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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

DN

FILE: WAC 04 249 53507 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2007

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 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 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 more than 30 employees and $2.2 million in annual gross income at the time of filing.[1] It seeks to employ the beneficiary as a software engineer 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 or that 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 director also noted that the evidence of record did not establish that the petitioner was in compliance with the Labor Condition Application (LCA) filed in support of the Form I-129, Petition for a Nonimmigrant Worker.

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:

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[1] The home page of the company reflects that it was purchased by Quintegra Solutions, Ltd. *See* http://www.valleyus.com.

(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 software engineer. Evidence of the proffered position's duties includes: the Form I-129, the petitioner's September 3, 2004 letter in support of the petition and counsel's January 27, 2005 response to the director's request for evidence. At the time of filing, the petitioner indicated that it was in the initial development phase of "One Link," a product that would "provide an out-of-the box portal for software development" and required engineers to provide software development and ultimately customer service. In response to the director's request for evidence, counsel clarified that the beneficiary would be assigned to work in-house on the design, development and implementation of "One Link" for the duration of his H-1B status. However, he also noted that the petitioner had various other in-house projects in the development stage and could guarantee that the beneficiary would have year-round employment throughout the period requested on the Form I-129.

As described by counsel, the beneficiary's work on "One Link" would require him to perform the following duties:

- Analysis of user needs, involving the review and analysis of existing systems and data for the development of the product;

- Planning and coordination of the design and development required to modify applications to meet client needs, including the formulation/definition of systems' scope and objectives, and the writing of a detailed description of user needs, program functions and the steps required to develop or tailor computer programs; and

- Testing and implementation of proposed modifications and providing support as necessary, requiring the configuration and customization of various modules based on user requirements and involvement in systems integration, systems configuration, program specifications, coding, testing and unit integration.

The petitioner states that the performance of the above duties requires the beneficiary to hold a baccalaureate degree in engineering, computer science, engineering 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 concluded that the record did not establish the petitioner as 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). The basis for this conclusion was the petitioner's failure to submit an employment itinerary for the beneficiary, including contracts identifying the locations where and the employers for which the beneficiary would work while in H-1B status.

There are two aspects to the petitioner's business operations -- software consulting and software development. While at the time of filing, the petitioner's letter of support failed to specify where the beneficiary would be placed within its organization, counsel's response to the director's request for evidence clarified the beneficiary's responsibilities, indicating that he would work in-house on software development rather than serve the petitioner's consulting business. As only those petitioners that intend to employ beneficiaries at more than one location are required to submit employment itineraries, no itinerary is required in the instant case. 8 C.F.R. § 214.2(h)(2)(i)(B). The AAO finds the record to establish the petitioner as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii).

The director also concluded that, without contracts or statements of work establishing the locations where the beneficiary would be employed, he was unable to determine whether the petitioner was in compliance with the terms of the LCA submitted at the time of filing, as required by 8 C.F.R. § 214.2(h)(4)(iii)(B)*(2)*. The LCA states that the beneficiary would be employed at the petitioner's offices in Cupertino, California. In that the petitioner has indicated that it would employ the beneficiary on an in-house basis, the AAO also finds the record to establish the petitioner's compliance with the terms of the LCA.

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

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. The 2006-2007 *Handbook's* discussion of software engineers includes the following description of the occupation's responsibilities:

> 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 . . . .
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> *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.
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> *Computer systems software engineers* coordinate the construction and maintenance of a company's computer systems and plan their future growth . . . . They also might set up the company's intranets – networks that link computers within the organization and ease communication among the various departments. [*Handbook*, page 111].

While the duties of the proffered position are largely those of computer applications software engineers, the petitioner has also indicated that in developing "OneLink" applications, the beneficiary would be required to analyze the various systems on which "OneLink" would operate and to formulate or define the systems' scope and objectives. These duties fall outside the *Handbook's* discussion of the employment of computer applications software engineers, as well as that of computer systems software engineers. Instead, they appear to reflect the work of computer systems analysts whose responsibilities include defining systems' hardware and software needs. [*Handbook*, page 116]. 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 does the record establish the proffered position as employment that is identifiable with an industry-wide educational standard, or that is distinguishable, by its unique nature or greater complexity, from a similar but non-degree-requiring position. Furthermore, although the petitioner has asserted that all of its software engineers hold, at a minimum, the equivalent of a baccalaureate degree, it has submitted no evidence that would establish its history of recruiting and hiring for the position. 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 that the petitioner's discussion of the proffered position has established that the proposed duties are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in computer science or a related field. Therefore, the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) and has established the proffered position as a specialty occupation.

