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AUG 06 2007

FILE: WAC 04 254 51947 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



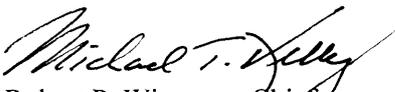
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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 consulting firm, reporting 35 employees and \$4 million in annual gross income at the time of filing. It seeks to employ the beneficiary as a systems analyst 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 he determined that the record did not establish that the beneficiary would be employed in a specialty occupation. His decision further questioned whether the petitioner qualified as a U.S. employer under the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or a U.S. agent, as defined by 8 C.F.R. § 214.2(h)(2)(i)(F).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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, a petitioner must establish that its position meets one of four 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it seeks the beneficiary’s services as a systems analyst. Evidence of the proffered position’s duties includes: the Form I-129 and the petitioner’s September 13, 2004 letter in support of the petition. At the time of filing, the petitioner indicated that in addition to providing consulting services to its clients, it offered software solutions, networking solutions and customized software and hardware to meet market needs. In response to the director’s request for evidence, counsel reported that the petitioner was actively involved in the development of software targeted to the “e-government market place” and was in need of systems analysts skilled in the Microsoft and Oracle suite of products to assist with this initiative. Counsel stated that the petitioner was seeking the beneficiary’s services to meet its in-house software development needs and that she would be fully employed by the petitioner in the development of its own products.

As described by the petitioner, the beneficiary’s in-house work would require her to perform the following duties:

- Analyze , design, develop, test and implement detailed software modules and systems according to project requirements using various tools and technologies including C, C++, Java, Java Swing, Visual C++, Visual Basic, SQL Server, etc. under Windows operating systems;
- Confer with personnel to resolve problems of achievable objectives and feasibility for identification of optimum systems approaches;
- Write detailed logical flow charts in symbolic forms and computer configurations;

- Develop, analyze, study and review existing systems to evaluate effectiveness and develop new software systems to improve data processing using advanced mathematical, numerical analysis and computer methodology;
- Prepare technical reports and instructional manuals relative to the establishment and functioning of complete operational systems; analyze, design, develop, modify and implement customized computer systems for commercial applications based on user requirements using Client/Server technology, and MS Windows on IBM PC compatible machines; and
- Evaluate user requests for new or modified programs to determine feasibility, cost, time required, compatibility with current system and computer capabilities; consult with user to identify current operating procedures and clarify program objectives.

The petitioner states that the performance of the above duties requires the beneficiary to hold a baccalaureate degree or its equivalent in engineering, computer science, computer programming or a related field.

The AAO will first consider whether the record establishes that the petitioner is eligible to submit the Form I-129 on behalf of the beneficiary, either as a U.S. employer or as an agent.

As previously noted, the director's denial of the petition questioned whether the petitioner was a U.S. employer under the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent under the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F). He noted that the record failed to include a written contract between the petitioner and beneficiary as to her job duties and terms of employment or the actual address at which she would perform her duties. He further indicated that the record provided no description of the duties that the beneficiary would ultimately perform for the petitioner's clients.

The record does not, however, indicate that the beneficiary will be directly employed by the petitioner's clients, thus requiring CIS to review the actual duties she would perform at client sites. Instead, it establishes that it is the petitioner's intention to employ the beneficiary full-time on in-house software development projects at its Santa Clara office, at the address indicated in the certified Labor Condition Application (LCA) submitted at the time of filing and at the salary specified in this same document. While the AAO notes that the petitioner has not submitted a written contract covering the beneficiary's services, counsel's response to the director's request for evidence indicates that the petitioner and beneficiary have an oral contract under which the petitioner is obligated to pay the prevailing wage stated on the H-1B application and LCA, and to abide by the rules and regulations of the H-1B visa. Under this agreement, the petitioner or the beneficiary may terminate employment for any reason with a two-week notice. The AAO finds counsel's explanation of the terms of the oral agreement, while minimal, to be sufficient to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iv)(B), which allow a petitioner to provide "a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract." Accordingly, the AAO finds the record to establish the petitioner as the beneficiary's employer. 8 C.F.R. § 214.2(h)(4)(ii).

The AAO now turns to a consideration of the duties of the proffered position and whether they establish it as a specialty occupation.

The director indicated that he found the record to offer no description of the duties of the proffered position, beyond the petitioner's broad statement that the beneficiary would work in software development in its Santa Clara office. The AAO, however, notes that the previously listed duties were provided by the petitioner at the time of filing and identified as those of a systems analyst.

The AAO consistently relies on the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about occupations and the preparation required to perform them. While the duties of proffered position are similar to those performed by systems analysts, the AAO finds the occupation of computer software engineers, as discussed by the 2006-2007 *Handbook*, to be more closely aligned with the employment that has been described by the petitioner:

Software engineers working in applications or systems development analyze users' needs and design, construct, test, and maintain computer applications software or systems. Software engineers can be involved in the design and development of many types of software, including software for operating systems and network distribution, and compilers, which convert programs for execution on a computer

Computer applications software engineers analyze users' needs and design, construct, and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program Some software engineers develop both packaged systems and systems software or create customized applications. [*Handbook*, page 111].

While the duties of the proffered position are largely those of a computer applications software engineer, the petitioner has also indicated that the beneficiary would be required to prepare technical reports and instructional manuals relative to the establishment and functioning of complete operational systems. Such duties do not fall within the description of the work performed by computer software engineers. As a result, the AAO does not find the duties of the proffered position to align neatly with the occupation of computer software engineer, employment that does not normally impose a degree requirement on those seeking employment. [*Handbook*, page 112]. Neither do the seven Internet advertisements submitted on appeal establish the proffered position as employment that is identifiable with an industry-wide educational standard, or that it is distinguishable, by its unique nature or greater complexity, from a similar but non-degree-requiring position. Furthermore, although counsel asserts on appeal that all of the petitioner's employees in similar positions possess the minimum of a bachelor's degree, the record offers no proof that this is the case. Without supporting documentary evidence, the assertions of counsel will not meet the petitioner's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record, therefore, fails to demonstrate that the proffered position qualifies as a specialty occupation under any of the first three criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, the AAO finds the petitioner's discussion of the proffered position to establish that the proposed duties would require the beneficiary to possess skills, specifically the technical writing skills required to

prepare technical reports and instructional manuals, not normally possessed by computer software engineers. As the proffered position combines duties that set it apart from other computer software engineering employment, the petitioner has established the proffered position as a specialty occupation based on the complexity and specialization of its duties under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

To prove that the beneficiary is qualified to perform the duties of a specialty occupation, the petitioner must establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such a degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

To establish the beneficiary's qualifications to perform the duties of the proffered position, the petitioner has submitted copies of: the beneficiary's 2003 master's degree in applied sciences, software engineering from Bharathiar University in India; her academic transcripts; and an evaluation of the beneficiary's academic record prepared by Worldwide Educational Evaluators (WEE), Inc. in Atlanta, Georgia, which finds the beneficiary's degree to be the equivalent of a master's degree in software engineering from a regionally accredited university in the United States.

Based on its own review of the record, the AAO accepts the WEE evaluation and finds the beneficiary's degree equivalency in software engineering to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) – 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. Accordingly, the petitioner has established the beneficiary's qualifications to perform the duties of a specialty occupation.

For reasons previously discussed, the petitioner has demonstrated that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) and that the beneficiary is qualified to perform the duties of the position, pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). Accordingly, the appeal will be sustained and the petition approved.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.