

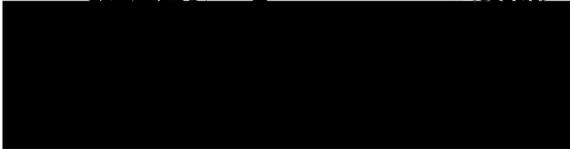


DA

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: WAC-01-040-53279 Office: California Service Center

Date: DEC 27 2002

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)

IN BEHALF OF PETITIONER:



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.

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 The decision of the director will be withdrawn and the petition will be remanded for further consideration.

The petitioner is an engineering and computer consulting business with approximately 100 employees and a gross annual income of \$12 million. It seeks to employ the beneficiary as a programmer analyst for a period of three years. The director determined the petitioner, as the beneficiary's agent, had not provided employment contracts including a complete itinerary of services to be performed by the beneficiary. The director also determined that, without such contracts, the Service was unable to determine whether the petitioner had complied with the terms of the labor condition application.

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 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.

8 C.F.R. 214.2(h)(2)(i)(F), *Agents as petitioners*, states:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(3) A foreign employer, who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

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, 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."

On appeal, counsel states, in part, as follows:

. . . the Petitioner stated in its Response to the Service, dated March 28, 2001, that it could not provide the Service with copies of actual contracts between the Petitioner and its clients, due to confidentiality and nondisclosure agreements amongst the two parties. However, the Petitioner lists some of its current clients on its website, such as Winston Tires, Toshiba and Pacific Bell . . .

Moreover, in its Response to the Service, dated March 28, 2001, the Petitioner provided the Service with an itinerary of projects that the beneficiary would be engaged in. The Petitioner also provided the Service with an employment contract between it and the beneficiary.

In a letter dated March 28, 2001, the petitioner's president and CEO states, in part, that:

[The beneficiary] is a full-time, permanent employee who we expect to contribute to the following projects over the next three years:

Present through December, 2001 - On-Site Technical assistance in the area of system administration and some Oracle Database Administration for OSI Consulting's Phoenix, Arizona office. Specifically, he will provide network/system administration duties for NT and Unix platform currently supporting our Arizona operations. He will also be required to provide on-site client support in those same areas. Other responsibilities include: performance tuning, system security, SQL programming and unix scripting.

2002 - Continued system administration for OSI's Arizona operations throughout the year. Additional clients may include: Tosco, Uhaul, The City of Chandler and Canon. On-Site technical support and SQL server maintenance is likely to be required at each of those client sites.

Beyond 2002 - Continued System Administration and SQL Server database administration support for the above listed clients as well as any new clients requiring expertise in that area.

The record indicates that the beneficiary may assist in the system administration and database administration support of Tosco, Uhaul, and the City of Chandler and Canon. Counsel's argument that he is unable to provide a copy of a consulting contract between the petitioner and its clients due to confidentiality and nondisclosure agreements, and that such contract is not necessary as the beneficiary will work on the petitioner's premises, is noted. As with employment agencies as petitioners, however, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position

interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the record indicates that the beneficiary will be performing system administration and SQL Server database administration support for Tosco, Uhaul, and the City of Chandler and Canon, as well as any new clients requiring expertise in that area, the record does not contain a description of the beneficiary's proposed duties from an authorized representative of such clients. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation.

In view of the foregoing, the director has not determined whether the proffered position is a specialty occupation. Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues.

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. It is noted that the credentials evaluator concluded that the beneficiary has the academic equivalent of a bachelor of science degree in agricultural engineering, and a master of science degree in industrial engineering from a regionally accredited institution of higher education in the United States. A review of the Department of Labor's Occupational Outlook Handbook, 2002-2003 edition, at page 182, finds that for systems analyst, programmer-analyst, as well as database administrators, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems (MIS). The record, however, does not contain any evidence that the beneficiary's educational background is equivalent to a degree in computer science, information science, or management information systems (MIS). The director may request any additional evidence she 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.

must meet, in addition to the statutory and regulatory definition." Supra at 387.

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.