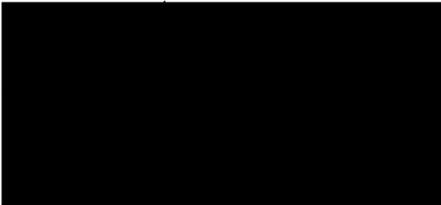




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FILE: EAC 05 003 54101 Office: VERMONT SERVICE CENTER Date: **JUL 26 2006**

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:

SELF-REPRESENTED

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, Director  
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 development firm that seeks to employ the beneficiary as a software engineer. 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 determined that the proffered position qualifies as a specialty occupation, but denied the petition on the ground that the employment contract between the petitioner and beneficiary contained a clause that violates Department of Labor (DOL) regulations at 20 C.F.R. § 655.731(c)(9) (incorrectly identified by the director as 20 C.F.R. Part 655.73(c)(9)) in that it required the beneficiary to provide the petitioner with a promissory note to cover the fees associated with obtaining H1-B status.<sup>1</sup>

On appeal the petitioner submits a revised employment contract in which the disputed clause does not appear.

The AAO finds that the director erred in denying the petition for apparent violation of 20 C.F.R. § 655.731(c)(9). The provisions of 20 C.F.R. § 655.731 address wage requirements related to the Labor Condition Application (LCA) filed with the Department of Labor. The issues of violation of LCA conditions, misrepresentation of material facts on an LCA, and appropriate penalties are matters for DOL adjudication pursuant to the complaint, investigation, and disposition provisions of section 212(n) of the Act, 8 U.S.C. § 1182(n). Violation of 20 C.F.R. § 655.731(c)(9) is not a legitimate ground for denial of an H-1B petition by Citizenship and Immigration Services (CIS). In addition, the revised employment contract appears to remedy the violation upon which the director's denial is based.

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<sup>1</sup> The portion of 20 C.F.R. § 655.731(c)(9) relied on by the director states as follows:

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--

...

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), *except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition)*; the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers).... (emphasis added)

The AAO turns now to the issues of whether the proffered position qualifies as a specialty occupation and, if so, whether the beneficiary is qualified to perform the duties of the proffered position.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 are 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) the Form I-129 and supporting documentation; (2) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes the Form I-129 petition and supporting documents. According to this evidence the beneficiary would work on the functional specifications, technical design and code implementation for J2EE-based enterprise software applications; and cover the entire software development process including clarification of the requirement details with the Business Analysts, implementation, coordination with the data base analysts and system administrators to deploy changes, testing, performance tuning and communication. The petitioner requires a minimum of a bachelor's degree in engineering, computer science or a related field for entry into the proffered position.

The AAO concurs with the director that the proffered position qualifies as a specialty occupation. The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook*, 2006-2007 edition (*Handbook*) for information about the duties and educational requirements of particular occupations. The *Handbook* notes that "most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies," but that individuals who receive certification through computer training programs also find jobs as software engineers. 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)(I).

The petitioner has established, however, that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The duties are specialized and complex in nature and are normally performed by individuals who have obtained a baccalaureate level education, or its equivalent, in such fields as computer science or management information systems. As noted in the *Handbook*, a bachelor's degree is a prerequisite for many software engineer positions. The duties of the proffered position, which include elements of the entire software development process, require the theoretical and practical application of a body of highly specialized knowledge. The duties of the proffered position go beyond the duties of mere testing and verifying of ongoing designs, duties which the *Handbook* ascribes to entry-level software engineer positions, to the more advanced duties of designing and developing of software. The petitioner has, therefore, satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The proffered position is a specialty occupation.

The director did not make a determination as to the beneficiary's qualifications to perform the duties of the proffered position. The record is sufficient, however, for the AAO to make this determination.

To prove that a beneficiary is qualified to perform the duties of a specialty occupation, a 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 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.

At the time of filing, the petitioner submitted an evaluation from the Trustforte Corporation to establish that the beneficiary holds a foreign degree that is the equivalent of a U.S. Master of Science degree in information systems and engineering. Thus, the beneficiary is qualified to perform the duties of the specialty occupation.

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 sustained that burden and the petition shall accordingly be sustained.

**ORDER:** The decision of the director is withdrawn and the appeal is sustained. The petition is approved.