

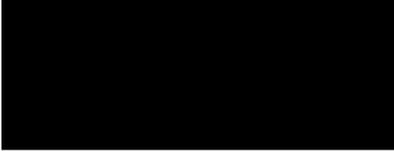


DA

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-01-149-50460 Office: California Service Center

Date: OCT 07 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.

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
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 appeal will be dismissed.

The petitioner develops hardware chips and system software. It has 110 employees and a projected gross annual income of \$14 million. It seeks to employ the beneficiary as an electronics engineer for an approximate period of three years. The director determined the petitioner had not submitted contracts or an itinerary indicating where the beneficiary would work. The director further determined that, without such contracts and itinerary, the petitioner had not established that it is the beneficiary's employer, or that it 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)(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, that:

. . . Petitioner's offices are located in Santa Clara, California and as such are clearly within the 50 contiguous United States. Secondly, the present need for Beneficiary's expertise is in the Petitioner's facilities where some products are being developed and not elsewhere.

Further, there is no real connection between the possession of third-party contracts and itinerary and whether or not a position for Electronics Engineer exists: Petitioner has

stated plainly that it requires Beneficiary to work at its own work-site in Santa Clara, California and as such the position indicated does exist.

The Offer Letter . . . establishes that Petitioner will be the employer of Beneficiary and that Beneficiary will [be] on Petitioner's payroll as employee. This contract was provided to the INS and . . . clearly shows the relationship between Petitioner and Beneficiary will be that of Employer-Employee and that Petitioner will be responsible for Beneficiary's salary. Beneficiary has no employer-employee relationship with any other person. Further, as an employer, Petitioner certainly cannot be classified or likened to an agent.

The record contains, in part, the following:

* Letter dated January 16, 2001, stating the terms of employment between the petitioner and beneficiary;

* Labor Condition Application certified by the Department of Labor on December 19, 2000.

The record contains a summary of the terms of employment indicating that the petitioner has hired the beneficiary and will pay the beneficiary's salary. Even though the petitioner has provided a description of the beneficiary's proposed duties, as with employment agencies as petitioners, 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 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.

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.

In this case, the record contains a letter dated July 24, 2001, in which the petitioner's HR manager stated that the beneficiary would be "working for Petitioner at the Petitioner's office location and *surrounding areas where Petitioner has its facilities.*" (Emphasis added.) Although the director stated in his decision that the petitioner had not provided addresses for the surrounding areas where the petitioner has its facilities, counsel states on appeal only that the beneficiary "will be working for Petitioner at is [sic] own work-site situated in Santa Clara County in California." Counsel's statement on appeal conflicts with the information provided by the petitioner's HR manager.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988). Furthermore, without clarifying where the beneficiary is to work and providing a comprehensive description of the beneficiary's proposed duties, the petitioner has not demonstrated that the work that the beneficiary will perform qualifies as a specialty occupation.

Furthermore, although counsel states on appeal that there is no real connection between the possession of third-party contracts and an itinerary, and whether or not a position for an electronics engineer exists, the record demonstrates that in order to demonstrate that a specialty occupation exists for the beneficiary, the director properly requested an itinerary as well as contracts between the petitioner and its client organizations. Absent the supporting documentation requested in the director's Notice of Action, the petitioner has not persuasively demonstrated that the beneficiary will be performing the duties of a specialty occupation, or that it has complied with the terms of the labor condition application. 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 appeal is dismissed.