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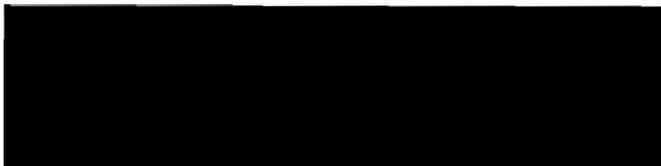
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 163 52656 Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2008**

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner develops software products and delivers solutions to businesses. The petitioner seeks to employ the beneficiary as a computer programmer. Accordingly, 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 record includes: (1) the Form I-129 file April 3, 2007 and supporting documents; (2) the director's June 11, 2007 request for further evidence (RFE); (3) the petitioner's August 9, 2007 response to the director's RFE; (4) the director's September 10, 2007 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On September 10, 2007, the director denied the petition determining: (1) that the petitioner had not provided a credible offer of employment for the requested three years of the beneficiary's tenure in H-1B classification; (2) that the petitioner had not established that it was an employer or an agent; and (3) that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement with attachments.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

In a March 28, 2007 letter appended to the petition, the petitioner listed the beneficiary's responsibilities as:

- Design and develop test scripts for eFirstHelp enhancements; Design and develop test scripts for other future enhancements in eD3, FirstEntity and testing other client applications and system integration with ERP applications like Oracle.
- Testing eFirstHelp and our other Applications in the Suite.
- Unit test, code, maintain and modify software.
- Provide customer support.

The petitioner also provided the following information under the heading "Itinerary of work location and location of work for [the beneficiary]:"

- Start date of employment: From October 1, 2007
- End date of employment: Until September 30, 2010
- Pay Rate: As per the LCA, prevailing wage
- Pay Period: Twice a month

The Form 9035E, Labor Condition Application (LCA) submitted with the petition certified the work location for a computer programmer in Cheyenne, Wyoming.

On June 11, 2007, the director requested, among other items: clarification of the petitioner's employer/employee relationship with the beneficiary; an itinerary of services or engagements that specifies the date of each service or engagement and the names and addresses of each of the employers; and copies of signed contracts, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate end-user of the beneficiary's services that list the beneficiary's name and a detailed description of the duties the beneficiary will perform.

In its August 9, 2007 response, the petitioner explained that the beneficiary would be working on specific product enhancements and attached a copy of the master and detail project plan for the eFirstHelp product. The petitioner added that the beneficiary would be working from the petitioner's Cheyenne, Wyoming offices and would when necessary visit a client site to implement solutions, but would return to the Cheyenne, Wyoming office. The petitioner also noted that it expected to contract for further enhancements for the eFirstHelp product as well as enhancements for other products; thus would have work for the beneficiary to perform for his three-year tenure in H-1B classification. The petitioner provided a revised itinerary adding the beneficiary's work location as Cheyenne, Wyoming. The petitioner further provided a detailed task description for the eFirstHelp product and identified the beneficiary as the resource performing these tasks through September 2009. The record also contains a marketing analysis study for the eFirstHelp product.

As observed above, the director denied the petition, determining: (1) that the petitioner had not provided a credible offer of employment for the requested three years of the beneficiary's tenure in H-1B classification; (2) that the petitioner had not established that it was an employer or an agent; and (3) that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner asserts that it is its general practice to not attach the roles and responsibilities in the offer letter but to provide those duties to an employee in a separate document. The petitioner references an attached copy of the following general description for its computer programmer:

Job Functions, roles and responsibility: Reviews, analyzes, and modifies programming systems including encoding, testing, debugging and documenting programs. Require a bachelor's degree in related and equivalent field and 2-5 years of experience in the field or in a related area. Familiar with standard concepts, practices, and procedures within a particular field. Relies on limited experience and judgment to plan and accomplish goals. Performs a variety of tasks. Works under general supervision; typically reports to a project leader or manager. A certain degree of creativity and latitude is required.

The petitioner also references the Department of Labor's summary report taken from the *Occupational Information Network* or *O*NET Online* (*O*NET*). The petitioner states that the beneficiary's itinerary is for a period starting October 1, 2007 and ending September 30, 2010. The petitioner observes that the beneficiary was hired to work in its product development department and attaches a copy of the project plan for eFirstHelp 8.6.

