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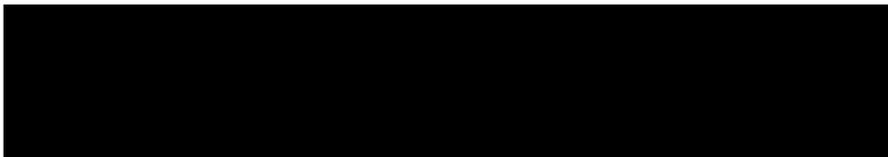
FILE: WAC 05 222 51793 Office: CALIFORNIA SERVICE CENTER Date: **JUL 31 2007**

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 *Michael T. Kelly*
Robert P. Wiemann, Chief
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 solutions and IT consulting firm. It seeks to employ the beneficiary as a programmer analyst. 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 stating that the petitioner did not qualify as a United States employer, and that the proffered position did not qualify as a specialty occupation. On appeal, counsel submits a brief stating that the proffered position is a specialty occupation and that the petitioner qualifies as a United States employer.

The first issue to be considered is whether the petitioner qualifies as a United States employer.

Pursuant to 8 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 petitioner provided copies of sample contracts that it maintains with various clients whereby the petitioner would provide manpower to complete projects on behalf of those companies. The petitioner also provided tax and financial documentation establishing that it has employees, pays those employees, and pays payroll taxes on behalf of those employees. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The next issue to be determined is whether the proffered position qualifies as a specialty occupation.

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.

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, 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 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.

The petitioner seeks the beneficiary's services as a programmer analyst. Evidence of the beneficiary's duties is set forth in the Form I-129 petition with supporting documentation, and in the petitioner's response to the director's request for evidence. According to evidence the beneficiary would:

- Analyze, design, develop, test and implement detailed software modules and web based applications according to project specifications using Java, Visual Basic, ASP, COM, Active X, SQL Server, Oracle, HTML, DHTML, JavaScript, VBScript, C#, JSP, etc., under Windows operating systems;
- Analyze, design, develop, modify and implement customized computer systems for commercial applications based on user requirements using client/server technology;
- Evaluate user requests for new or modified programs to determine feasibility, cost, time required, compatibility with current system and computer capabilities;
- Consult with users to identify current operating procedures and clarify program objectives;
- Formulate plans outlining steps to develop programs, using structured analysis and design;

- Create instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages;
- Enter program codes into computer systems;
- Enter commands into computers to run and test programs;
- Read computer printouts or observe display screens to detect syntax or logic errors during the program test, or use diagnostic software to detect errors;
- Write documentation to describe program development, logic, coding, and corrections; and
- Write manuals for users to describe installation and operating procedures.

The petitioner requires a minimum of a bachelor's degree computer science or engineering for entry into the proffered position.

In denying the petition, the director noted that the beneficiary had not provided contracts from clients who would be the end user of the beneficiary's services, and thus it could not be determined that the proffered position qualified as a specialty occupation. The director also noted that an itinerary had not been established for the length of the beneficiary's intended stay. In response to the director's request for evidence, the petitioner stated that the beneficiary would not work on client projects, and would work at the petitioner's business premises on an in-house project. The beneficiary described in detail the project (e-health suite of applications) and its intended use.¹ The contracts submitted in response to the director's request for evidence were submitted by way of example and in response to the director's request for evidence. The petitioner noted in its response that the beneficiary would be employed to work on internal product development. Under these circumstances, client contracts and an itinerary are not relevant to adjudication of the Form I-129 petition. The appeal shall be adjudicated based upon the position description provided by the petitioner.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for computer programmers. Although there are many training paths available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. As the level of education and

¹ The petitioner's website notes that it develops and markets health management software.

training required by employers continues to rise, the proportion of programmers with a college degree should increase in the future. In 2004, more than two-thirds of computer programmers held a bachelor's or higher degree. Presently, however, it cannot be determined that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the proffered position. The petitioner has not, therefore, established that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Programmers are still employed in the industry in substantial numbers with less than a baccalaureate level education.

The petitioner, however, has established that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. For example, the duties of the offered position require the beneficiary to develop, test and implement software products and applications using a variety of programming languages and databases. The beneficiary will develop proprietary software products on behalf of the petitioner which requires him to use structured analysis and design to outline steps to develop programs, write instructions and logical steps for coding into language processable by computers, enter codes and commands into computers to run and test programs, detect syntax or logic errors, and correct errors. The software developed will be marketed by the petitioner for use by numerous business enterprises. These duties, taken in conjunction with the scope and nature of the petitioner's business organization, are so specialized and complex that knowledge required to perform them is usually associated with the obtainment of a bachelor's or higher degree in a specific specialty. Giving consideration to all evidence submitted, including the stated duties the petitioner's business operations, the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), and the offered position qualifies as a specialty occupation.

The final issue to be considered is whether the beneficiary is qualified to perform the duties of the proffered position. The director did not comment on this issue as the petition was denied on another ground. The record is sufficient, however, for the AAO to make that determination. The beneficiary's foreign education has been determined by a credentials evaluation service to be equivalent to a Master of Science degree in Computer Science from an accredited college or university in the United States. That degree is closely related to the offered position. The beneficiary is, therefore, qualified to perform the duties of the offered position.

As always, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has sustained that burden. Section 291 of the Act, 8 U.S.C. § 1361.

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