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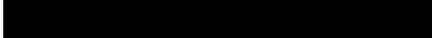
U.S. Citizenship
and Immigration
Services

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DR

FILE: EAC 05 055 50230 Office: VERMONT SERVICE CENTER Date: **AUG 29 2006**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 The director's decision will be withdrawn.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 software consulting company. It seeks to employ the beneficiary as a programmer analyst 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 ground that the record failed to establish that the beneficiary is qualified to perform services in 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien must have the following credentials to be qualified to perform the services of a specialty occupation:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

- (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 director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. 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 fledgling software development and consulting company, established in 2004, with two employees and projected gross annual income of \$250,000. The petitioner stated that it provides a variety of services ranging from turnkey projects, to outsourcing, maintenance, and contract services, and requires experienced information technology professionals to complete its contractual obligations to clients. The petitioner proposes to hire the beneficiary as a programmer analyst for three years, at an annual salary of \$45,000, and provided the following description of the job in its initial letter:

As a programmer analyst, the beneficiary will plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs. More specifically, the beneficiary will formulate plans outlining steps required to develop programs using structured analysis and design in addition to preparing flowcharts and diagrams to convert project specifications into detailed instructions and logical steps for coding into languages processed by computers. The beneficiary may also write manuals and document operating procedures and assist users to solve problems. The beneficiary will also replace, delete and modify codes to correct errors, analyze, review, and oversee the installation of software and provide technical assistance to clients. Furthermore, the beneficiary will be assigned to various projects, which will require him to maintain client networks and software builds. He will also coordinate with various locations during transitioning, oversee network administration and create test scripts and applications to manage and test the various functionality of builds and network administration.

According to the petitioner, the proffered position requires a baccalaureate degree or its equivalent in information systems, engineering, or a related quantitative, technical or business discipline. The beneficiary is qualified for the position, the petitioner declares, by virtue of his three-year bachelor of engineering degree in metallurgical engineering from Andhra University in Visakhapatnam, India, in October 1997; his post-graduate diploma in computer applications from the Intel Computer Training Centre in Hyderabad, India, on December 18, 1998; and his one-year master of technology degree in the field of industrial metallurgy from Bakatiya University in Warangal, India, in August 2000. As evidence of the beneficiary's U.S. degree equivalency, the petitioner cites the report of an academic credentials evaluation service which concludes that the beneficiary's two degrees and computer training diploma in India are equivalent to a bachelor's degree in computer information systems from a U.S. college or university.

In response to the RFE, the petitioner provided a more detailed description of the duties of the programmer analyst position, and the percentage of time required by each duty. It reads as follows:

- 10% **Project Planning:** Defining the scope of the project, deliverables and milestones. These will also involve interaction and coordination of various people and organizations to further define and finalize requirements. Updating progress reports. Managing the scope to deliver the project on time.
- 20% **IT Requirements:** Interaction with the end users, engineering and technical personnel to formulate the problem. The beneficiary will use techniques such as block diagrams, flow charts and other techniques to elicit requirements for the business information technology solutions. The formulations will be further refined and validated with the appropriate members of the organization.
- 20% **Designs:** The beneficiary will design technical architecture based on the business requirements. Designs will include detailed definition of modules, subroutines, and user interfaces that will aid in solving the problem. Details will include application program interfaces and programs sequence that will result in solving the business problem.
- 20% **Construction (Coding):** Taking the above designs, and writing programs that will functionally enable the designs to work on the computer systems. The beneficiary will develop modules, sub-routines, user interfaces and other programmatic logic to deliver the business information solution. He will understand the limitations of the computer systems and the associated languages to accomplish the design.
- 20% **Testing:** The beneficiary will test for functionality and robustness of the system developed during the coding/construction activity. This will also involve working with the end users and engineering to validate the programs. He will work on the refinements of the programs to gain acceptability of the business solutions by the end users.
- 20% **User Support and Trouble Shooting:** The beneficiary will provide comprehensive technical support to users.

Supplementing the documentation submitted with the petition – which included the petitioner’s articles of incorporation, employer tax identification number, business credit card issuance, and a consulting services agreement between the petitioner and a client to which the beneficiary was assigned as consultant – the petitioner submitted additional evidence in response to the RFE that its business is a going enterprise – including another consulting services agreement with a client, several phone bills, a company brochure, and photographs of the business premises.

In his decision the director found that the academic credentials evaluation report submitted by the petitioner was not persuasive evidence that the beneficiary’s metallurgical engineering degrees and computer training diploma in India are equivalent to a bachelor’s degree in computer information systems from a U.S. college or university. Nor did the record establish that the beneficiary has a combination of education and work experience that is equivalent to a bachelor’s degree in a computer-related field. The director concluded that the evidence of record failed to establish that the beneficiary is qualified to perform services in a specialty occupation, in accordance with section 101(a)(15)(H)(i)(b) of the Act.

On appeal counsel reiterates the petitioner's contention that the beneficiary's academic degrees qualify him to perform the duties of a programmer analyst because an information technology professional providing computer software consulting services must utilize the same kinds of quantitative analysis methodologies employed in the engineering field. Counsel refers to information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* identifying engineering as one of the preferred degrees among employers of computer programmers and systems analysts.

CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. The duties of the proffered position, as described by the petitioner, reflect two occupational categories in the *Handbook* – computer programmers and computer systems analysts. With respect to the educational requirements for computer programmers, the *Handbook* states, in pertinent part, as follows:

[T]here are many training paths available for programmers, mainly because employers' needs are so varied Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with two-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

[I]n the absence of a degree, substantial specialized experience or expertise may be needed. Even when hiring programmers with a degree, employers appear to place more emphasis on previous experience.

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, inventory control, or another area of business

[E]mployers using computers for scientific or engineering applications usually prefer college graduates who have degrees in computer or information science, mathematics, engineering, or the physical sciences Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business and who possess strong programming skills.

Handbook, 2006-07 edition, at 105-06. As for the educational requirements for computer systems analysts, the *Handbook* states, in pertinent part, as follows:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. Relevant work experience also is very important

Many employers seek applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS) Employers are increasingly seeking individuals with a master's degree in business administration (MBA),

with a concentration in information systems, as more firms move their business to the Internet.

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment as system analysts

Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and good interpersonal skills. Courses in computer science or systems design offer good preparation for a job in these computer occupations. For jobs in a business environment, employers usually want systems analysts to have business management or closely related skills, while a background in the physical sciences, applied mathematics, or engineering is preferred for work in scientifically oriented organizations.

Id. at 117. As indicated in the foregoing excerpts, numerous combinations of education, training, and work experience can lead to jobs in computer programming and systems analysis. Academic degrees in a variety of fields – including engineering – are suitable for entry into many computer programmer and systems analyst positions.

As previously discussed, the beneficiary has a three-year bachelor of engineering degree in metallurgical engineering from the Faculty of Engineering at Andhra University in Visakhapatnam, India, and a one-year master of technology degree in the field of industrial metallurgy from the Faculty of Engineering & Technology at Bakatiya University in Warangal, India. The academic credentials evaluation report in the record concluded that those two degrees, together with the beneficiary's one-year post-graduate diploma in computer applications from the Intel Computer Training Centre in Hyderabad, India, are equivalent to a bachelor's degree in computer information systems from a U.S. college or university. After analyzing the beneficiary's baccalaureate and master's coursework and noting the lack of evidence that the computer training diploma was worth any college credit, the director concluded that the beneficiary's university study in India was not directly related to the proffered position. The director discounted the evaluator's conclusion that the beneficiary's university studies and computer training diploma are equivalent to a U.S. bachelor's degree in computer information systems. The AAO agrees that a credentials evaluation service, as specified in 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), may only evaluate education, not training. Accordingly, the AAO will discount that portion of the evaluation that includes the beneficiary's one year of computer training at a non-academic institution. Nevertheless, the evaluation implicitly states that the beneficiary's four years of academic coursework in India, culminating in a bachelor's degree in metallurgical engineering and a master's degree in industrial metallurgy, are equivalent to a U.S. baccalaureate degree in metallurgical engineering. Engineering is one of the academic fields favored by employers hiring computer programmers and systems analysts, as the DOL *Handbook* indicates, and the AAO agrees with the petitioner that the quantitative analysis methodologies utilized in engineering are directly applicable to the duties of a programmer analyst in the computer field.

Based on the foregoing analysis, the AAO determines that the beneficiary is qualified to perform the duties of the proffered position – a programmer analyst. Accordingly, the petitioner has overcome the grounds for denial discussed in the director's decision. The petition may not be approved, however, unless the petitioner can establish that the proffered position is a specialty occupation. This issue was not addressed in the director's decision.

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.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple locations to perform services established by contractual agreements for multiple third-party companies. In *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), a federal appeals court held that for the purpose of determining whether a proffered position is a specialty occupation the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The court recognized that evidence of the client companies’ job requirements is critical when the work is to be performed for entities other than the petitioner, and held that the legacy Immigration and Naturalization Service reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor’s degree for all employees in that position.

The record contains copies of two consulting services agreements between the petitioner and client companies, dated and signed in December 2004, only one of which identifies the beneficiary as the consultant who will be providing services to the client. Neither agreement provides any details about the services to be provided. More importantly, there is no description of the beneficiary’s job duties from the client company or companies, as required to show that the beneficiary is performing services that require a baccalaureate or higher degree in a specific specialty.

Furthermore, the record is unclear as to where the beneficiary would be working. Though the petitioner identified the beneficiary’s work location as Worcester, Massachusetts in its labor condition application (Form ETA 9035E) certified by the Department of Labor, the consulting services agreements in the record appear to indicate that the services will be performed at the clients’ work sites in Michigan and California, respectively. Though the agreements do not name the work locations, they specify that the governing law is Michigan and California – the clients’ respective home states – not Massachusetts, where the petitioner is located. Moreover, both agreements appear to give the clients the discretion, through the issuance of work orders, of deciding where the work will be performed. Based on the current record, it is difficult to determine whether the petitioner is in compliance with the work location condition of its DOL-certified labor condition application.

The petition is remanded for consideration of the foregoing issues by the director – *i.e.*, whether the proffered position qualifies as a specialty occupation and whether the petitioner is in compliance with the terms and conditions of its labor condition application. 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 8, 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.