The petitioner also submits a November 6, 2007 opinion prepared by ██████████, Professor Computer Science Department, Western Washington University, regarding the petitioner's proffered position of computer programmer. Professor Hearne notes that he has reviewed the petitioner's description of its position of computer programmer and a corporate overview of the petitioner. Professor ██████████ indicates that a computer programmer is a standard title for a person who designs and writes computer software in high-level languages such as C++, Java or C# and who has knowledge of operations systems such as Windows, UNIX or Linux. Professor ██████████ notes that although such skills can be acquired in an apprenticeship setting, the more usual career path towards such a position is earning one of the computer-related baccalaureates such as Computer Science, Computer Information Systems, or Information Technology. Professor ██████████ opines that the "knowledge and skills stipulated [in the petitioner's description] presuppose strong technical abilities in computer programming and database design, abilities that are normally acquired while earning one of the computer-related baccalaureates." Professor ██████████ concludes that the petitioner's proffered position is a specialty occupation, normally requiring a computer-related baccalaureate or equivalent experience.

The AAO concurs with counsel's assertion that the petitioner will be 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). 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 AAO further finds that although the scope of the petitioner's advertisements indicates that the petitioner is an employment contractor, the petitioner has provided an itinerary indicating that the beneficiary will not work in multiple locations but will only work in Cheyenne, Wyoming. The petitioner has provided a credible offer of employment.

The AAO also finds that the petitioner has provided sufficient detailed information regarding the duties of the proffered position to establish that it is a specialty occupation. The AAO first considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely reviews the Department of Labor's *Occupational Outlook Handbook (Handbook)* to assess the type of occupation described by the petitioner and to review the educational requirements for the occupation. The 2008-2009 edition of the *Handbook* reports:

Computer programmers write, test, and maintain the detailed instructions, called programs that computers follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. With the help of other computer specialists, they figure out which instructions to use to make computers do specific tasks.

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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).

Programmers usually write programs according to the specifications given by computer software engineers and systems analysts. . . . After engineers and analysts design software—describing how it will work—the programmer converts that design into a logical series of instructions that the computer can follow.

* * *

Programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program.

* * *

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct results. This process is called testing and debugging. Programmers may continue to fix problems for as long as a program is used.

* * *

Programmers in software development companies may work directly with experts from various fields to create specialized software—either programs designed for specific clients or packaged software for general use—ranging from games and educational software to programs for desktop publishing and financial planning.

The petitioner in this matter indicates that the individual in the proffered position will design and develop test scripts for a particular product's enhancements, will test the enhancements and code, maintain and modify the software as well as provide customer support. The AAO finds that the petitioner's description of the proffered position corresponds to the duties of a computer programmer. In this matter the petitioner has also provided detailed information regarding the particular project the beneficiary would be working on and it is the detailed nature of the project and the beneficiary's duties as they relate to that project that allows the AAO to conclude that the proffered position would normally require a baccalaureate or higher degree or its equivalent as the minimum requirement for entry into the particular position. Taking into consideration the detailed nature of duties as they relate to the petitioner's specific product, the general information in the *Handbook* regarding the education of computer programmers, as well as the opinion of Professor Hearne, the AAO finds that a computer-related baccalaureate is usually associated with such a position. Upon review of the totality of the record, the record is sufficient to demonstrate that the proffered position requires a bachelor's degree or its equivalent in a specific discipline. Accordingly, it is concluded that the petitioner has demonstrated that the offered position is a specialty occupation within the meaning of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO has also reviewed the beneficiary's qualifications to perform the duties of a specialty occupation in a computer-related discipline. The beneficiary has obtained a bachelor of engineering at the University of Madras, India, a four-year course of study beyond the equivalent of high school in the United States. In addition, the beneficiary possesses a post graduate diploma in management at the Indian Institute of Modern Management, a degree awarded upon completion of the four-year bachelor's degree. The record also contains the transcripts of the beneficiary's coursework. In addition, the record includes an educational equivalency evaluation indicating that the beneficiary has the equivalent of a bachelor's degree in electrical engineering from a regionally accredited college or university in the United States. Upon review of this information, the AAO finds that the beneficiary has obtained the equivalent of a bachelor's degree in an information technology discipline, and thus is qualified to perform the duties of the proffered specialty occupation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

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