information systems and related areas. The evaluator states, and the record reflects, that the beneficiary has sufficient qualifying experience, in addition to her formal education, to satisfy the requirements of a bachelor's degree in computer science from an accredited college or university in the United States. Further, the record reflects that: Baruch College, City University of New York, is an accredited university; has a program for granting college-level credit based on students' employment experience; and Professor Appel has authority to make determinations concerning the granting of such credit.

The record establishes that the beneficiary possesses the equivalent of a bachelor's degree in computer science from an accredited college or university in the United States, and the director's findings to the contrary are withdrawn.

¹ A statement from the University of the Philippines registrar states that the beneficiary lacks completion of nine semester units to complete graduation requirements.

The petition may not be approved, however, as the record does not reflect that the position is a specialty occupation. The director did not determine whether the proffered position qualifies as a specialty occupation since the decision was denied on another ground. The duties of the offered position, as detailed by the petitioner, are essentially those noted for computer programmers. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that although there are many training paths available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. As the level of education and training required by employers continues to rise, the proportion of programmers with a college degree should increase in the future. In 2004, more than two-thirds of computer programmers held a bachelor's or higher degree. Presently, however, it cannot be determined that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the proffered position. Programmers are still employed in the industry in substantial numbers with less than a baccalaureate level education.

As stated above, the petitioner has submitted a list of duties to be performed by the beneficiary. The petitioner, however, is a consulting firm that places its employees at client work sites to work on various projects for those clients. Thus, it is the client who ultimately determines the specific job duties to be performed by the beneficiary. 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. In her request for evidence, the director did not request copies of contracts with the petitioner's clients establishing a complete itinerary for the beneficiary during her period of intended stay in the United States, or a description of the duties to be performed by the beneficiary from the end-user of the beneficiary's services. Thus, it cannot be determined from the record whether the proffered position qualifies as a specialty occupation. As such, this matter must be remanded to the director to make that determination. The director may request the evidence detailed above, and such additional evidence as she deems necessary in rendering her decision.

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.