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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 205 53853 Office: CALIFORNIA SERVICE CENTER Date: JUN 23 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

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 appeal will be dismissed. The petition will be denied.

The petitioner is a computer project services and software consulting company. It seeks to employ the beneficiary as a programmer analyst and to employ 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 record failed to establish that the beneficiary is qualified to perform services in the specialty occupation, that the petitioner will be the beneficiary's employer, or that the petitioner is in compliance with its labor condition application (LCA) as certified by the Department of Labor (DOL).

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien must have the following credentials to be qualified to perform the services of a specialty occupation:

(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.

As further explained in 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria to qualify to perform the services of a specialty occupation:

(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.

For the purpose of deciding whether the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), 8 C.F.R. § 214.2(h)(4)(iii)(D) provides that the determination shall be based on 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 [CIS] 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. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty . . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as: (i) Recognition of expertise in the specialty

> occupation by at least two recognized authorities [1] in the same specialty occupation; (ii) Membership in a recognized foreign or United States association or society in the specialty occupation; (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers; (iv) Licensure or registration to practice the specialty occupation in a foreign country; or (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

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.

The petitioner describes itself as an information technology company that offers software development, implementation, and maintenance services for e-business and enterprise applications. The petitioner states that it was established in 2003 and in January 2004 took over the employees and accounts of another IT company, Sigma Project Services, Inc. (whose gross receipts totaled close to $11 million in 2002 according to the company's federal income tax return for that year). At the time of filing the petitioner indicated that it had 130 employees, projected gross annual revenues of $13 million, and proposed to employ the beneficiary as a programmer analyst with responsibility "for custom program design, development and implementation of software applications and systems to meet clients' needs and specifications." The duties of the proffered position were described as follows in a letter accompanying the petition:

> [The beneficiary] will analyze user's requirements, procedures, and problems to automate processing or to improve existing computer systems. He will confer with personnel involved to analyze current operational procedures, and identify problems. He will write detailed description of user needs, program functions, and steps required to develop or modify computer programs. Further, he will review computer system capabilities, workflow, and study existing information processing system to evaluate effectiveness and develop a new system to improve productivity. Additionally, he will provide software support, which includes testing, debugging, and modifying software as per needs of the client.

The minimum educational requirement for the proffered position, the petitioner indicates, is a bachelor's degree in computer science, mathematics, or engineering, together with relevant experience. The petitioner declares that the beneficiary is qualified for the position by virtue of his coursework in India, culminating with a bachelor's degree in computer applications at the University of Madras in 2002, along with three and one half years of work experience in the computer field. According to a report from the

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[1] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

Foundation for International Services, Inc., a foreign educational credentials evaluation service in Bothell, Washington, which was submitted with the petition, the beneficiary's education and work experience are equivalent to a bachelor's degree in computer information systems from an accredited U.S. college or university.

In his decision the director found that the beneficiary did not qualify to perform services in the specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*) because he does not have a U.S. baccalaureate or higher degree, or under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*) because he does not hold a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree, or under 8 C.F.R. § 214.2 (h)(4)(iii)(C)(*3*) because he does not have an unrestricted state license to practice the specialty occupation. The director also determined that the beneficiary did not qualify to perform the services of the specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) because the record failed to establish that he had a combination of education, specialized training and progressively responsible work experience equivalent to a U.S. baccalaureate or higher degree in the specialty. The report from the Foundation for International Services was not an evaluation of the beneficiary's foreign education alone, as required to be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Rather, it was an evaluation of the beneficiary's academic record and work experience, which must therefore have been authored by an official with authority to grant college-level credit for training and/or experience in areas related to the specialty in order to be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), or by a recognized authority in the field to be considered as evidence of the beneficiary's U.S. degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). Neither of these conditions was met by the evaluation report from the Foundation for International Services, Inc. The director also reviewed the letters in the record from prior employers of the beneficiary, but determined that they did not contain the types of evidentiary detail specified in C.F.R. § 214.2(h)(4)(iii)(D)(*5*) to establish the beneficiary's U.S. degree equivalency and recognition of expertise in the specialty through progressively responsible work experience.

