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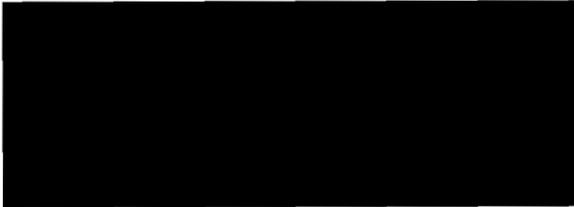
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20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE: WAC 07 130 53021 Office: CALIFORNIA SERVICE CENTER Date: NOV 17 2008

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

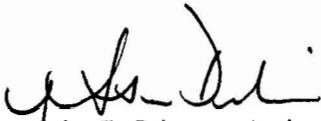
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



**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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides software development and consulting services. The petitioner avers it was established in 1999, has 40 employees and had \$6,000,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a computer programmer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On July 24, 2007, the director denied the petition, determining that the petitioner had not established that it was an employer or an agent and had not established the proffered position as a specialty occupation. On appeal, counsel for the petitioner submits a brief and documents in support of the appeal.

The record of proceeding before the AAO includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's April 14, 2007 request for evidence (RFE); (3) the petitioner's June 25, 2007 response to the RFE; (4) the director's July 24, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and documents presented in support of the appeal.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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 seeks the beneficiary's services as a computer programmer. In a March 28, 2007 letter appended to the petition, the petitioner provided the following description of the beneficiary's duties as a computer programmer:

- Design, analyze and develop business process applications in a Windows and UNIX environment.
- Utilize Oracle, MS SQL Server and MS-Access as a relational database management system (RDBMS).
- Involve in the Design, Development and Maintenance of all database instances and user management.
- Tuning the SQL queries, PL/SQL Stored Procedures using SQL Server.
- Develop Dynamic web pages using .Net technologies.
- Writing algorithms required to develop programs using system analysis and design.

- Preparing flowcharts and diagrams to illustrate sequence of steps that program must follow and to describe logical operations.
- Preparing data models and Entity-Relationship models by using tools like ERWIN.
- Using graphic files and text data from a database and presenting it on web.
- Collecting user requirements and developing applications as per the business needs.
- Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding the client's requests for enhancements and new business functions.
- Interface programming, debugging and executing of programs.

The petitioner noted that the beneficiary's daily tasks would be apportioned approximately as: system analysis – 25%; database design and development – 20%; developing the source code and programs - 30%; implementation and documentation – 10%; unit and system testing – 15%. The petitioner provided a copy of a Form ETA 9035E, Labor Condition Application (LCA) showing the beneficiary's work location in Lisle, Illinois as a computer programmer. The petitioner also submitted a copy of a March 8, 2007 offer of employment and non-compete agreement between the petitioner and the beneficiary.

On April 14, 2007 the director requested, among other items: clarification of the petitioner's employer-employee relationship with the beneficiary; a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; contractual agreements, statements of work, work orders, service agreements, letters from authorized officials of the ultimate client companies where the work will actually be performed, that provide a comprehensive description of the beneficiary's proposed duties; and an itinerary that specifies the dates of each service or engagement, the names and addresses of the actual employers and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested.

On June 25, 2007, counsel for the petitioner stated that the petitioner would be the *bona fide* employer of the beneficiary and that the beneficiary would be working in-house on a company project at the company's Lisle, Illinois location. Counsel repeated the above list of duties, indicated that the beneficiary would be working on the petitioner's Network Management System project in-house, and would be supervised by the petitioner's technical manager. Counsel included a copy of a detail design for the Network Management System. Counsel also provided copies of the petitioner's job announcements for various software related positions. The positions advertised included announcements for software engineers, network and computer systems administrator positions, and developers with certain computer language and platform skills. The announcements did not include a position for a computer programmer. The petitioner provided a copy of its organizational chart showing one technical manager who reported to the chief executive officer and who supervised two project leads and 15 computer programmers. The two project leads supervised 15 software engineers.

On July 24, 2007, the director denied the petition. The director determined, based on the record that the petitioner did not use computer programmers, analysts, or others to complete its own projects, but rather subcontracted workers with a variety of computer skills to other companies which needed computer programming services. The director noted that the petitioner had not provided copies of service agreements,

purchase orders, or other documents and that without those documents the petitioner had not established that it is an employer or an agent, and therefore qualified to file petitions for alien H-1B workers. The director also determined that the petitioner had failed to establish that the beneficiary's actual duties would be the duties of a specialty occupation.

On appeal, counsel for the petitioner repeats his response to the director's RFE, that the petitioner would be the *bona fide* employer of the beneficiary and that the beneficiary would be working in-house on a company project at the company's Lisle, Illinois location. Counsel also repeats the same list of duties and indicates that the beneficiary would be working on the petitioner's Network Management System project in-house, and would be supervised by the petitioner's technical manager. Counsel asserts that due to the demand for its services, the petitioner is constantly in search of qualified technical personnel with strong education and experience in the field of computer science, engineering, or management information systems and that the petitioner is in need of a programmer analyst with an educational background with extensive knowledge and training in the field of computer systems – level software. Counsel indicates that the petitioner considers a college education with the completion of a master of science in engineering with specialty training and experience in the field of computer software and database applications to be a pre-requisite for this position. Counsel also submits a number of work orders and service agreements with third party companies located in Florida, New Jersey, Rhode Island, Indiana, Ohio, Wisconsin, Missouri, Maryland, and Illinois.

