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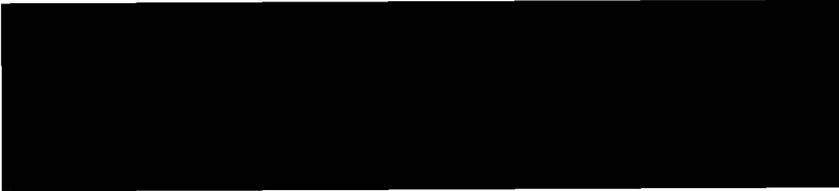
FILE: WAC 04 220 53390 Office: CALIFORNIA SERVICE CENTER Date: MAY 09 2006

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.

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 appeal will be sustained. The petition will be approved.

The petitioner is a computer software company that provides application development/support and strategic services. It seeks to employ the beneficiary as a programmer analyst and to classify him 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 grounds that the petitioner is an agent and failed to furnish any itinerary of definite employment for the beneficiary, as evidenced by contracts with client companies that would utilize the beneficiary's services, and that it was therefore impossible to determine that the beneficiary would perform services in a specialty occupation. Without such contracts, the director stated, he was also unable to determine that the petitioner was in compliance with its labor condition application, certified by the Department of Labor, regarding the beneficiary's wages and work location.

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.

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.

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 director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of 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 a letter accompanying Form I-129, dated July 19, 2004, the petitioner described itself as a provider of "application development/support and strategic solutions, with a special emphasis on ERP and HCM [human capital management] systems, large scale IT project/program management." The petitioner stated that its business was established in 2000, had two employees and projected gross income of \$500,000 in 2004, and wished to hire the beneficiary as a programmer analyst for a three-year time period running from October 1, 2004 to September 30, 2007. The duties of the position were described as follows:

[The beneficiary] will be assigned various responsibilities including system design, development, implementation, testing and problem resolution for PeopleSoft systems; design the programs, write code, test and implement; analyze application fixes with users; provide technical support for upgrading and certifying new versions of the code; develop and maintain interfaces from and to the PeopleSoft application.

According to the petitioner, the proffered position requires an individual with baccalaureate level education. The beneficiary is qualified for the position, the petitioner declares, by virtue of the bachelor of engineering (electrical and electronics engineering) he received in April 2001 from C.R.R. College of Engineering in Eluru, India, and the master of science in electrical engineering he received from the University of South Alabama in December 2003.

In response to the RFE, the petitioner stated that it was developing a product called F1 Integration System (FINIT), which will function as a gateway between People Soft and all www websites, and that the beneficiary would be a key employee to help design and develop the product. The petitioner described the duties of the programmer analyst position, and the percentage of time required by each duty, as follows:

30% **Design:** The beneficiary will develop technical specifications for FINIT and design application based on the technical specifications. He will design networks, servers, workstations, system interfaces, reports, applications security and information architecture.

40% **Program Development:** The beneficiary will investigate and propose architectural changes that improve system performance, organization, and structure. He will develop the technical architecture, develop customizations, write interfaces, write code, and unit test them.

10% **Testing:** The beneficiary will perform volume testing, online volume testing, security and workflow testing, and stress testing. He will also system test plan, user test plan, parallel test plan, performance test plan, benchmark test plan, stress/load test plan, and disaster recovery plan.

- 10% **System Support:** The beneficiary will fix the production bugs, troubleshoot issues, conduct code reviews and monitor the interface performance.
- 5% **Systems Tuning and Audits:** The beneficiary would be designing and implementing tuning processes and procedures. The beneficiary's knowledge would help in creating processes and implement regular database audits.
- 5% **System Performance:** The beneficiary would help to ensure these critical system resources [memory, the central processing unit (CPU), and data input/output (I/O)] are properly allocated and utilized currently and into the future.

As evidence that the petitioner's business was rapidly expanding, counsel indicated that its gross revenues for the first eight months of 2004 were \$312,516 (in comparison with gross receipts of \$52,260 for the entire year 2003); its staff of programmer analysts had increased from two to ten by November 2004; and its software consulting contracts during the year totaled thirteen. Documentary evidence was submitted to support these figures.

