

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



D 1

FILE: WAC 03 178 52935 Office: CALIFORNIA SERVICE CENTER Date: **SEP 06 2005**

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an information technology business that seeks to extend its authorization to employ the beneficiary as a systems analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 determined the petitioner had not submitted a signed contract indicating where the beneficiary would work. The director further determined that, without such a contract, the petitioner had not established that the proffered position is a specialty occupation or that the petitioner is the beneficiary's employer. The director also determined that the petitioner had not demonstrated that it had complied with the terms of the labor condition application.

On appeal, counsel submits a brief, signed by the petitioner, and additional evidence, including the following:

- Technical Services Agreement, signed by a representative of [REDACTED] and the beneficiary on April 8, 2003, and April 4, 2003, respectively;
- Letter, dated March 17, 2004, from [REDACTED] of [REDACTED] certifying that the beneficiary has been working for IBM for approximately the past three years under a contract between [REDACTED] and the petitioner;
- New labor condition application with Westlake Village, California and Raleigh, North Carolina stipulated as the beneficiary's work locations;
- Assignment Initiation/Change form for the beneficiary, signed by [REDACTED] and the petitioner, indicating that the "estimated end date" for the project at work location of Research Triangle Park, NC (RTP, NC) is March 1, 2005;
- Release Authorization, signed by the beneficiary on February 22, 2001, authorizing a personal background check for access to IBM Global Services;
- Agreement Concerning Assignment to IBM Work, signed by the petitioner and beneficiary on February 22, 2001;
- Supplement to General Vendor Agreement for Services, signed by the petitioner on February 22, 2001, assigning the beneficiary to IBM at RTP, NC from March 1, 2001 through December 30, 2001;
- Time sheets from March 2003 to February 2004, showing IBM as the petitioner's client;
- Employment agreement between the petitioner and the beneficiary; and
- Insurance coverage certificate and recent pay stub for the beneficiary.

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.

The director found that the petitioner had not demonstrated that it qualifies as an agent or that an employer/employee relationship exists.

On appeal, counsel states, in part, that the record contains evidence that the petitioner meets all three prongs of 8 C.F.R. § 214.2(h)(4)(ii), namely, that the petitioner has filed a work petition on behalf of the beneficiary, the record contains a copy of the employment agreement between the petitioner and the beneficiary, and the petitioner has a legitimate IRS tax identification number.

The record indicates that the beneficiary is employed by the petitioner. In view of the evidence of record, the petitioner has established an employer-employee relationship with the beneficiary. The petitioner, therefore, has overcome this portion of the director's objections.

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. . . .

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a computer systems analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the May 9, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing computer and business problems of existing and proposed systems; initiating and enabling specific technologies that will maximize the petitioner's ability to deliver more efficient and effective technological and computer related solutions to business clients; gathering information from users to define exact nature of system problems and then designing a system of computer programs and procedures to resolve such problems; planning and developing new computer systems and devising ways to apply the IT industry's existing technological resources to additional operations that will streamline clients' business processes; analyzing subject matter operations to be automated, specifying the number and type of records, files, and documents to be used, and formatting the output to meet users' needs; developing complete specifications and structure charts that will enable computer users to prepare required programs; and coordinating tests of the systems, participating in trial runs of new and revised systems, and recommending computer equipment changes to obtain more effective operations. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in computers, engineering, or a related field.

The director found that the proffered position was not a specialty occupation because the petitioner had not submitted a signed contract indicating where the beneficiary would work. The director found further that the contract between the petitioner and [REDACTED] is insufficient evidence that a specialty occupation exists for the beneficiary because [REDACTED] not the firm requiring the software development services of the beneficiary.

On appeal, counsel states, in part, that the contract submitted by the petitioner is between the petitioner, as indicated on the contract's signature page. Counsel states further that th [REDACTED]

legally binds the petitioner with IBM, the business needing systems analysts. Counsel updates the beneficiary's itinerary to reflect IBM Research Triangle Park in Raleigh, North Carolina, as his new work site, and submits a new labor condition application reflecting this information.

The record contains a signed contract where the beneficiary will perform computer systems analyst duties. The petitioner, therefore, has overcome this additional portion of the director's objections. The petition may not be approved, however, because the certified labor condition application for the Raleigh, North Carolina work location was certified on March 19, 2004, a date subsequent to May 27, 2003, the filing date of the visa petition. Regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) provide that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. (Emphasis added.) Since this has not occurred, it is concluded that the petition may not be approved.

It is further noted that the petitioner should file a new petition to reflect the changed work location, pursuant to the regulations at 8 C.F.R. § 214.2(h)(2)(E), which state:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

In view of the foregoing, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional 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. The petition is denied.