



DA

U.S. Department of Justice

Immigration and Naturalization Service

**prevent clearly unwarranted
invasion of personal privacy**

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



File: WAC-01-128-51903 Office: California Service Center

Date: SEP 24 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 and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a computer software consulting and development business with 25 employees and a gross annual income of \$2 million. It seeks to extend its authorization to employ the beneficiary as a computer programmer for a period of three years. The director determined the petitioner, as the beneficiary's agent, had not established that it had provided employment contracts including a complete itinerary of services to be performed by the beneficiary. The director also determined 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, the petitioner submits additional information.

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)(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 CFR 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)(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, the petitioner states, in part, that the petitioner is not required, by law or regulation, to submit 3rd party contracts. The petitioner further states that:

We have filed several H1B petitions in [the] last 2 years with similar evidence and ALL our petitions were approved by INS California service center without asking for contracts. We are submitting copies of H1B approvals without contracts.

We are responsible for hiring, placing, supervising and firing the beneficiary. We are paying the proffered wages and withholding all applicable taxes.

The record contains the following:

* Employment Offer Letter effective on December 21, 2000, between the petitioner and beneficiary indicating that the petitioner would be the beneficiary's employer. Such letter is not signed by the beneficiary;

* Partial contract executed on June 13, 2000, between the petitioner and Second Wage Applications Group;

* Purchase Order Annexure with a billing date commencement of January 29, 2001, between the petitioner and Kirloskar Software Services, Inc., naming an employee other than the beneficiary as a consultant;

* Purchase Order for IT contractor services on October 19, 2000, billed to Honeywell Shared Services by the petitioner for \$82,560;

* Consulting Agreement effective July 17, 2000, between the petitioner and i2 Technologies, Inc.

In a letter dated February 14, 2001, the petitioner's president stated, in part, as follows:

[REDACTED] is a computer software consulting company, formed in 1997 to provide quality computer consulting services to our clients at their sites as per their needs.

In a Notice of Action dated May 16, 2001, the director requested the following:

* Signed and legally binding contractual agreements between the petitioning entity and the companies for which your organization (the beneficiary) will be providing professional services. The contract(s) should specify what services the beneficiary will be performing for the petitioner's clients. If the contracts do not detail work to be performed and a definite time frame in which the work is to be performed, submit copies of work orders/statement(s) of work that provide the information.

* A legal binding contractual agreement between you and the beneficiary under the terms which the beneficiary will be employed.

* An itinerary listing the location(s) and organization(s) where the beneficiary will be providing services for your organization. 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 are to be performed at the employer's work site (on site), specify that also in the itinerary. The itinerary should include all service planned for the period of time requested--in this case until May 14, 2004.

The record contains an "Employment Offer Letter" indicating that the petitioner has hired the beneficiary and will pay the beneficiary's salary. Thus, the record indicates that the petitioner and beneficiary share an employer-employee relationship.

The record demonstrates that the director properly requested the above listed contracts in order to determine whether the beneficiary will be performing the duties of a specialty occupation. Although the record contains the above contract, purchase orders, and consulting agreement, such documents do not provide specifics related to the beneficiary's intended employment. In a letter dated May 23, 2001, the petitioner's president and CEO stated that when individuals join the petitioner's company, they begin work on in-house projects. Information submitted at the time of the filing of the petition, in the petitioner's February 14, 2001 letter, however, indicates that the petitioner "provide[s] quality computer consulting services to our clients at their sites as per their needs." As such, the petitioner's argument that the beneficiary would be working at the petitioner's worksite is not convincing. The record therefore contains insufficient evidence of the availability of a specialty occupation for the beneficiary. Absent the supporting documentation requested in the director's Notice of Action, in addition to a description of beneficiary's proposed duties provided by the business where the beneficiary will provide his services, 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.

With respect to counsel's objection to denial of this petition in view of the approval of a similar petition in the past, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

Beyond the decision of the director, the petitioner's labor condition application was certified on March 14, 2001, a date subsequent to March 6, 2001, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.