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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-01-217-51424 Office: Vermont Service Center

Date: 24 APR 2002

IN RE: Petitioner:
Beneficiary



24 APR 2002

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)

Public Copy

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 development and consulting business with nine employees and a gross annual income of \$1.54 million. It seeks to employ the beneficiary as a programmer analyst for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits additional evidence.

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 the petitioner had filed at least 19 petitions on behalf of foreign workers, already has nine employees, and paid only \$23,125 in salaries and wages for the year 2000. The director further found that the petitioner's federal tax return for the year 2000 reflected only 7% of the gross annual income figure reflected on the petition. On appeal, the petitioner's vice president states, in part, that the petitioner has filed only 13 petitions rather than 19 as stated by the director. He further states that the gross annual income reflected on the petition was an anticipated rather than actual figure, and the misunderstanding was due to a clerical error only. He also states that only five of the 13 petitions have been approved, and, of those, only three beneficiaries had reported to work. The petitioner's vice president also submits two W-2, Wage and Tax Statement, forms for the year 2000 reflecting that the petitioner has two employees.

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 . . .

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application. The petitioner's labor condition application reflects the beneficiary's proffered salary as \$60,000. As the petitioner's quarterly tax returns for the periods ending on December 31, 2000 and March 31, 2001, reflected only minimal wages paid, the director requested a copy of the petitioner's 2000 tax return.

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. Despite the argument on appeal by the petitioner's vice president that the beneficiary would be employed in a specialty occupation in the U.S., the record contains information that seems to conflict with what was presented on the original petition. In addition to the discrepancy related to the petitioner's gross annual income, the record contains evidence of the petitioner having only two employees rather than the nine that were reflected on the original petition. The record contains no explanation of this additional discrepancy. In view of the foregoing, the petitioner has not persuasively established that a position for the beneficiary in a specialty occupation actually exists. Therefore, the petition may not be approved.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

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.