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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

[REDACTED]

File: WAC-02-023-54351 Office: California Service Center

Date: **NOV 25 2002**

IN RE: Petitioner:
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:

[REDACTED]

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INSTRUCTIONS:

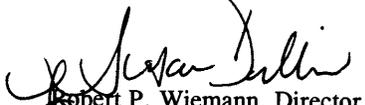
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an engineering and computer systems 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 that 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 stated 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.

The director found the petitioner's initial evidence deficient and requested that the petitioner submit the following additional evidence in support of the petition:

- * Contractual agreements between you and the companies for which your organization (the beneficiary) will be providing services. Contracts should specify the duties contracted to be performed by the "consultant" while working for the client. Include copies of statements of work, work orders and any other documents or appendices. Documentation should specify duties, dates of services requested specific duties to be performed.
- * A legal binding contractual agreement between you and the beneficiary under the terms which the beneficiary will be employed.
- * An itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary will be providing services. The itinerary should specify the dates of each service or engagement, the names and addresses of the actual

employers, and the names and addresses of the establishment, venue, or location where the service will be performed by the beneficiary. If services will be performed on site, specify that in the itinerary. The itinerary should include all service planned for the period of time requested--in this case until November 1, 2004.

In response to the notice, the petitioner submitted the following:

1. employment agreement between the petitioner and the beneficiary;
2. master client service agreement between the petitioner and Parker Hannifin Corporation;
3. work schedule outlining the preliminary description of work, estimates, and pricing of the work to be performed by the beneficiary for Parker Hannifin;
4. letter signed by Peter Seth, Manager of Parker Aerospace, providing a list of job and project descriptions for the beneficiary while he is on assignment at Parker Aerospace;
5. master client service agreement between the petitioner and Robbins Brothers, Incorporated;
6. statement of work pursuant to the agreement between the petitioner and Robbins Brothers;
7. associate vendor teaming agreement between the petitioner and Volt Services Group;
8. customer amendment to the associate vendor teaming agreement between the petitioner and Volt Services Group;
9. rate schedule relating to the associate vendor teaming agreement between the petitioner and Volt Services Group; and
10. master client service agreement between the petitioner and Sitelite, Incorporated.

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 C.F.R. 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)(4)(iv)(B) states 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.

After reviewing the evidence of record, the director determined that the petitioner is not the entity that has control over the beneficiary's work and as such is the beneficiary's agent rather than his employer.

On appeal, counsel asserts that the employment agreement between the petitioner and the beneficiary clearly shows that the petitioner is the beneficiary's employer.

A review of the employment agreement reveals that the petitioner reserves the right to make decisions about the beneficiary's employment terms and conditions, including but not limited to, demotions and promotions, pay increases and decreases, duties and job assignments, with or without notice and with or without cause. The beneficiary is eligible to participate in OSI's medical, dental, vision, life, long term disability, and 401(k) plans. Additionally, the contractual agreement between the petitioner and its client, Parker Hannifin Corporation, specifies that OSI will pay all salaries, wages, and other forms of compensation; withhold income taxes and social security; make contributions to unemployment or disability funds; and pay all other required payroll charges for and on behalf of its consultants. OSI will further be responsible for filing all tax forms, and will pay all taxes. The agreement further states at 5.b, "*Location of Services and Support*":

Contractor (OSI) shall have the sole and exclusive right to control and direct the manner and method of performing the Services hereunder, subject to Client's right to ensure that the results are satisfactory to and in accordance with Client's expectations. Client shall be responsible to provide to Consultants such information, guidance and assistance as is necessary for the successful and timely completion of the Services.

The petitioner will pay the beneficiary's salary, withhold income taxes and social security taxes from the beneficiary's salary, provide the beneficiary with the usual employee benefits, and control the work to be performed by the beneficiary. The petitioner also retains the right to hire or fire the beneficiary.

In view of the foregoing, it is concluded that the relationship between the petitioner and the beneficiary is that of employer-employee. Therefore, the petitioner has overcome that portion of the director's objection.

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

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)(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.)

The director found the work schedule submitted in conjunction with the contract between the petitioner and Parker Hannifin Corporation invalid because the stated contracted work period was from August 29, 2001 to December 31, 2001, a period that had already expired by the issuance date of the director's decision.

