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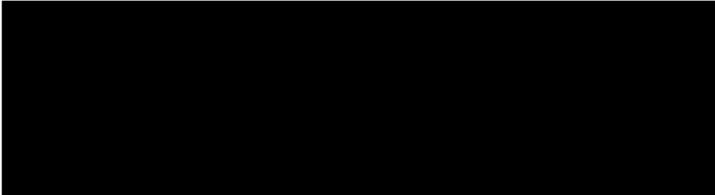
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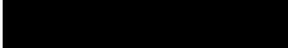
U.S. Citizenship
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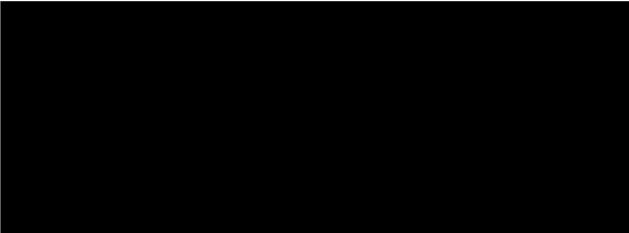


FILE: WAC 07 131 52915 Office: CALIFORNIA SERVICE CENTER Date: **OCT 18 2007**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 engaged in software development services, and it seeks to employ the beneficiary as a developer. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received on April 2, 2007; (2) the director's request for additional evidence, dated April 14, 2007; (3) the petitioner's response to the director's request, received on May 1, 2007; (4) the director's denial letter, dated May 9, 2007; and (5) the Form I-290B and supporting documentation, filed on June 11, 2007. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the ground that the petitioner had failed to demonstrate that it meets the regulatory definition of an "employer" and that it will engage in an employer-employee relationship with the beneficiary. The director also found that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 proposed position.

The term "employer" is defined at 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.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

As noted on page 3 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated that the beneficiary will work at its main office in Delaware, Ohio. In addition, in its response to the director's request for evidence, the petitioner submitted a letter from the Vice-President, Corporate Service Operations, which stated that the beneficiary is employed directly by the petitioner at the Delaware, Ohio offices. The letter stated the following:

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

All of [the beneficiary's] work is for the development of software copyrighted by [the petitioner]. While [the beneficiary] completes software development that will eventually be used by [the petitioner's] clients, all of his work products are owned and managed directly by [the petitioner], and his compensation is paid directly by [the petitioner]. . . . Thus, [the petitioner] is his actual employer, the petition is based on a bona fide job offer, and [the petitioner] is not acting as an agent to arrange short-term employment for workers who are traditionally self-employed.

The petitioner also submitted its job description for the position of developer offered to the beneficiary, which indicated that the position is a full-time position and not a contractor position.²

In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

The record also establishes that the beneficiary will be employed in a specialty occupation.

The petitioner is engaged in software development services, was established in 2002, has 33 employees and a gross annual income of \$1.9 million. It seeks to employ the beneficiary as a developer. In its March 30, 2007 letter of support, the petitioner stated the duties of the proposed position as follows:

As Developer, [the beneficiary] will design and analyze software, develop software, and work on a daily basis with structured query language. He will be responsible for handling client's requests and resolving their technology and software development issues and will work on problems involving name and address parsing. Further, [the beneficiary] will program features and upgrades to meet client needs.

The petitioner's job description requires the position to be filled by an individual who has obtained a Bachelor's degree in Computer Science or Information Systems or a related field.

The proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a showing that the nature of the specific duties of the proposed position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. The record reflects that the petitioner develops client-specific and general software in-house. The nature of the petitioner's business is corroborated by its website. The description of the duties of the proposed position in the context of the petitioner's business operations establish that the duties of the proposed position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree or higher in a specific specialty.

² The petitioner's assertion that it is the beneficiary's actual employer and it is not functioning as a contractor, is further corroborated by the petitioner's website: www.incubit.com.

The petitioner has overcome the grounds of the director's denial of the petition, and has demonstrated that the proposed position qualifies for classification as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the beneficiary earned a Bachelor's degree in Computer Science and Engineering from the Ohio State University in 2005. He therefore qualifies to perform the duties of the specialty occupation.

The petitioner has established that it is the beneficiary's employer, that it has three years of work for the beneficiary, that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the director's decision will be reversed and the petition approved.

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.

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