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U.S. Department of Justice  
Immigration and Naturalization Service

**identifying data deleted to  
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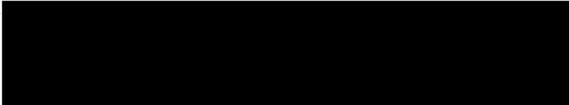
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: LIN-99-150-51157 Office: Nebraska Service Center

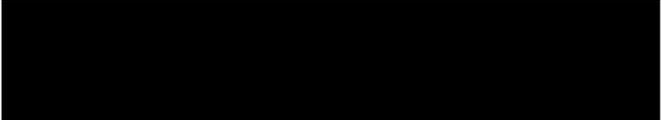
Date: OCT 10 2002

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:

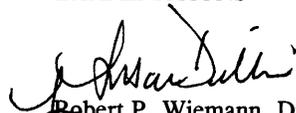
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 nonimmigrant visa petition was denied by the Director, Nebraska 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 matter will be remanded for further consideration and action.

The petitioner is a consulting and programming services business with 120 employees and a gross annual income of \$6.9 million. It seeks to employ the beneficiary as a programmer analyst for a period of two years and five months. The director determined that the petitioner had failed to provide sufficient evidence setting forth the actual nature of the duties to be performed by the beneficiary. The director stated that, without this evidence, the Service is unable to determine whether the duties of the proffered position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific field of study. The director further determined that the petitioner is the beneficiary's agent performing the function of an employer, and as such has failed to provide an itinerary stating exact dates and locations of employment as required by the regulations at 8 C.F.R. 214.2(h)(2)(i)(B).

On appeal, counsel asserted that the beneficiary would be performing the duties of a specialty occupation. In support of his argument, counsel submitted samples of software development projects in which the petitioner is currently engaged. Counsel stated that the work to be performed in those projects is typical of the type of work the beneficiary would perform as a programmer analyst for MDC Systems, Inc. Counsel further asserted that MDC Systems, Inc., is the actual employer of the beneficiary. In support of this assertion, counsel submitted an offer letter that describes the terms and conditions of employment between the petitioner and the beneficiary.

The Associate Commissioner for Examinations noted that the beneficiary will be working at client sites other than the petitioner's headquarters and dismissed the appeal reasoning that the petitioner had failed to submit an itinerary listing the dates and locations where the beneficiary's services would be performed. The Associate Commissioner further noted that the beneficiary has been offered a position for an indefinite period with no specified termination date.

On motion, counsel submits a brief and supporting documentation.

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.

8 C.F.R. 214.2(h)(2)(i)(F) 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. . . . A United States agent may be: the actual employer, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or 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. . . .

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

*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.

On appeal, counsel submitted a copy of the employment agreement between the petitioner and the beneficiary. According to this

agreement, the petitioner hired the beneficiary, will pay the beneficiary's salary, and will provide the usual employee benefits to the beneficiary. The petitioner also has the authority to fire the beneficiary and control the work of the beneficiary. Accordingly, it is concluded that the petitioner is the United States employer of the beneficiary as that term is defined in the regulations.

On motion, counsel points out that the Associate Commissioner incorrectly stated that the petitioner has made an indefinite offer of employment to the beneficiary. Upon further review, it is noted that the petitioner indicates on the petition that the dates of the beneficiary's intended employment are from May 1, 1999 to October 10, 2001. Additionally, the petitioner's president stated in the letter that accompanied the petition that the beneficiary is being offered employment as a programmer analyst for "a period of three years terminable at will." Therefore, the petitioner has overcome that portion of the Associate Commissioner'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 . . . .

The Associate Commissioner noted that the beneficiary will be working at client sites other than the petitioner's headquarters and dismissed the appeal reasoning that the petitioner had failed to provide an itinerary listing the dates and locations where these services will be performed. On appeal, and again on motion, counsel states that the beneficiary will begin his employment for the petitioner by working on in-house projects at the petitioner's place of business. Counsel further states that, if the beneficiary is transferred to another work location outside the parameters of the existing LCA, the petitioner will file an amended I-129 petition. Therefore, it is concluded that portion of the Associate Commissioner's objection has been overcome.

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 submitted a certified labor condition application (LCA) and a statement that it will comply with the conditions of the LCA. The petitioner indicates in the LCA that the beneficiary will work in the Metro Detroit, Michigan area. The petitioner's president stated in his letter dated April 20, 1999, that the beneficiary will be working as a programmer analyst at the location of MDC Systems, Inc., in Farmington Hills, Michigan. On motion, counsel submitted a copy of a "Non-Compete Agreement" between the petitioner and DSC Inc. Software Services. The agreement states that DSC Inc. is a company that provides software-consulting services to its client as an independent contractor and has agreed to subcontract with MDC Systems for the services of four consultants to work on a software development project for DSC's client located in Detroit, Michigan. The beneficiary is one of the four consultants named in this agreement. The petitioner has already stated in the LCA that the beneficiary will work in the Metro Detroit area. Farmington Hills is approximately 24 miles from Detroit, and as such is within the Metro Detroit area. Whether the beneficiary works on-site at the petitioner's location in Farmington Hills or as a subcontracted consultant in Detroit, the petitioner remains in compliance with the terms of the LCA.

According to the agreement between the petitioner and DSC Inc., the beneficiary has been selected to work as a subcontracted programmer analyst for an unnamed client of DSC Inc. In a letter which accompanied the I-129 petition, the petitioner's president provided a description of the beneficiary's proposed duties. Counsel stated in his appellate brief that this is a general description of the beneficiary's core duties. Counsel further stated that these duties provide a framework into which the beneficiary's specific duties may be inserted depending on the nature of the current project to which the beneficiary is assigned.

As with employment agencies as petitioners, however, 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.<sup>1</sup> To interpret the regulations any other way would lead to

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<sup>1</sup> 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

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.

In this case, although the record indicates that the beneficiary will be performing programmer analyst duties for an unnamed client of DSC Inc., the petitioner has not provided a document from this client describing the actual duties to be performed by the beneficiary. Without this description, it is not possible to determine whether the beneficiary's proposed duties meet the statutory definition of a specialty occupation. See Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1).

The director has not determined whether the proffered position is a specialty occupation or whether the beneficiary qualifies to perform services in a specialty occupation. The record shows that the beneficiary received a bachelor of science diploma from the University of Mysore in India in 1992 and a master of computer applications diploma from the same university in 1995. The beneficiary also has related work experience. It is noted that the petitioner has not provided any evidence to show that the beneficiary's foreign education and work experience are equivalent to a bachelor's degree in computer science, information science, or management information systems such as an evaluation from a reliable credentials evaluation service as required by the regulations at 8 C.F.R. 214.2(H)(4)(iii)(D). Accordingly, the matter will be remanded to the director to make such determinations 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.

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also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.