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 1998 degree in electrical engineering from the University of Gorakhpur in India; the results of his 1998 examination in electronics; and an evaluation of the beneficiary's academic record prepared by the Foundation for International Services (FIS), Inc., which finds the beneficiary's degree from the University of Gorakhpur to be the equivalent of a bachelor's degree in electrical engineering with a specialization in electronics from a regionally accredited college or university in the United States. The FIS evaluation also notes it has reviewed the beneficiary's resume and three letters verifying his employment between 1998 and the filing of the petition, and finds this additional evidence to provide the beneficiary with the equivalent of a U.S. baccalaureate degree in computer information systems. However, the AAO will not accept this second evaluation, which assigns academic credit for the beneficiary's employment experience.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)*(1)*, an evaluation of the beneficiary's employment for the purposes of assigning academic credit may only be performed by an official who has the 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. As the record does not indicate that the individual who signed the FIS evaluation has such authority or is affiliated with an academic institution with a program that assigns credit for experience, the FIS evaluation of the beneficiary's employment history will not be considered. Moreover, the

employment letters to which the FIS evaluation refers are not included in the evidence of record. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO will, however, accept the FIS evaluation of the academic degree held by the beneficiary as the equivalent of a U.S. baccalaureate degree in electrical engineering, which the 1998 University of Gorakhpur examination report indicates included a number of courses in computer-related subjects. In that the *Handbook* [page 111] reports that computer software engineers apply "the principles and techniques of computer science, engineering and mathematical analysis to the design, development, testing and evaluation of the software and systems that enable computers to perform their many applications," the AAO finds the beneficiary's degree equivalency in electrical 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.

The AAO notes the director's concerns regarding the more than 159 Form I-129 petitions[2] he states have been filed by the petitioner when the documentation it has submitted in relation to its staff indicates it employs only 53 individuals. The director also found the petitioner to have established its withdrawal of only seven previously-filed H-1B petitions, although it asserted withdrawing petitions for 39 beneficiaries. Based on the number of H-1B filings by the petitioner, its employee totals and the lack of a satisfactory explanation for the discrepancies noted, the director questioned the petitioner's hiring practices.

The record contains a range of documents that establish the growth of the petitioner's workforce: DE-6 Quarterly Wage Reports for the quarters ending March 31, 2004 and June 30, 2004, listing 37 and 43 employees respectively; an Employer's Quarterly State Report of Wages Paid to Each Employee for the quarter ending September 30, 2004, which lists 49 employees, with 39 employees in California, 3 in Virginia, 1 in Massachusetts, 4 in New Jersey, and 2 in Virginia; "EasyPay" listings, entitled "Quarterly Taxable Wage," for the quarters ending September 30 and December 31, 2004. which identify 55 employees (39 identified as working in California, 3 in Florida, 1 in Massachusetts, 4 in New Jersey, 6 in Texas and 2 in Virginia) and an undated list of 60 employees, identified by name, title and immigration status, submitted as part of the petitioner's January 27, 2005 response to the director's request for evidence.

Counsel on appeal submits copies of 38 withdrawal letters for pending or approved Form I-129 petitions filed by the petitioner in 2004-2005, 33 cases processed at the California Service Center, 3 at the Nebraska Service Center, with single cases from the Texas and Vermont Service Centers.[3] He also provides a list of 39 withdrawals, 13 of which are not included among the submitted copies. A check of relevant CIS data bases confirms that at least 10 of the 13 petitions have been withdrawn or revoked.

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[2] A separate check of CIS data bases indicates the total is 139.

[3] Two letters were mailed to the incorrect service center; the withdrawal of WAC 04 167 51089 was sent to the Nebraska Service Center and the withdrawal of LIN 04 013 55553 to the California Service Center.

Therefore, of the H-1B petitions filed by the petitioner since its incorporation in 2000, 48 appear to have been withdrawn during 2004-2005 in response to changed employment circumstances. In that the petitioner is in the business of software consulting and development, an industry with a high turnover of personnel, the AAO finds the documented withdrawals are sufficient proof of the petitioner's claims regarding the mobility of its workforce. Accordingly, the petitioner has addressed the director's concerns regarding its hiring practices, specifically the significant difference between the number of Form I-129 petitions it has filed and the number of H-1B workers employed.

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.