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Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D. C. 20536



File: WAC-01-079-54192 Office: California Service Center

Date: JUL 08 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 which originally decided your case. Any further inquiry must be made to that office.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiegmann, 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 The decision of the director will be withdrawn and the petition will be remanded for further consideration.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 consulting service in software and semiconductor technologies. It has 20 employees and an estimated gross annual income of \$2 million. It seeks to employ the beneficiary as a software engineer for a period of two years and seven months. The director determined that the petitioner is a U.S. agent performing the function as an employer and therefore must demonstrate that it complies with 8 C.F.R. 214.2(h)(2)(i)(F).

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.

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.

The director denied the petition because the petitioner had not provided any contracts to demonstrate that it meets the Service's definition of an agent. The director further found 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 states, in part, that the petitioner is an employer rather than an agent because it has the

ability to hire or fire the beneficiary, as well as maintain full control of the beneficiary's work duties and assignments at all times. Counsel further states that the petitioner will determine whether the beneficiary will work on in-house projects or client projects. Counsel additionally states that since the beneficiary is an employee and not an agent, itineraries for employment are not needed, and, therefore, the petitioner has complied with the terms of the labor condition application.

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 record contains the following:

- * A copy of an in-house research and development project;
- * Consulting agreement dated May 30, 2001, between the petitioner and Catamaran Communications, Inc.;
- * Consultancy services agreement signed on March 12, 2001, between the petitioner and CoWave Networks, Inc.;
- * Consultancy services agreement signed on March 5, 2001, between the petitioner and Corona Networks, Inc.;
- * Representation agreement signed by the petitioner on March 21, 2000, between the petitioner and digital-X, Inc.;
- * Purchase order signed on April 18, 2000, between the petitioner and digital-X, Inc.;
- * Independent contractor services agreement effective May 26, 1999, between the petitioner and Fujitsu Microelectronics, Inc.;

* Statement of employment terms dated August 29, 2001, between the petitioner and the beneficiary;

* Verbal agreement for employment dated August 26, 2001, between the petitioner and the beneficiary;

* Employment offer letter dated December 16, 2000, from the petitioner addressed to the beneficiary.

A review of the petitioner's documentation indicates that it is the beneficiary's employer as it has the ability to hire or fire the beneficiary, as well as maintain full control of the beneficiary's work duties and assignments at all times. As such, the petitioner has overcome the objection of the director.

The petition may not be approved, however, as the director has not determined whether the beneficiary qualifies to perform services in a specialty occupation. It is noted that the beneficiary holds a baccalaureate degree in electronics engineering. A review of the Department of Labor's Occupational Outlook Handbook, 2002-2003 edition, finds that the usual degree concentrations for applications software engineers are computer science or software engineering; for systems software engineers, usual concentrations are computer science or computer information systems. Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues. The director may request any additional evidence he 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.

ORDER: The decision of the director is withdrawn. The matter is remanded to him 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.