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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536

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File: EAC-01-061-53538

Office: Vermont Service Center

Date:

24 APR 2002

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:



Public Policy

**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, 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 business with two employees and an estimated gross annual income of \$1 million. It seeks to employ the beneficiary as a software consultant for a period of three years. The director determined the petitioner had not established that a specialty occupation actually exists.

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.

The director denied the petition because although the petitioner had been in business for approximately three years, its tax return for the year ending on October 31, 2000, showed no gross annual income. On appeal, counsel states, in part, that due to lengthy market research, the petitioner did not have any business activity during its first few years. Counsel further states that the petitioner only currently engaged in the business of software services. Counsel also states that the record contains letters from the petitioner's financial guarantors and evidence of several software project orders that demonstrate that the job offer is bona fide.

The record contains the following:

\* Notification letter dated March 1, 2001, from the Indian government, declaring Vinayaka Mission's Research Foundation "to be University";

\* Approval letter dated January 11, 2001, from Software Technology Parks of India, addressed to [REDACTED] [REDACTED] for setting up of 100% Export Oriented Unit under the Software Technology Park scheme of Government of India";

\* Certificate of Incorporation dated August 22, 2000, for [REDACTED]

\* Preliminary Agreement signed on April 27, 2001, between [REDACTED] University of Information Technology and [REDACTED] Mission's Research Foundation, Deemed University;

\* Memorandum of Understanding signed April 30, 2001, between STS, Seoul, Korea, and [REDACTED]

\* Letters dated May 9, 2001, from the director of [REDACTED] (and bank statements) offering financial support for the proffered position;

\* Letter dated June 5, 2000, from the director of [REDACTED] Mission Medical Centre, addressed to the petitioner, promoting infotech services in the United States;

\* Letter dated February 2, 2001, from the vice president of [REDACTED] addressed to the petitioner, asking for confirmation of acceptance of a \$325,000 software project in Singapore;

\* Letter dated February 23, 2001, from the vice president of [REDACTED] addressed to the petitioner, asking for confirmation of entering into a business arrangement;

\* Letter dated June 13, 2001, from the vice president of [REDACTED] addressed to the petitioner, asking for approval of a team of four consultants;

\* Letter dated February 26, 2001, from the president of [REDACTED] addressed to the petitioner, expressing interest regarding the petitioner's services;

\* Letter dated November 29, 2000, from the [REDACTED] addressed to the petitioner, discussing a software project.

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. The record indicates that the petitioner has only two employees and no gross annual income. As such, the director properly requested additional evidence to determine the bona fides of the job offer. The above documentation submitted by counsel and the petitioner has been reviewed. Although it appears that the petitioner has been involved in discussions concerning contracts and work orders, the record, as it is presently constituted, does not contain any evidence demonstrating that the petitioner has sufficient work at the H-1B level to offer the beneficiary.

Furthermore, even if the Service were to conclude that some of the above listed letters were sufficient evidence of H-1 level work for the proffered position, the position would still not qualify as a specialty occupation because such letters are dated after the filing date of the petition on December 18, 2000, and therefore do not demonstrate evidence of sufficient H-1 level work as of the filing of the petition. 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. As such, the petitioner has not established that the proffered position is a 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. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.