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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

Stamp: This decision can be deleted in...  
Stamp: ...



File: EAC-00-051-52635 Office: Vermont Service Center Date: 17 MAY 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)

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, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a computer consulting business with two employees and a gross annual income of \$80,000. It seeks to extend its authorization to employ the beneficiary as a software engineer for a period of three years. The director determined the petitioner had not established that it had ever employed the beneficiary. As such, the petitioner had not demonstrated that the proffered position is a specialty occupation.

On appeal, the petitioner had provided additional information in support of the appeal.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not submitted evidence that the beneficiary had a bona fide job offer.

On motion, the petitioner's account manager states, in part, that the beneficiary's expertise was not initially in demand. The account manager indicates that the petitioner now has sufficient work for the beneficiary. In support of his argument, he submits two job contracts for the beneficiary, copies of the beneficiary's W-2 for the year 2000, and the beneficiary's last pay stub.

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 petitioner's argument on motion is not persuasive. The petitioner has submitted the following evidence on motion:

- \* Consulting agreement effective as of June 22, 2000, between the petitioner and Everest Solutions LLC;
- \* Contract between the petitioner and Everest Solutions, LLC. dated June 23, 2000, indicating that the beneficiary would be employed for three months;
- \* Contractor agreement between the petitioner and Xenon Company dated August 13, 2001;
- \* A work order for the beneficiary dated August 13, 2001, signed by the petitioner and Xenon Company, indicating that the beneficiary would be employed from August 27, 2001 through February 26, 2002;
- \* 2000 W-2, Wage and Tax Statement, for the beneficiary reflecting wages of \$20,532.65;
- \* Pay stub for the beneficiary dated August 31, 2001.

The evidence in the record demonstrating that the beneficiary is currently employed by the petitioner is noted. As discussed in the director's and the Associate Commissioner's previous decisions, however, the record also demonstrates that at the time of the filing of the instant petition, the beneficiary had violated his nonimmigrant H-1B status, as he had not begun his employment with the petitioner. As such, the petitioner and the beneficiary are ineligible for the benefit sought. 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. In view of the foregoing, 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 decision of the Associate Commissioner dated September 7, 2001, is affirmed.