

02

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, NW
BCIS, AAO, 20 Mass. Ave., N.W. 3rd Floor
Washington, D.C. 20536



4-25-2013

File: WAC 02 028 55852 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an information technology company that provides project management and consulting to its clients. It has 15 employees and a gross annual income of \$1,500,000. It seeks to temporarily employ the beneficiary as a software engineer/programmer for three years. The director determined that the petitioner had not established that: 1) the contract is valid, thereby casting doubt on whether the position is bona fide; 2) the petitioner is a U.S. employer; and 3) the Labor Condition Application (LCA) is valid.

On appeal, counsel asserts that the director either misunderstood or misapplied the law and that, since the director acknowledged that the position is a specialty occupation, the petition should be approved.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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)(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.

In the decision issued by the Bureau on June 14, 2002, the director stated:

Based on the duties provided, the position requires a theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. However, it is not the petitioning entity that will be providing these duties to the beneficiary. The petitioner negotiates contracts with various firms that need services. Firms needing services will contract with the petitioner and pay a fee to the petitioner for each individual. . . . In other words the petitioner is a contractor.

The director has determined that the proffered position is a specialty occupation, so the issues remaining to be resolved are those regarding the validity of the contract and the LCA, and the nature of the relationship between the petitioner and the beneficiary.

The first issue is whether the contract was valid, and whether the position is bona fide.

Counsel asserts on appeal that there is no basis for determining that the contract is invalid. The director stated that it could not be considered valid since it does not specifically include starting and ending dates, the nature of the project, the specific duties and where the duties will be performed. As counsel put forth, under California law, a contract is valid as long as there are parties capable of contracting, they consent to the terms, there is a lawful object, and there is sufficient cause or consideration. In addition, it does set out the nature of the project and what duties are to be performed in terms of an end product.

The contract under which the petitioner intends the beneficiary to be employed is valid; there is no additional reason to presume that the position is not bona fide.

The director also stated that the position descriptions in the petition and contract are not parallel. Counsel maintains that, while the contract is not as detailed as the original position description, it does set out the project that needs to be completed in order for the terms of the contract to be met. The position description states that the beneficiary would "develop Relational Database Management Systems;" the contract states that the work will include "Building of Modular Program and Installation and Building of Data Base Systems and Installation." The contract then lists four different types of programs and four different data bases included.

The position description is clearly more detailed, but the two descriptions can be understood to pertain to the same skills and position. Accordingly, this basis for denying the petition shall be withdrawn.

The second issue is whether or not the employer is a United States employer.

The director stated that the beneficiary could not meet this standard because 8 C.F.R. § 214.2(h)(4)(ii)(2) defines United States employer to mean: "Has an employer-employee relationship . . . as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee. . . ." The director further stated the:

[P]etitioner does not employ Software Engineer/Programmer at its place of business. It is noted that without complete and valid contracts between the petitioner and the firms that use software engineers/programmers, the petitioner is unable to show that the beneficiary will be performing work as a software engineer/programmer in a specialty occupation. The petitioner asserts that it is the employer of the beneficiary because it will be directly paying the beneficiary's wage. However, payment of the wage is only one element of determining an employer. . . . [T]he actual employer is the entity having control over the work being done which in this would be the entity directing the programming work. The petitioner is not a firm that uses a software engineer/programmer to complete their projects; therefore the petitioner does not exercise control over the beneficiary and cannot be considered the employer of the beneficiary.

On appeal, counsel claims that there is no information in the original petition, response to director's request for additional evidence, or the appeal to support this statement by the director. The response to the request for evidence filed March 21, 2002 specifically states that the beneficiary will be:

[S]pending 100% of his time *in-house* [emphasis added] . . . We as the only employer of the beneficiary

are responsible for all the activities of duties [sic] as follows: hiring, firing, supervising, scheduling, housing, insurance and traveling, etc. . . ." In addition, petitioner submitted a copy of a service contract with the client on whose project beneficiary would be working, stating that the petitioner shall maintain "Workers' Compensation and Employers' Liability Insurance as prescribed by law, Comprehensive General Liability . . . in an amount not less than \$3,000,000 per occurrence, Professional Liability and Errors and Omissions Insurance covering all services provided or contemplated hereby . . . and a non-auto liability policy.

Counsel explains that the petitioner in this case does use the software engineer/programmer to complete its projects. It provides a service in the form of a completed end product to its clients. It does not contract for a certain individual or a certain number of individuals to go to the client's worksite to work under the authority of the client. It retains control over the employees, the work and the final product, which remains the property of the petitioner.

When the petitioner's statement and the terms of the contract are taken together, the record indicates that the petitioner is the actual employer rather than a contractor. Therefore, this basis of the director's objection to the approval of the petition shall also be withdrawn.

The third and final issue is whether the Labor Condition Application (LCA) is valid.

The director states:

Without contracts the Service is unable to determine whether the petitioner has complied with the terms of the LCA nor can the Service determine if the LCA is proper in relationship to the area of employment or the wage offered the beneficiary. Since a determination cannot be made as to the working conditions of the beneficiary as listed on the LCA, the LCA cannot be considered to be in compliance.

This statement appears to be premised on the incorrect assumption that the petitioner is an agent rather than an employer and that the beneficiary would be working at sites other than the petitioner's office. Counsel notes that the LCA was filed for Santa Fe Springs, California, where the petitioner is located. As has been shown above, that is where the petitioner intends the beneficiary to spend 100% of his time; therefore the LCA is valid.

The director determined that the proffered position is a specialty occupation. Upon review of the record, the Act and the

regulations, the petitioner has established that a valid contract, and therefore a bona fide position, exists, as well as that the LCA is valid and that the petitioner is the actual employer rather than an agent.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.