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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



Public Copy

File: WAC 99 062 52527 Office: California Service Center

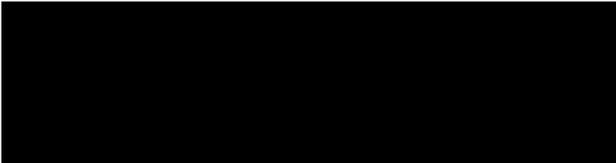
Date: 02 NOV 2001

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:



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, 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 decision of the director will be withdrawn and the matter remanded to her for further action and consideration.

The petitioner is a software development and consulting firm with one employee and an estimated gross annual income of \$850,000. It seeks to employ the beneficiary as an applications programmer for a period of just under two years and ten months. The director determined the petitioner had not established that a qualifying employer-employee relationship exists between the petitioner and the beneficiary because the petitioner was not an bona fide employer within the meaning of the regulations.

On appeal, the petitioner argues that it does meet the definition of employer as stated in 8 C.F.R. 214.2(h)(ii).

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.

The director has based his decision on the concept of "speculative employment." There is no support for the exploration of this concept per se in either statute or regulations. Similarly, the director has questioned whether the petitioner was a bona fide employer. On appeal, counsel argues that the petitioner possesses an Internal Revenue Tax Identification number, is going to employ the beneficiary within the United States, and has an employer-employee relationship as it can hire, pay, fire, supervise, or otherwise control the work of the beneficiary. As such, it is concluded that the petitioner meets the definition of employer pursuant to 8 C.F.R. 214.2(h)(ii), and that a qualifying employer-employee relationship exists between the petitioner and the beneficiary. Therefore, the director's objections to the approval of the petition have been overcome on this one issue.

The director has not determined whether the proffered position is a specialty occupation. Furthermore, the director must reexamine the evidence contained in the record relating to the beneficiary's academic credentials to determine whether the beneficiary qualifies to perform services in a specialty occupation. Accordingly, the matter will be remanded to the director to make such determinations

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.

ORDER: The decision of the director is withdrawn. The matter is remanded to her 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.