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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

JAN 08 2003

File: WAC-01-059-54122 Office: California Service Center Date:

IN RE: Petitioner:
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)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is a software and hardware design, development, and consulting business with 56 employees and an estimated gross annual income of $10 million for the year 2000. It seeks to employ the beneficiary as a programmer analyst for a period of two years, nine and one-half months. The director determined that the petitioner, as the beneficiary's agent, had not provided employment contracts including a complete itinerary of services to be performed by the beneficiary. The director also determined that, without such contracts, the Service was unable to determine whether the petitioner had complied with the terms of the labor condition application (LCA).

On appeal, counsel asserts that the petitioner is the employer of the beneficiary, not the agent. Counsel further asserts that the petitioner needs the beneficiary's services and can pay the beneficiary the required salary. Counsel contends that the petitioner was not required by law, regulation, or Service policy to provide the extensive documentation requested by the director, including contracts and itineraries. Counsel submits the petitioner's federal income tax returns for the years 1997 through 2000, the petitioner's quarterly payroll tax statement, various bank statements, the company lease, the company's articles of incorporation, and copies of recent contracts between the petitioner and various companies.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

3. Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section, . . .

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the LCA. The petitioner indicates in the LCA that the beneficiary will be working in the San Francisco Bay area. The petitioner's president subsequently stated, in his response to a Service request for additional evidence, that the beneficiary will be working primarily at the company's office in Santa Clara, California, but he will also work at the sites of Innova's clients, all of whom are located in the San Francisco Bay area. Therefore, it is concluded that the petitioner is in compliance with the terms of the LCA.

8 C.F.R. 214.2(h)(2)(i)(F), *Agents as petitioners*, states:

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;
>
> *(1)* An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
>
> *(2)* A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements.

> The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
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> *(3)* A foreign employer, who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

8 C.F.R. 214.2(h)(4)(ii) states, in part, that:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
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> *(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 record contains the employment agreement between the petitioner and the beneficiary. According to this document, the petitioner hired the beneficiary and will pay the beneficiary's salary and provide the beneficiary with the usual employee benefits including vacation time and the opportunity to participate in the company's savings plan and health and dental insurance plans. The petitioner retains the right to terminate the beneficiary's employment with the company at any time, with or without cause. The petitioner will also control the work of the beneficiary. As such, it is concluded that the petitioner and the beneficiary share an employer-employee relationship.

8 C.F.R. 214.2(h)(2)(i)(B) states, in part, as follows:

> A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training . . .

8 C.F.R. 214.2(h)(4)(iv)(B) states, in part, that an H-1B petition involving a specialty occupation shall be accompanied by:

> Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

8 C.F.R. 214.2(h)(9)(i) states in part that the director shall consider all the evidence submitted *and such other evidence as he or she may independently require to assist his or her adjudication.* (Emphasis added.)

Further, in a Service memorandum entitled "Supporting Documentation for H-1B Petitions," dated November 13, 1995, it states as follows:

> Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation."

The director found the initial evidence insufficient and requested that the petitioner submit copies of the contracts between the petitioner and the clients for whom the beneficiary will perform services, as well as a complete itinerary of the services to be performed by the beneficiary including the specific dates of each service and the names and address of the "actual employers."

In response, the petitioner submitted a letter from the president of Innova Solutions, Rajkumar Velagapudi, providing the beneficiary's itinerary, along with copies of the petitioner's contracts with all six clients listed on the itinerary. Mr. Velagapudi explained in his letter that the projects listed in the itinerary are currently being implemented in Innova's Santa Clara office, but the beneficiary will also need to perform services for the clients at their offices in the San Francisco Bay area during the integration, testing, and post customization maintenance phases of each project. Although the director stated in his decision that the petitioner had not provided statements of work in correlation with any of the contracts, examination of the record reveals that the petitioner submitted statements of work in correlation with the following contracts: Mobile Airwaves, Talking Drum, Inc., and Aspect Communications. Each statement of work sets forth the scope of the services to be provided to the client by Innova's consultants, the nature of the work to be performed, the process for acceptance of the deliverables, the quality assurance process, the project schedule, the number and type of consultants to be

provided to the client by Innova, and the payment schedule. On appeal, the petitioner provided copies of additional contracts, purchase orders, and statements of work in correlation with these contracts.

While the statements of work provide general information on the nature of the project, none of the statements of work or purchase orders name the beneficiary as a consultant assigned to that particular project, nor do these documents provide any information regarding the specific duties to be performed by the beneficiary in the execution of the project. As with employment agencies as petitioners, the Service 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 whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[1] To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, the record does not contain a description of the beneficiary's proposed duties from an authorized representative of any of the companies with which Innova has contracted for computer consulting services. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation.

In view of the foregoing, the director has not determined whether the proffered position is a specialty occupation. Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues. The director may request any additional evidence he deems necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director will enter a new decision.

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[1] The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

ORDER: The decision of the director is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.