On appeal, counsel states that the work schedule at page 13 of the Parker Hannifin contract provides a *preliminary* description of work, estimates, and pricing for consulting work to be done by the beneficiary. (Emphasis added by counsel.) Counsel points out that Peter Seth, the Manager of Parker Aerospace, states in his letter dated November 30, 2001, that the "contract time" is February 25, 2000 to December 17, 2002, with additional extensions.

According to Mr. Seth's letter, the beneficiary will be involved in the following projects:

1. STARS (System Tracking and Researching STARK). (Project Dates: February 2000 to March 2002): Project involves [d]esigning and programming of the stars project. [The beneficiary] will be working on this system for next 6 months on the web version of the STARS project.
2. RCARD (Remote Data Up Load). (Project Dates: April 2002 to May 2002): [The beneficiary] will be involved in [d]esigning and web uploads of this project.
3. Mil STARS (Military System Tracking and Researching STARK). (Project Dates: May 2003 to May 2005): [The beneficiary] will be involved in system net tracking, Schema designing, Data loading of Mil STARS [p]roject.

Clearly, the beneficiary's work for the petitioner's client is ongoing and will not terminate prior to the end of the period of

time requested in the petition. In view of the foregoing, it is concluded that the petitioner has overcome that portion of the director's objection.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner is an engineering and computer consulting company that wishes to employ the petitioner as a programmer analyst. The petitioner described the beneficiary's general duties in the initial I-129 petition as follows:

Develop client server applications using various development tools and perform all steps required during the life cycle of a project, including strategy, analysis, building, testing and implementing. Primarily working with relational database systems. Develops and maintains Oracle applications.

The Department of Labor describes the work of a programmer analyst in its Occupational Outlook Handbook, 2002-2003 edition, at page 180 as follows:

Programmer-analysts design and update the software that runs a computer. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. . . . As this becomes more commonplace, these analysts increasingly work with object-oriented programming languages, as well as client/server applications development, and multimedia and Internet technology.

The director determined that the beneficiary's general duties as described by the petitioner in the initial I-129 petition require the theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. However, the director found the contract between the petitioner and Parker Hannifin invalid because the contracted work period had already expired. The director noted that the statement of work from Robbins Brothers does not display the specific duration of the assignment and that no work orders were submitted in conjunction with the other consulting contracts submitted by the petitioner. The director concluded that, without a valid contract between the petitioner and a client requiring computer programming work, the evidence of record does not establish that there is a computer programming position, and thus a specialty occupation, for the beneficiary.

A review of the duties to be performed by the beneficiary during his work for Parker Aerospace reveals that these specific duties parallel the duties of a programmer analyst as that job is described in the Handbook. According to the Handbook, the usual requirement for programmer analyst positions is a bachelor's degree in computer science, information science, or management information systems (MIS) or its equivalent. Therefore, it is concluded that the petitioner has shown that the proffered position is a specialty occupation.

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 labor condition application (LCA) and a statement that it will comply with the conditions of the LCA.

The director determined that the petitioner, as the beneficiary's agent, had failed to provide valid contracts and a complete itinerary of the work to be performed by the beneficiary. The director stated that, without these documents, the Service is unable to determine whether the petitioner has complied with the terms of the LCA.

According to the LCA contained in the record, the beneficiary was scheduled to work at the petitioner's office in Woodland Hills, California. However, the work schedule submitted in conjunction with the consulting contract between the petitioner and Parker Hannifin specifically identifies the work location as:

Parker Hannifin Corporation
14300 Alton Parkway
Irvine, CA 92618-1814

Additionally, the consulting contract between the petitioner and Parker Hannifin specifically states at 5.b, "*Location of Services and Support*":

Unless otherwise agreed to by the parties, all Services to be performed by Consultants shall be performed on Client's premises.

There is nothing in the record to indicate that the petitioner and Parker Aerospace have agreed that the beneficiary will work in Woodland Hills, California while engaged in consulting projects for Parker Aerospace, which is located in Irvine. It appears the beneficiary will be working at a site other than the site indicated on the LCA. While counsel states on appeal that the petitioner maintains an approved Labor Condition Application for the job site in Irvine, no such Labor Condition Application is contained in the record of proceedings. Without this document, it cannot be concluded that the petitioner is in compliance with the terms of the LCA. For this reason, 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 appeal is dismissed.