Furthermore, the director found that the petitioner failed to establish that it is the beneficiary's employer. The director cited conflicting evidence about whether the beneficiary would be working on an in-house project at the petitioner's business premises or on a project at a client location, and concluded that the record did not show that there was a job in existence for the beneficiary to perform. In view of the conflicting evidence about where the beneficiary would be working, the director also determined that it was unable to determine if the petitioner is in compliance with the LCA in regard to the beneficiary's wage and work location.

Based on the foregoing analysis, the director concluded that the beneficiary is ineligible for H-1B classification.

On appeal counsel asserts that the beneficiary's diploma in electronics and telecommunications engineering from the Indian government and his degree from the University of Madras, together with more than three years of experience in the computer industry, is equivalent to a U.S. degree in the field, thereby qualifying the beneficiary to perform services in the specialty occupation. Counsel clarifies that the beneficiary will be working on an in-house project and that he will be working at the petitioner's business premises, even if occasional travel to other sites is required. Counsel claims that an itinerary of the work has already been submitted and that the petitioner is in compliance with its LCA. In support of the appeal counsel has submitted additional documentation from two companies in India confirming that

the beneficiary was employed by them between February 2001 and November 2004, as well as an updated evaluation of the beneficiary's foreign education and work experience from the Foundation for International Services. Counsel has also submitted an additional evaluation of the beneficiary's education and work experience from an associate professor of computer science at Western Washington University (WWU) in Bellingham, Washington, [redacted], declaring that the beneficiary has the equivalent of a baccalaureate degree in computer information systems from a U.S. college or university. In conjunction with the letter from [redacted] counsel has submitted a letter from the acting dean of WWU's college of arts and sciences discussing the authority of its faculty to grant college level credit for training and experience.

The documentation from WWU does not establish that [redacted] has the authority to grant college-level credit for training and/or experience in the computer field, or that the university has a program for granting such credit. The letter from the acting dean of WWU's college of arts and sciences, Ron Kleinknecht, states that "[WWU] faculty have the authority to grant college level credit for training and experience, both in their areas of training and [in areas of general education]," and that they are "appropriate evaluators of academic and professional credentials and work experience for the purpose of admissions, advising, placement in degree programs, substitution of courses, assessment of internships and co-op experiences, and other routine university evaluations." The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) requires that the institution have a program for granting credit based on an individual's training and/or work experience, without regard to prior education. The letter from Mr. [redacted] does not state that WWU has such a program, or that [redacted] is authorized by WWU to grant college-level credit for training and/or experience in the computer field which, as in the beneficiary's case, is unconnected to a college-sanctioned internship, co-op, or related program.

Thus, the documentation of record fails to meet the evidentiary requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). It does not establish that the evaluator has the authority to grant college-level credit for training and/or experience in a specialty field, or that Western Washington University has a program for granting college-level credit for training and/or experience in the specialty.

Nor does the record establish that the beneficiary has the equivalent of a U.S. baccalaureate degree in the specialty through a combination of education, specialized training, and/or work experience in the specialty occupation or related areas, and recognition of expertise therein, as required to meet the alternative qualifying criteria of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). The record indicates that the beneficiary earned a diploma in electronics and communication engineering in 1996 after passing a state examination in Madras, and that he received a bachelor of computer applications in 2002 after a two-year course of study at the University of Madras. According to the credentials evaluation report from the Foundation for International Services, the beneficiary's diploma in electronics and communication engineering is equivalent to one year of university-level credit in the United States and his bachelor of computer applications is equivalent to the second and third years of university-level credit in the United States. Thus, the beneficiary's education is equivalent to three years of academic credit from a U.S. college or university. The record contains letters from two employers in India confirming that the beneficiary worked for Solprocom Computers (P) Ltd (Solprocom) in Chennai from February 2001 to July 2003 and for Zap App India Pvt Ltd (Zap App) in Bangalore from July 2003 to November 2004. The letter from Solprocom is signed by the project manager, identifies the beneficiary's position as "programmer (computer engineer)," and states that he "designed, developed, tested and implemented several project[s] using Visual Basic, ASP, MTS, MSMQ, IIS, Ms Acess, Sql Server and Windows NT."

