

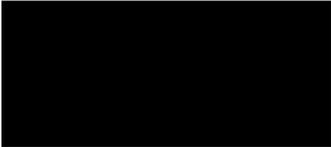


DA

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: LIN-95-028-50156 Office: Nebraska Service Center

Date: AUG 06 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: SELF-REPRESENTED

Public Copy

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. Wienmann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director. The record of proceeding was forwarded to the Associate Commissioner for Examinations, and the decision of the director was reviewed on certification. The Associate Commissioner reversed the director's decision and approved the petition. The matter is now before the Associate Commissioner for Examinations on a Service motion to reconsider. The motion is granted. The previous decision of the Associate Commissioner will be withdrawn. The director's decision to deny the petition is affirmed.

The petitioner is a computer consulting business with 950 employees and a gross annual income of \$55 million. It seeks to employ the beneficiary as a programmer analyst for a period of three years. The director determined the petitioner had not specified where the beneficiary will be employed, and had not established that a qualifying position exists for the beneficiary.

On certification, the Associate Commissioner found that the petitioner was the actual employer of the beneficiary and not an agent, and therefore was not required to submit the additional documentation requested by the director.

On motion, the director states, in part, that the petitioner, as the beneficiary's employer, plans to employ the beneficiary in a location other than the location of the petitioner. The director further states that regulation, policy, and the instructions on Form I-129 specify the importance of contracts, or the terms of oral agreement, in establishing that a qualifying position exists.

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.

8 C.F.R. 214.2(h)(4)(ii) states, in part, that:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it

may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

8 C.F.R. 214.2(h)(2)(i)(B) states, in part, as follows:

A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training . . .

8 C.F.R. 214.2(h)(4)(iv)(B) states, in part, that an H-1B petition involving a specialty occupation shall be accompanied by:

Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

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, a Service memorandum entitled "Supporting Documentation for H-1B Petitions," dated November 13, 1995, states as follows:

Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation."

In a letter dated November 1, 1994, the petitioner's manager of legal services states, in part, as follows:

The following is [redacted] Inc's. agreement with [the beneficiary]:

1. [The beneficiary] is to work on a three year term commencing the date of the approval.

2. His job title is Programmer Analyst.

3. He will be paid by [redacted] Inc, his employer. His annual salary paid by [redacted] Inc is \$40,000. As an employer, [redacted] Inc. will be responsible for paying, hiring, firing, supervising and controlling [the beneficiary] from the Corporate office located at [redacted], [redacted]

4. The establishment, venue and location of the service that will be performed is 1818 H Street NW, Washington DC 20433. Further, this is the complete itinerary and no other work locations are anticipated.

On November 22, 1994, the director requested a signed copy of the petitioner's contract with the client organization which included the name of the client organization and confirmation that an actual programmer/analyst position exists for the beneficiary.

In a letter dated December 21, 1994, the petitioner's counsel responded, in part, as follows:

. . . the above case is an example of information which involves a third party who is unwilling to submit confidential information about its contractual relations to the [INS]. All contracts are, and have always been, implemented between the petitioner [REDACTED] Inc. and the beneficiary, our future employee. Our employees, after obtaining H-1B approval, are contracted to various companies to facilitate their projects.

It is neither the custom nor the practice of this industry to supply third party contracts in the above situation. Please note that the regulations at 8 CFR Section 214.2(h) do not require third party contracts for I-129 petitions. The contractual elements are satisfied by Syntel, Inc. and, although contracts are confidential in nature and have never been requested by the Service in the past, we are willing to provide the Service with a copy of the contract between the petitioner and the beneficiary in a good faith effort to promote the interests of both the Service and Syntel Inc. if necessary.

The record indicates that in order to clarify the nature of the work to be done by the beneficiary, the director properly requested a contract between the petitioner and its client organization. The record further indicates that the petitioner replied that its client organization was "unwilling to submit confidential information about its contractual relations to [INS]." As such, the record contains insufficient evidence of the availability of a specialty occupation for the beneficiary. (It is further noted that not even the name of the client organization where the beneficiary is to perform the duties of a programmer analyst has been provided in response to the director's request.) Absent the supporting documentation requested by the director such as a signed contract between the petitioner and its client organization, including specific information regarding the specialty occupation, the petitioner has not persuasively demonstrated that a qualifying position exists for the beneficiary.

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 decision of the Associate Commissioner dated February 3, 1995, is withdrawn. The decision of the director denying the petition is affirmed.