U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

JAN 08 2003

File: EAC-01-281-53153 Office: Vermont Service Center Date:

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a computer system and service provider with six employees and a gross annual income of $1,370,000. It seeks to employ the beneficiary as a systems engineer for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

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.

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:
>
> *(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.

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 denied the petition, in part, because the petitioner had not submitted any evidence such as work contracts or orders to demonstrate that the beneficiary would be performing H-1B level duties.

On appeal, counsel states, in part, as follows:

> Exhibit E also includes the petitioning company's quarterly returns, W-2 forms filed through last year, sample business records, bank statements, and the business money management statement of the petitioning company. The additional evidence together with evidence provided previously in the current petition have fully established that the petitioning company is conducting normal business and has the specialty position for the beneficiary who will be a system engineer serving the systems sold by View Micro in their local region.

The record contains, in part, the following:

* Petitioner's lease agreement;

* Petitioner's W-2 forms and quarterly federal tax return;

* Various invoices.

The record contains a summary of the terms of employment indicating that the petitioner has hired the beneficiary and will pay the beneficiary's salary. Even though counsel argues that such documentation demonstrates that the petitioner and beneficiary share an employer-employee relationship, 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, although the record contains a letter dated September 17, 2001, from the petitioner's president who states that part of the beneficiary's duties will be communicating with clients' technical support engineers, and providing technical consultation to end-users, there is no evidence in the record such as contracts with the petitioner's clients or a comprehensive description of the beneficiary's proposed duties from an authorized representative of such clients. Without such evidence, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation. For this reason, the petition may not be 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 not sustained that burden.

ORDER: The appeal is dismissed.

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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.