There is a series of letters from Zap App indicating that the beneficiary was hired as a "software engineer" in July 2003 and that he was promoted to "module lead-dev." in August 2004. Though the beneficiary's documented employment from February 2001 to November 2004 would equal more than one year of college-level training in the computer field (in determining equivalency to a baccalaureate degree in the specialty the regulation provides that three years of specialized experience equal one year of college education), the letter from Solprocom is the only one that describes the duties of the position in any detail. Thus, that is the only work experience which may be viewed as involving the theoretical and practical application of specialized knowledge required by the specialty occupation. There is no evidence in the record, however, that any of the beneficiary's experience at Solprocom was gained while working with peers, supervisors, or subordinates who have degrees or their equivalent in the specialty, or that the beneficiary has documented recognition of expertise in the specialty, as required under the regulation. Accordingly, the beneficiary's work experience cannot be counted for the purpose of determining degree equivalency under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). The AAO concludes that the beneficiary's education and work experience combined are not equivalent to a U.S. degree in a computer-related specialty.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

Based on the evidence of record, the AAO determines that an employer-employee relationship exists between the petitioner and the beneficiary, and that the petitioner meets the definition of a U.S. employer at 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.

In the petitioner's offer of employment letter, dated June 10, 2004, the beneficiary was advised that "your services will be utilized at our office or at a client's site which can change from time to time and this may be anywhere in North America." No specific client was identified in the letter. In the Form I-129, filed on July 15, 2004, the petitioner's description of the job duties once again did not identify a specific client. In its response to the RFE, filed on October 7, 2004, the petitioner indicated that the beneficiary would work on an in-house project, submitted a list of one product (identified as "Domain C/S maintenance and Support") and two in-house projects (identified as "Accruent –ECMS Support" and "Wellpoint") on which it was working from 2001 to 2007, and submitted the statement of work from one of the clients, Accruent, located in Santa Monica, California. The petitioner did not identify the client to which the beneficiary would be assigned. On appeal counsel implies that the beneficiary may work on multiple in-house projects, but does not identify the client(s), and indicates that the work may require occasional work at the client's location. The AAO concludes that the petitioner has established that it will be the beneficiary's employer.

In accord with the director's decision, however, the AAO concludes that the work location of the beneficiary has not been established and, as a result, that the validity of the LCA for the work location cannot be determined. The petitioner has indicated that the beneficiary will work both at its offices and at client sites. The LCA submitted with the petition identifies Cerritos and Los Angeles, California as the work locations. Because the petitioner has not submitted an itinerary of work to be performed by the beneficiary off site, the AAO cannot determine whether the LCA is valid for all proposed work locations.

Beyond the decision of the director, the record does not establish that the beneficiary will perform the duties of a specialty occupation. The evidence is unclear about which client's in-house project(s) the beneficiary will work on. Only the Accruent project is documented in the record. If the beneficiary works for another client, there are no details in the record as to the particular duties he would perform and whether the duties would require the services of an individual with a baccalaureate or higher degree in a computer-related specialty. In *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), a federal appeals court 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 court recognized that evidence of the client companies' job requirements is critical when the work is to be performed for entities other than the petitioner, and held that the legacy Immigration and Naturalization Service reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position. As the instant petition lacks any evidence from client companies of the duties the beneficiary would perform for them, the AAO cannot determine whether the duties require a baccalaureate or higher degree in a computer-related specialty. Accordingly, the record does not establish that the beneficiary will be performing services in a specialty occupation, as defined in section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). For this additional reason the petition may not be approved.

For the reasons discussed above, the AAO determines that the petitioner has failed to establish the beneficiary's qualifications to perform services in a specialty occupation, that the LCA is valid, or that it will employ the beneficiary in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.