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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: LIN 02 092 54651

Office: NEBRASKA SERVICE CENTER

Date: NOV 20 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:



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. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Nebraska Service Center denied the nonimmigrant visa petition and certified his decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed. The petition shall be denied.

The petitioner is a consulting and software development firm. It employs two persons and has a gross annual income of \$250,000. It seeks to employ the beneficiary as a programmer/analyst. The director denied the petition finding that (1) the petitioner does not meet the definition of "United States Employer" found at 8 C.F.R. 214.2(h)(4)(ii), and (2) the petitioner did not establish the existence of a specialty occupation at the time the petition was filed.

On notice of certification, neither the petitioner nor counsel 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 the classification of qualified nonimmigrant 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 the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) 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.

The petitioner submitted the I-129 petition on January 23, 2002 and requested premium processing service. At the time of filing, the petitioner claimed to provide computer consulting services to third party clients and to develop computer software. The petitioner also claimed to employ two persons and have a gross annual income of \$250,000.

On January 25, 2002, the director requested additional evidence from the petitioner. The director specified that he wished to see evidence that the petitioner was doing business, evidence that a bona fide job offer for the beneficiary existed, and evidence that the beneficiary would perform duties of a specialty occupation for third party clients. The director specifically requested copies of contracts between the petitioner and the third parties for whom the beneficiary would perform work, and the petitioner's description of the duties that the beneficiary would perform for a third party client.

The petitioner responded to the director's request. According to

the petitioner, it had been operational for only one month at the time of the petition filing and, therefore, was not yet developing computer software. The petitioner submitted the requested job contracts and a description of the beneficiary's duties. Based on this additional evidence, the director denied the petition on February 27, 2002. The director concluded that the petitioner did not meet the definition of "United States Employer" that is found at 8 C.F.R. 214.2(h)(4)(ii) and that a specialty occupation did not exist at the time the petition was filed.

Regarding the petitioner's status as a United States employer, the director noted that a contract submitted by the petitioner between it and Trident Software Corporation (Trident), contained language which indicated that "the selection, power of dismissal, and effective selection of the work to be produced as well as the control of the work product are all controlled by a third party, end user client." Regarding the existence of a specialty occupation, the director noted that the petitioner failed to present credible evidence that it had secured a sufficient number of consulting contracts to support its claim that a specialty occupation existed.

I. UNITED STATES EMPLOYER

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

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.

A review of the contract between the petitioner and Trident Software Corporation reveals that the petitioner cannot be considered a United States employer. According to the terms of the contract, the petitioner provides computer-consulting services to clients that Trident locates. It is the clients, not the petitioner, who would control the work of the beneficiary. For this reason, the petitioner cannot be considered a United States employer as that term is defined at 8 C.F.R. 214.2(h)(4)(ii).

II. SPECIALTY OCCUPATION

In order to establish that the beneficiary will be coming to the United States to work in a specialty occupation, the petitioner must show that the duties assigned to the beneficiary, by the end-user of the beneficiary's services, require 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 Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). Here, the petitioner has not sustained that burden. Previously, the director requested copies of work orders/contracts between the petitioner and its client(s), and explanations from the petitioner and its client(s) about the types of duties that the beneficiary will be required to perform. In response, the petitioner submitted one blank contract and one contract with Trident. The Trident contract did not contain a description of the duties that the beneficiary would be required to perform, and the petitioner did not submit the letter(s) from its client(s) that the director requested. Thus, there is no evidence in the record to show that the beneficiary will be coming to the United States to perform the duties of a specialty occupation.

The director's decision to deny the petition is affirmed on the bases that the petitioner is not a United States employer and a specialty occupation does not exist. Accordingly, the petition is denied. 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.

ORDER: The decision of the director is affirmed. The petition is denied.

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