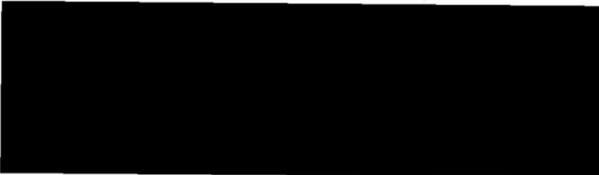




U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY



02

FILE: WAC 04 045 52751 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 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:



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. Wieman, 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 The director's decision is withdrawn and the petition remanded for entry of a new decision.

The petitioner is a software developer with five employees that seeks to employ the beneficiary as a software development engineer. The petitioner, therefore, 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 did not establish that it was the employer as defined by the regulations at 8 C.F.R. § 214.2(h)(4)(ii). On appeal, counsel submits a brief.

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.

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.

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.

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; (3) counsel's response to the director's request for evidence; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a software development engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would: design and implement software systems and tailor existing software for client companies in such areas as systems for inventory control, tracking accounting, and inter-division interfacing; develop user manuals and train end users; develop or modify software appropriate to computer operations systems used by client companies; establish software that operates in LAN and WAN. The petitioner indicated that the proffered position requires a bachelor's degree in computer science, information technology, computer or electrical engineering.

The director issued a request for evidence, specifically requesting a detailed description of the work to be done and the percentage of time to be spent on each duty. The director requested evidence to establish that the proffered position meets one of the above listed criteria. The director issued a request for the following information to substantiate the information provided on the Form I-129: Form DE-6; the petitioner's organizational chart; business license; federal income tax returns; company profile; H and L approval notices; photographs of business premises; lease agreements; floor plan; list of employees; state income tax returns; and payroll summary.

The director determined that the record was not clear that the petitioner will be the beneficiary's employer. The director stated that this determination was based upon a review of CIS records and evidence contained within the various petitions that the petitioner has previously filed with CIS. The director noted that at the time of his decision the petitioner had filed seven petitions for H-1B non-immigrant beneficiaries. The director noted that the petitioner indicated five employees on the Form I-129. The director noted that a review of the petitioner's Form DE-6 quarterly wage reports shows that the petitioner reported wages for five employees during the last quarter of 2003 and five employees during the first quarter of year 2004. The director found that the submitted evidence did not indicate all names of previously approved H-1B beneficiaries.

The director found that CIS had not received written withdrawals for employees who were granted H-1B status and do not appear to be working for the petitioner. The director found that there did not appear to be evidence that the petitioner paid for reasonable costs of transportation abroad for those aliens if they were dismissed from employment by the petitioner. The director found that sufficient evidence has not been submitted establishing which organization will supervise the beneficiary, control his work, and have the authority to terminate his employment. The director stated that, based on past practices of this employer, the petitioner: has not established that it has any services to be performed by this alien during the requested

period; knew, at the time of filing this instant petition, that its request to employ the beneficiary on a full-time continuous basis was not realistic; and in fact does not have a position available.

The director stated that it appears that the petitioner has previously provided fraudulent misrepresentations of material facts to the Departments of Labor, Homeland Security, and State because the evidence shows that the petitioner has paid less than the proffered annual wage to the majority of the beneficiaries on whose behalf the petitioner had successfully petitioned. The director found that the petitioner has not previously complied with the conditions of the petitions that have been filed. The director stated that CIS “is not convinced that if the instant petition was approved that [sic] the petitioner would honor the terms and conditions set forth and signed for.” The director found that all the evidence provided by the petitioner is considered incredible and insufficient to establish that the petitioner has been and will be actually employing the beneficiary in the described position. The director found that the evidence is insufficient to establish that the petitioner employs its H-1B workers in accordance with the terms and conditions of the I-129 petition.

On appeal, counsel asserts that the director erred in the decision as a matter of fact in its failure to adequately evaluate the information and documentation provided by the petitioner. Counsel contends that the director has denied the petition for reasons that were not made apparent in the previous CIS request for evidence, and that the request had not offered the petitioner the opportunity to respond to the assertions made in the decision.

The AAO concurs with the petitioner that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner “if a decision will be adverse to the...petitioner and is based on derogatory information considered by the Service and of which the...petitioner is unaware”, and give the petitioner “an opportunity to rebut the information in his/her own behalf before the decision is rendered.” The request for further evidence sent by the director in this case did not give the petitioner adequate notice of the director’s intention to deny the petition on the basis of misrepresentations, and did not provide an opportunity to rebut this information.

The director’s decision may not be affirmed as the director has not made a determination on whether the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A) and whether the beneficiary is qualified for the position under the criterion 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 qualifies as a specialty occupation and whether the beneficiary is qualified to perform the duties of the specialty occupation. Pursuant to regulation, if an adverse decision is to be rendered on the basis of adverse information not in the record, the director should apprise the petitioner of such information and afford the petitioner the opportunity to rebut it and present information on its own behalf. 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 May 14, 2004 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.