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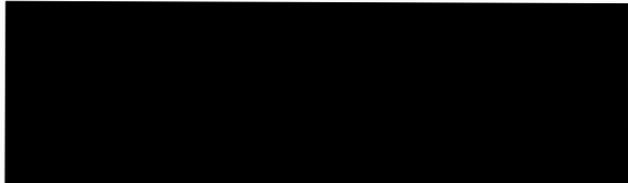
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 07 130 53114 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

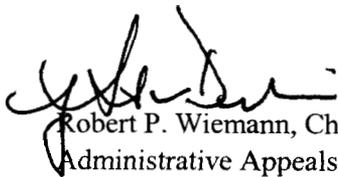
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


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 dismissed. The petition will be denied.

The petitioner provides information technology services. It claims to employ 23 personnel and to have had \$2,100,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a software engineer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the petitioner had not established that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 2, 2007 with supporting documentation; (2) the director's April 17, 2007 request for further evidence (RFE); (3) counsel for the petitioner's June 22, 2007 response to the director's RFE; (4) the director's August 13, 2007 denial decision; and (5) the Form I-290B, counsel's brief and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

An 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 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.

In a March 22, 2007 letter appended to the petition, the petitioner stated that it is an information technology firm that provides products, services, and business solutions to clients in the United States. The petitioner labeled the proffered position a "software engineer" position and indicated that the beneficiary would be involved in design, development, and implementation of different computer software applications and that the duties involved the following phases:

- Phase 1 – Analyze existing applications
- Phase 2 – Design and develop new software applications
- Phase 3 – Write and test new software programs and perform enhancements of current software programs
- Phase 4 – Implement new and enhanced software programs
- Phase 5 – Provide technical support after application implementation

The petitioner added that the day-to-day responsibilities included:

- Analysis of software requirements – 15% of the time
- Evaluation of interface feasibility between hardware and software – 10% of the time
- Software application design and programming (Using computer languages, databases, tools, and graphical user interfaces – 45% of the time
- Unit and integration testing – 15% of the time
- Application implementation – 10% of the time
- Application maintenance – 5% of the time

The petitioner noted that the operating systems involved would be Windows and UNIX and the software included C++, C, Java, Servlet's, Java Script, Web Sphere, Java beans, JDBC, DHTML, ASP, HTML, Oracle, MS Access, MS Office.

In response to the director's RFE, requesting a comprehensive description of the beneficiary's proposed duties, the petitioner provided a marketing analysis for a data archiving solution product. Within the marketing analysis, the petitioner noted that it "provided highly skilled professionals to handle projects effectively at the client's locations." The petitioner also indicated that it used its internal resources and employees to do research and development of the product and later hired application developers, web developers and database administrators and that it anticipated the need for more resources to further enhance and develop the product. The petitioner provided a personnel plan that indicated a need for three developers (software engineers) who would develop the product and write the required coding in various languages and one quality assurance analyst (software engineer) who would test the product at various stages of the product. The record also contains the project document for the "Archive Product Solution."

In the August 13, 2007 decision, the director found that the petitioner had established an employer-employee relationship between itself and the beneficiary. When discussing whether the petitioner had established the proffered position as a specialty occupation, the director found that the record did not contain evidence of a specific product development project. The director observed that even if the beneficiary would work on a project internally, the design, development, and implementation of computer software applications would be performed in accordance with a client's specification. The director further observed that the petitioner had not provided any contracts demonstrating that the petitioner is doing business with various clients or companies. The director determined that the record did not provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of any company or organization where the beneficiary would ultimately perform the proposed duties. The director found that without a description of duties, the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel asserts: that the petitioner is legally established as a business entity; that the petitioner has physical premises where it conducts business; and that the petitioner is actually conducting business. To support these assertions, counsel submits the petitioner's incorporation documents, information from the petitioner's website and advertisements, the petitioner's lease, and the petitioner's Internal Revenue Service (IRS) Forms. Counsel reiterates that the duties of the proffered position will be performed at the petitioner's offices. Counsel references the Department of Labor's *Occupational Outlook Handbook (Handbook)* and asserts that the *Handbook* reports that "[m]ost employers prefer to hire persons who have at least a bachelor's degree and broad knowledge and experience with computer systems and technologies" for the position of software engineer. Counsel also references the Department of Labor's *Occupational Information Network – (O*NET)* and asserts that *O*NET* also reports that a bachelor's degree is normally required for entry into the occupation of software engineer as the specific vocational preparation (SVP) range is 7.0<8.0. Counsel re-submits the petitioner's Archive Product Solution documentation and asserts that the beneficiary will be employed on such project as a software engineer.

Although the AAO finds that the petitioner has provided evidence of an internal project to which the beneficiary would be assigned, the petitioner has not provided a comprehensive description of the duties of the position and has not identified the beneficiary's particular tasks associated with the project. Thus, the AAO is unable to determine whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge consistent with the attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation. The AAO

observes that the petitioner initially provided an overview of the phases of a project and a generic description of responsibilities associated with the project. Although the petitioner referenced the operating system involved (Windows and UNIX) and the various software associated with the project, the actual specific detail of the duties that the individual in the proffered position would perform is not described.

The AAO recognizes that the *Handbook* reports:

Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems.

The AAO notes, however, that employer preference is not synonymous with the "normally required" language of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). In addition, the *Handbook* describes several types of software engineers and provides a general overview of the duties of each of these types of software engineers. The *Handbook* also describes the duties of a computer programmer, a hardware engineer, and a systems analyst. The description of duties provided by the petitioner could incorporate the duties of the different types of software engineer, or a computer programmer, or a systems analyst. A generalized description of occupations such as those found in the *Handbook* is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has not offered a description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed in this position rather than providing an overview of a computer-related occupation. The petitioner, therefore, has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, the petitioner's general description of the proffered position shows that the proffered position would involve computer-related work; however, as noted above the *Handbook* lists a number of computer-related positions, some of which require a four-year course of college-level education, some of which require a two-year associate's degree, and some of which only require experience. The lack of detail offered by the petitioner in its initial description of the proffered position and the employment offer submitted in response to the director's RFE does not provide sufficient information regarding the duties of the position

to establish the position as a specialty occupation. Without a meaningful job description, the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. Likewise, without a meaningful description, the petitioner has not established that the position's duties are parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform for the project outlined, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. For this reason, the petition may not be approved.

The AAO acknowledges counsel's reference to *O*NET* and the SVP level of 7<8 for a software engineer. However, the AAO does not consider *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not provided sufficient information to demonstrate that the proffered position incorporates the duties of a software engineer or that the proffered position would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

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 not been met.

ORDER: The appeal is dismissed. The petition is denied.