The AAO finds that the submission of a number of agreements with third party companies establishes that the petitioner is an employment contractor. The AAO finds that the record contains sufficient evidence to establish that the petitioner would act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary. The AAO has reviewed the record and also finds that the petitioner has submitted evidence of an in-house project. The petitioner, however, has not submitted sufficient documentary evidence to establish that the beneficiary will work on the assigned project in a specialty occupation position.

The petitioner initially submitted a broad statement describing the duties of the occupation of a computer programmer, without the specifics necessary to establish that the proffered position is a specialty occupation. The petitioner did not provide further information relating specific duties to the petitioner's in-house project in response to the director's RFE. Even if considering that the beneficiary would work only in-house on the petitioner's Network Management System project, the record does not include evidence establishing that the work would comprise the work of a specialty occupation.

The AAO first considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information

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<sup>1</sup> See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

about the duties and educational requirements of particular occupations. Regarding the occupation of a computer programmer, under the title *Computer Programmers*, the *Handbook* reports:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. With the help of other computer specialists, they figure out which instructions to use to make computers do specific tasks. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools, for example—have redefined the role of a programmer and elevated much of the programming work done today.

The *Handbook* provides the following regarding the educational requirements for the occupation of a computer programmer:

A bachelor's degree commonly is required for computer programming jobs, although a two-year degree or certificate may be adequate for some positions. Employers favor applicants who already have relevant programming skills and experience. Skilled workers who keep up to date with the latest technology usually have good opportunities for advancement.

***Education and training.*** Most programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

As referenced above, the petitioner does not describe the beneficiary's specific duties in connection with its Network Management Systems project. The description of duties provides an overview of the occupation of a computer programmer but does not provide the necessary detail to enable an analysis of the beneficiary's actual daily duties. The petitioner has not described specific tasks relative to the beneficiary's assignment working on the petitioner's in-house project that would elevate the proffered position to a position that would normally require a baccalaureate or higher degree in a specific discipline.

When discussing programmers, the *Handbook* reports: "[m]ost programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs." First, the AAO has long found that employer preference is not synonymous with the "normally required" language of this criterion. Second, based on the *Handbook's* statements, a baccalaureate or higher degree or its equivalent in a specific discipline is not the normal minimum requirement for entry into the particular position. Third the petitioner has not provided sufficient information regarding the duties of the proffered position to establish whether the duties of the proffered position require an individual with a baccalaureate or higher degree in a specific discipline or whether the duties could be performed by an individual with an associate degree or training certificates in particular computer languages.

The petitioner in this matter has failed to provide a definitive description of the duties that the beneficiary would perform on its in-house project and has not detailed specific tasks associated with the project that would require a baccalaureate or higher degree or its equivalent in a specific discipline as the normal minimum requirement for entry into position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner in this matter has not submitted letters from similar organizations regarding their requirements, if any, for individuals employed in positions that are parallel to the proffered position. As the record does not include information that would establish a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations, the petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In the alternative, the petitioner may submit evidence under the second criterion to establish that the duties of the proffered position are more specialized and complex than those of a typical computer programmer. In this matter, the petitioner has not provided such evidence. The description provided, again, does not provide the level of detail required to establish that the duties of the proffered position are so specialized and complex that only an individual with a bachelor's degree or higher in a particular discipline would be able to perform the duties. The petitioner has not described a position that is distinguishable as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The petitioner has not established that the proffered position is a specialty occupation pursuant to the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO acknowledges the job announcements submitted by the petitioner to show that it normally requires a bachelor's degree in a specific discipline to perform the duties of a computer programmer. The announcements, however, do not include an announcement for a programmer analyst. In addition, the announcements do not provide descriptions of the actual duties the incumbents would be required to perform, but rather list the skills in various computer languages or platforms that the petitioner would expect the successful applicant to have obtained. The AAO finds that it is not the skills of a particular individual that make a position a specialty occupation; it is the duties of the position and whether the position incorporates the use of a theoretical and practical application of a body of highly specialized knowledge that is associated with the attainment of a bachelor's or higher degree in a specific specialty. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the

individual to have a baccalaureate or higher degree. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. When assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. Again, the AAO observes that the petitioner's description of the duties of the proffered position as those duties relate to the petitioner's specific requirements and business needs is not sufficiently defined. The petitioner's description of the duties of the proffered position, for example, does not describe specific elements that demonstrate that the individual in the proffered position would use techniques that are obtained only through study at a four-year university. Without a meaningful list of duties related to the beneficiary's assigned project that detail specialized and complex aspects of the proffered position, the petitioner has not established that the individual in the proffered position is required to have knowledge associated with the attainment of a baccalaureate or higher degree in a specific discipline. It is not possible to conclude from the evidence in the record regarding the proffered position as it relates to the petitioner's business that the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 not sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.