



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



Public Copy

File: WAC-00-082-50259 Office: California Service Center Date: OCT 25 2001

IN RE: Petitioner: [Redacted]  
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:



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 a software consulting and development firm with five employees and a gross annual income of \$500,000. It seeks to employ the beneficiary as a programmer/analyst for a period of two years. The director determined the petitioner had not submitted an itinerary of definite employment immediately available upon admission to the U.S., including dates and locations of services to be performed, in compliance with Service regulations.

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.

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.

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.

On appeal, counsel states in part that:

The Petitioner is an IT company a software development and consulting firm who develops in-house software and provide[s] consulting services at the client sites. In the instant case the beneficiary is going to work at Thomas V Ennis Consulting located at [REDACTED] California as stated on the response to the additional evidence dated May 25, 2000, and had further stated that the contract is due to start as of July 1, 2000, and attached a sample contract with Thomas V Ennis and consulting which is used in past.

Counsel cites an unpublished AAU decision, which has no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Counsel argues that the present case is analogous to the unpublished decision. The petitioner in the decision cited by counsel had 161 employees and a gross annual income of \$8 million. In the present case, the petitioner has five employees, a gross annual income of \$500,000, and operates from an office consisting of a living room, kitchen, and bedroom. There is no evidence to establish that as of the filing date of the petition, the petitioner had a specialty occupation position available for the beneficiary. Counsel has not sufficiently demonstrated that the present case is analogous to the unpublished decision.

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 record indicates that at the time of the filing of the present petition, the petitioner had been established for approximately 3 years and had five employees. As the labor condition application reflects that ten H-1B nonimmigrants would be hired, the director appropriately requested additional documentation from the petitioner including contracts between the petitioner and companies where the beneficiary would be providing services. In response to the director's request, the petitioner submitted the following:

\* two agreements dated June 17, 1999 and July 30, 1999, between the petitioner and EDFUND, for services from November 23, 1998 to July 30, 1999, and from August 2, 1999 to September 30, 1999;

\* a consulting services contract signed on September 8, 1999, between the petitioner and Thomas V. Ennis Consulting for services from August 1, 1999 through March 31, 1999 [sic-March 31, 2000];

On appeal, counsel states that the above contracts were not for the beneficiary of this petition but were evidence of the contracts with clients that existed during the time periods noted therein. Counsel further states that although a specific contract is not possible as the present application has not been approved, the beneficiary would provide services for Thomas V. Ennis Consulting. The record, however, contains no evidence of any business to be conducted by the petitioner other than the three contracts listed above. 8 C.F.R. 103.2(b)(12) states that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. The petitioner has not overcome the director's finding that the petitioner does not have an itinerary of definite employment immediately available upon admission to the U.S. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain an evaluation of the beneficiary's credentials from a service which specializes in evaluating foreign educational credentials as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(3). As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.