



U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC 99 051 53690 Office: Vermont Service Center

Date: MAR - 7 2001

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

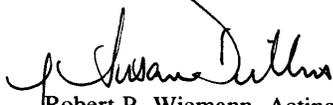
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 which 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, Acting 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 an information technology consulting firm which seeks to employ the beneficiary as a programmer for a period of three years. The director determined that the beneficiary's proposed employment is speculative.

On appeal, counsel argues that the petitioner has complied with pertinent regulations.

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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director has introduced the concept of "speculative employment" into this proceeding. There is no support for the exploration of this concept per se in either statute or regulations. Similarly, the director has questioned the petitioner's ability to pay the beneficiary's proffered wage. Wage determinations and the enforcement of their payment with respect to the H-1B Classification are the responsibility of the Department of Labor. Nevertheless, the petition may not be approved.

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, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

Although the petitioner was required by regulation to provide a certification from the Department of Labor that a labor condition application had been filed, that document was not initially submitted.

The petitioner has still not provided a certified labor condition application. Consequently, it is concluded that the petitioner has not complied with 8 C.F.R. 214.2(h)(4)(iii)(B)(1) and the petition may not be approved. 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. Since this has not occurred, it is concluded that the petition may not be approved.

The Service notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the Service's power to formulate. Helvering v. Gowran, 302 U.S. 238 (1937); SecuritiesComm'n v. Chenery Corp., 318 U.S. 86 (1943); and Chae-Sik Lee v. Kennedy, 294 F.2d 231 (D.C. Cir. 1961), cert. denied, 368 U.S. 926.

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. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.