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20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: WAC 05 056 52058 Office: CALIFORNIA SERVICE CENTER Date: AUG 29 2006

IN RE: Petitioner:
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 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 The director's decision will be withdrawn. The matter will be remanded for entry of a new decision.

The petitioner is a computer services and sales company. It seeks to employ the beneficiary as a software engineer and to continue his classification 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 whether the petitioner is the employer of the beneficiary or his agent. Assuming the petitioner was acting as an agent, the director stated that the record lacked evidence of contracts with client companies demonstrating that the beneficiary would be performing work in a specialty occupation, that the beneficiary has an itinerary of definite employment for the requested period of H-1B classification, and that the petitioner is in compliance with its labor condition application (LCA) certified by the Department of Labor.

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.

As provided in 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.

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

(*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.

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 and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as a local resource for computer network sales, service support and integration in the Fresno, California area. The petitioner stated that it was established in 1996, had 17 employees and gross revenues of $2.3 million in 2003, and wished to hire the beneficiary as a software engineer for three years at an annual salary of $36,000. The duties of the proffered position were listed as follows:

- Support or install operating systems and applications.
- Connect customers to Internet and provide network solutions for them, including instructional, configuration and customization.
- Install and configure Wireless LAN for our customers to extend network [from] one location to another location.

According to the petitioner, the minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering, or the equivalent. The beneficiary is qualified for the position, the petitioner declares, by virtue of his bachelor of commerce degree in 1990 from the University of Dhaka, in Bangladesh, a two-year computer training diploma from NCS Computer Systems, a series of certificates from other computer companies, and twelve years of computer experience in Bangladesh and Sri Lanka.

In response to the RFE counsel explained that the petitioner is not a staffing company that provides software engineers to client companies for a fee and pays its engineers out of the collected fee. Counsel stated that its software engineers are not consultants farmed out to clients, but employees who work at the petitioner's facility and provide the services described in the company's brochure to customers. The referenced brochure, submitted with the response to the RFE, lists the petitioner's services selection as follows:

Network Consulting Design & Integration: Planning, design, implementation and support of simple systems to highly fault-tolerant networks. We offer a complete solution, including acquisition and integration and support of hardware and software systems running Windows, Citrix, Unix, and Novell. Our LAN/WAN expertise ranges from wireless to secure, gigabit-based firewalled systems.

Outsourced Network Management: We monitor and act proactively to keep your computer network alive and healthy.

Warranty and Repair Services: We are an authorized repair center for Compaq, HP, IBM and Xerox products, and can provide repair services for most computer products and printers.

Computer Telephony: We specialize in today's leading computer-based telephony and voice-over IP systems such as solutions from Cisco and Avaya.

Infrastructure Services: Design and implementation of Category 5e/6 cabling and fiber-optic systems, and rack-based solutions from small offices, to enterprise level systems. All VNS Infrastructure Services are tested, and certified according to ANSI\EIA\TIA standards, and carry a LIFETIME warranty for workmanship.

Counsel submitted a photocopy of the "Employment Agreement" between the petitioner and the beneficiary, dated December 7, 2004, which provides that the "[e]mployee shall devote such time as necessary or is deemed necessary by the Company to carry out [his] duties and will devote substantially full time to the Company during normal business hours." Also submitted in response to the RFE were photographs of the petitioner's business premises, a year's worth of quarterly wage and withholding reports (Form DE-6) listing the company's employees, including the beneficiary as of the fourth quarter of 2004, and an organizational chart identifying the proffered position as a "systems engineer" in the company's technical services team.

In his decision the director stated that it appeared the petitioner places computer personnel in companies requiring computer programmers, and that the petitioner had failed to furnish any contracts with client companies to demonstrate that it had definite employment for the beneficiary. Without such contracts, the director determined, the petitioner could not show that the beneficiary would be performing work in a specialty occupation. The director also declared that without such contracts it could not be determined whether the petitioner is acting as the beneficiary's employer or as his agent, and whether the petitioner is in compliance with the wage and work location conditions of its LCA.

On appeal counsel reiterates that the petitioner is the employer of the beneficiary, pays him directly, and does not place him with client companies. The petitioner does not act as an agent or a staffing company, counsel declares, and does not operate by means of services contracts with clients. The petitioner's business, counsel explains, is providing a local resource for customers in the Fresno area to hire for the purpose of maintaining and servicing their computers. All of the evidence in the record establishes that the petitioner is the beneficiary's employer, counsel concludes, and the director's decision should therefore be overturned.

Based on the entire record in this proceeding, the AAO determines that the petitioner is the beneficiary's employer, meeting 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.

The director's decision must therefore be withdrawn. The petition cannot be approved, however, unless the petitioner can establish that the proffered position qualifies as a specialty occupation, under one of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A), and that the beneficiary is qualified to perform services in a specialty occupation under one of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(C). The director did not address these issues in his decision.

The petition will be remanded for a determination by the director as to whether the proffered position qualifies as a specialty occupation and whether the beneficiary is qualified to perform services in a specialty occupation. The director may afford the petitioner reasonable time to provide evidence pertinent to those issues, as well as any other evidence the director may deem necessary. The director shall then issue a new decision based on the evidence of record. As always, the burden of proof rests with the petitioner. *See* section 291 of the Act 8 U.S.C. § 1361.

ORDER: The director's decision of June 2, 2005 is withdrawn. The petition is remanded to the director for entry of a new decision. If adverse to the petitioner, the decision shall be certified to the AAO for review.