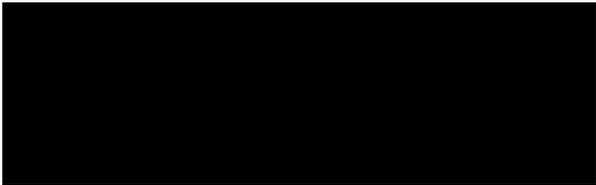


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FILE: WAC 01 297 55626 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2005

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:
[Redacted]

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, Director
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 appeal will be sustained. The petition will be approved.

The petitioner is a software development and system integration firm that 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 because the labor condition application (LCA) that was submitted with the petition was for a location that differed from the worksite indicated on the Form I-129. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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) 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 additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; (5) the petitioner's motion to reconsider; (6) the director's decision affirming the denial of the petition; and (7) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a software engineer. The petitioner submitted an LCA dated April 17, 2001 that covered Union City, California, the petitioner's headquarters, and West Valley, Utah, the petitioner's client's site. The petitioner stated on the Form I-129, Part 5, and the accompanying letter of support, filed December 18, 2001, that the beneficiary would be working in Salt Lake City, Utah. In the director's request for evidence, he stated that the LCA submitted with the petition was for Union City, California, and that the petitioner should submit an LCA for Salt Lake City, Utah. In response, the petitioner submitted a letter stating that the client's company had recently moved to Salt Lake City, and provided an LCA dated February 8, 2002 for Salt Lake City. The director determined that the second LCA, covering Salt Lake City, was dated subsequent to the date the petition was filed, and that a petition could not be approved unless eligibility is established at the time the petition was filed.

On appeal, counsel states that Salt Lake City is less than ten miles from West Valley, Utah, and that the original LCA included two sites, Union City, California and West Valley, Utah, rather than the one site listed by the director in his request for evidence. Counsel asserts that the director never should have issued the request for evidence, since the original LCA included West Valley, Utah, which is 7.5 miles from Salt Lake City, the site to which the client's company relocated. Counsel also asserts that the regulations define an area of intended employment as being an area within normal commuting distance of the place of employment where the alien will be employed. *See* 20 C.F.R. § 655.715.

The AAO agrees with counsel that the director did not need to issue the request for evidence regarding the LCA, as the LCA filed with the petition included the West Valley, Utah site (in addition to the Union City, California site). There was no material change in the terms of the petition, and the beneficiary would be working for the same petitioner in the same position several miles away from the site of the approved LCA. The AAO notes that the wage source used by the employer for both LCA's was Watson Wyatt, which, according to its website (www.watsonwyatt.com) provides compensation surveys covering "major metropolitan areas," and that the prevailing wage reported on both LCA's was the same, which further supports counsel's claim that the two locations (West Valley and Salt Lake City) are essentially the same for the purposes of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.