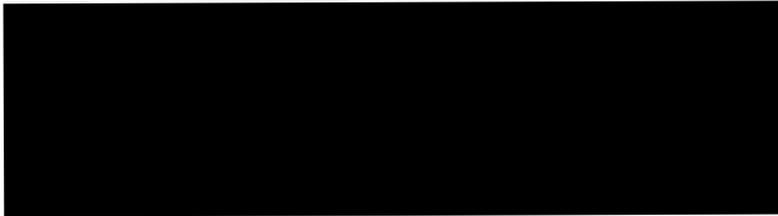


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prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

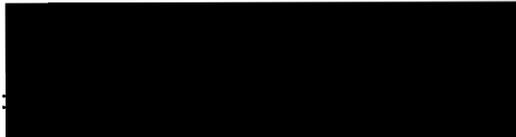
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FILE: LIN 04 156 50624 Office: NEBRASKA SERVICE CENTER Date: JUL 12 2006

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 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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is a software development and consulting staffing firm that 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 because the petitioner failed to respond to a notice of intent to deny. The director's decision to deny the petition cited a letter, dated August 18, 2004, in which the director notified the petitioner that the petition may be denied on the basis of the following adverse information:

Independent research conducted by the Service revealed that a corporation by the name of Deltasoft was involuntarily dissolved by the State of Illinois. A search conducted on the State of Illinois website failed to reveal that Deltasoft, Inc. was registered to conduct business in that state.

In his denial the director noted that the petitioner failed to respond to the August 18, 2004 letter.¹

On appeal, counsel submits a letter brief stating that the petitioner never received a notice of intended denial, and therefore, did not have an opportunity to rebut the adverse information.

The AAO finds, however, that information to the effect that the petitioning corporate entity was not registered in Illinois is not determinative of the petitioner's eligibility to file an H-1B petition. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B), (iii), and (iv). Therefore, the director's decision does not have a proper basis, and will be withdrawn.

As the director did not determine whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the services of a specialty occupation, the petition will be remanded for the director's determination on these issues.

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.

¹ The AAO notes that, per the Corporate/LLC Information Search database at the Internet site of the Illinois Secretary of State, the information about dissolution appears to relate not to the petitioner here, [REDACTED] but to a different entity, [REDACTED]. Also, the Division of Corporations section on the State of Delaware's Internet site reveals that the petitioner has been incorporated in that state since May 13, 2002.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner’s letter of support; (3) the director’s request for additional evidence (RFE), dated June 4, 2004; (4) the petitioner’s response to the RFE; (5) the director’s letter, dated August 18th 2004; and (6) Form I-290B and supporting documentation, and counsel’s letter brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner states that it is seeking the beneficiary’s services as a programmer analyst. Evidence of the beneficiary’s duties includes: the Form I-129 petition, and the petitioner’s letter in response to the director’s RFE. The petitioner stated that 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.

Upon review of the record, the petitioner has established that an employer-employee relationship exists between the petitioner and the beneficiary.

The AAO turns to the issue of whether or not the petitioner would be the beneficiary’s 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.

To qualify as a United States employer, all three criteria must be met. The payroll records indicate that the petitioner engages persons to work in the United States, and the Form I-129 indicates that it has an Internal Revenue Service Tax Identification Number. The record contains an at-will employment contract between the petitioner and the beneficiary. The petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, or otherwise control the work the beneficiary would perform.

However, the petition may not be approved at this time because the director did not make a determination whether the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A), and whether the beneficiary is qualified to perform the duties of a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C).

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation, and whether the beneficiary is qualified to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 21, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.