In his decision the director stated that the duties of the proffered position described by the petitioner showed that the position requires the theoretical and practical application of a body of highly specialized knowledge, as required to qualify as a specialty occupation. However, the director found that the petitioner was an agent, rather than an employer, of the beneficiary and had failed to furnish a complete itinerary of the beneficiary's services for the three-year period of requested H-1B classification, in accordance with the regulation at 8 C.F.R. § 214.2(h)(F)(2). The director noted that many of the petitioner's thirteen consulting contracts in 2004 had already expired and that none of them identified the beneficiary as the consultant assigned to a contract with operability during the period of requested H-1B classification. Without valid contracts showing that the beneficiary would be performing the duties of a programmer analyst, the director concluded, the record did not establish that there was a specialty occupation in existence for the beneficiary. In addition, the absence of any consulting contracts showing where, for whom, and at what rate of pay the beneficiary would be employed made it impossible to determine whether the petitioner was in compliance with the wage and work location conditions of the Form ETA-9035 labor condition application (LCA) issued by the Department of Labor. For the foregoing reasons the director denied the petition.

On appeal counsel asserts that the director erred in denying the petition for failure of the petitioner to submit copies of consulting contracts involving the beneficiary, and an itinerary of the beneficiary's employment with client companies, because the beneficiary is not going to work for the petitioner's clients, but rather directly for the petitioner on the in-house project – FINIT – described in the response to the RFE. The thirteen consulting contracts were submitted as evidence of the petitioner's financial viability, counsel explains, not as evidence of the type of work the beneficiary would be performing in H-1B status for the petitioner. Since the LCA states that the beneficiary's work location is Tracy, California, the petitioner's home base, and that the beneficiary's rate of pay will exceed the prevailing wage of Tracy, California, counsel also contends that the petitioner is in compliance with the LCA.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the

Handbook indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the proffered position combines the duties of a programmer and a systems analyst, as described in the *Handbook*, 2006-07 edition:

Programmers write, test, and maintain the detailed instructions, called programs or software, that computers must follow to perform their functions. These specialized programs tell the computer what to do – for example, which information to identify and access, how to process it, and what equipment to use. Custom programmers write these commands by breaking down each step into logical series, converting specifications into a language that the computer understands Many programmers also customize a package to clients' specific needs or create better packages.

Professionals involved in analyzing and solving problems include *systems analysts*, who study business, scientific, or engineering data-processing problems and design new flows of information Systems analysts tie together hardware and software to give an organization the maximum benefit from its investment in machines, personnel, and business processes. To do this, these workers may design entirely new systems or add a single new software application to harness more of the computer's power. They use data modeling, structure analysis, information engineering, and other methods. Systems analysts prepare charts for programmers to follow for proper coding and also perform cost-benefit analyses to help management to evaluate the system. These analysts also ensure that the system performs to its specifications by testing it thoroughly.

Based on the comprehensive job description of the work the beneficiary will perform on the FINIT project, the specialized and complex nature of the project, and the other documentation of record, the AAO determines that the proffered position requires baccalaureate or higher level knowledge in a computer-related specialty, and therefore qualifies as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

The AAO agrees with counsel, based on the evidence of record, that the petitioner is the beneficiary's employer, not his agent. "United States employer" is defined in the regulation at 8 C.F.R. § 214.2 (h)(4)(ii), as follows:

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 AAO determines that the proffered position – in which the beneficiary will work directly for the petitioner on the in-house project, F1NIT – establishes an employer-employee relationship between the petitioner and the beneficiary. The petitioner meets the definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii).

The record also establishes that the beneficiary's work is to be performed in-house at the petitioner's business premises in Tracy, California, and that the beneficiary's rate of pay will exceed the prevailing wage in the locality. Thus, the petitioner is in compliance with the LCA.

The petitioner has overcome the grounds for denial discussed in the director's decision. The decision must therefore be withdrawn.

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

- (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 includes copies of the beneficiary's academic degrees and transcripts which show that he earned a bachelor of engineering (electrical and electronics engineering) in April 2001 from C.R.R. College of Engineering in Eluru, India, and a master of science in electrical engineering from the University of South Alabama in December 2003. Based on the foregoing documentation, the AAO determines that the beneficiary is qualified, under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1), to perform the services of the specialty occupation.

Thus, the record establishes that the proffered position is a specialty occupation and that the beneficiary is qualified to perform services in that occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. Accordingly, the AAO will sustain the appeal and approve the petition.

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