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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-01-047-51533 Office: California Service Center Date: SEP 24 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:  
[Redacted]

**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 software consultancy business with approximately 18 employees and a gross annual income of \$3 million. It seeks to employ the beneficiary as a programmer analyst for an approximate 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, 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)(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, counsel states, in part, as follows:

Petitioner submitted several contracts in response to your request for evidence. Also, petitioner noted that [the beneficiary] will be working on an in-house project for his initial assignment. In the accompanying letter, petitioner again states [the beneficiary] will be working on an in-house project and goes into further detail regarding the project. This evidence establishes that petitioner has immediate work available for [the beneficiary]. It also further establishes that petitioner is the actual employer of [the beneficiary].

In a letter dated August 22, 2001, the petitioner's HR manager states, in part, as follows:

**[REDACTED]** is a computer consulting firm. Our business contracts require us to provide the services of qualified computer professionals for short-term software development projects at client work-sites or to work on software

development projects at our place of business pursuant to contracts with clients or pursuant to in-house marketing schedules.

However, at all times our employees are under the direct control of [REDACTED] and receive their salary from us. In fact, we are responsible for paying, hiring, firing, supervising and controlling each of our consultants from our headquarters in Sunnyvale, CA. While it is true that our consultants may be assigned to client sites, we have total control over the employment relationship and dictate all terms and conditions of employment under law.

In this case, [the beneficiary] will begin employment by working on in-house projects at our place of business. The Labor Condition Application ("LCA") filed in this case covers [the beneficiary's] proposed employment. If or when he is transferred to another work location outside the parameters of the existing LCA, we will file an amended I-129 Petition.

In particular, [the beneficiary] will be working on a range of business applications--specifically the "On line Reservation Product", which may be extended and used in Airlines, Railways, Hotels, Car rentals and other related businesses.

The record contains the following:

- \* Letter from the petitioner dated October 5, 2000, discussing the terms of its verbal employment agreement with the beneficiary, indicating that the beneficiary would be "working directly under our control as a Programmer Analyst";
- \* Petitioner's Labor Condition Application for a programmer analyst position, certified by the Department of Labor on September 2, 2000;
- \* Master Services agreement effective on December 8, 2000, between the petitioner and Sun Microsystems;
- \* Consulting Agreement dated January 31, 2001, between the petitioner and Talus Solutions;
- \* Professional Service Provider Agreement dated September 15, 2000, between the petitioner and Bea Systems, Inc.;
- \* Consulting Firm Agreement dated May 11, 2000, between the petitioner and Nemeth/Martin Personnel Consulting, Inc.;
- \* Independent Contractor Agreement dated January 6, 1999, between the petitioner and Intelligroup;

- \* Personal Services Agreement dated September 7, 1999, between the petitioner and HCL Technologies America Inc.;
- \* Client Agreement dated August 18, 2000, between the petitioner and Cash Edge.com;
- \* Pacesetter Consultant Services Agreement dated February 1, 2000, between the petitioner and Pacesetter, Inc.;
- \* Various other contracts and purchase orders.

Although the petitioner asserts that the beneficiary will be working on in-house projects, the petitioner's labor condition application indicates that the beneficiary will be working in "Metro Sunnyvale, California." The record indicates that the beneficiary will provide a variety of programmer analyst 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.<sup>1</sup> 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.

In this case, although the record indicates that the beneficiary will be working in the Metro Sunnyvale, California area, the record does not contain a description of the beneficiary's proposed duties from the business where the beneficiary will provide his services. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform in the Metro Sunnyvale, California area will qualify as a specialty occupation. For this reason the petition may not be approved.

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

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary is qualified to perform the duties of the specialty occupation. The beneficiary's university transcripts contain no computer courses. It is noted that in the petitioner's cover letter dated October 5, 2000, the petitioner's vice president states that the beneficiary has over three years of computer-related experience. The record, however, does not contain any corroborating evidence to support the evaluator's finding such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). 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.

**ORDER:** The appeal is dismissed.