

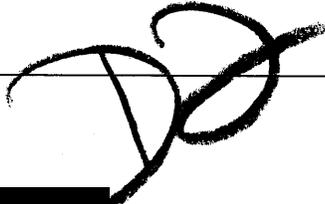
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**U.S. Department of Homeland Security**  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



File: WAC-01-069-50449

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 08 2003**

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)

ON BEHALF OF PETITIONER:



**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 Citizenship and Immigration Services (CIS) 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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing solutions, business systems development, and marketing business with 10 employees and a gross annual income of \$500,000. It seeks to employ the beneficiary as a test engineer for a 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 the proffered position is a specialty occupation or that the petitioner is the beneficiary's employer. The director further determined that the petitioner had not demonstrated 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.

The director denied the petition because the petitioner had not submitted valid contracts demonstrating that the beneficiary would be involved in test engineering work. The director further found that the petitioner had not submitted a labor condition application listing the locations where the beneficiary would be employed and other details of his employment such as his wage rate. On appeal, counsel submits a contract between the petitioner and Compu-Net Systems Solutions (Compunet) and a job order request form to demonstrate the need for the beneficiary's services.

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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F), *Agents as petitioners*:

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 C.F.R. part 274a.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B):

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 . . . .

Pursuant to 8 C.F.R. § 214.2(h)(4)(iv)(B), 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.

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), 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 an Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) 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.

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. Although the record may demonstrate that the petitioner and beneficiary share an employer-employee relationship, as with employment agencies as petitioners, CIS 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 CIS 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, counsel had indicated in his November 16, 2001 letter that the beneficiary would be rendering test engineering services at Advance Composite Technologies, LLC, a business that has a joint venture agreement with the petitioner. As the director found that the record contains no specific evidence that the beneficiary would be performing work in a specialty occupation at Advance Composite Technologies, LLC, counsel submits another contract on appeal, maintaining that the beneficiary now will be performing test engineering work at Compunet Systems Solutions, a

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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.

business that has a contract and work order request form with the petitioner. In this contract, dated January 2, 2001, between the petitioner and Compunet, Compunet is described, in part, as follows:

Compunet is a provider of systems, networking, software and hardware installations and development and employs a staff of network engineers, systems analysts, test engineers, electrical engineers and other technical staff on a per project need.

This contract includes a "Job Order Request Form" with the following job description for a test engineer:

Perform a variety of engineering work in electronics [sic] gadgets and components; inspect, test, repair, maintain and service telecommunications; develop operational, maintenance and testing procedures for electronic products, components, equipments [sic] and systems; perform general monitoring and troubleshooting in production lines; provide support to field technicians, cable locations, directs [sic] and coordinates [sic] activities concerned with manufacture, construction, installation, maintenance, operation and modification of electronic equipment; test system operations using testing equipment and diagnose malfunctions; perform other functions related to engineering work using engineering education background and skills and may assist in inspecting electronic equipment, instruments, products and systems to ensure conformance to specifications.

The proffered position appears to be primarily that of a technical support specialist. In its *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the Department of Labor (DOL) describes the position of a technical support specialist, in part, as follows:

Technical support specialists are troubleshooters, providing valuable assistance to their organization's computer users. Because many nontechnical employees are not computer experts, they often run into computer problems they cannot resolve on their own. Technical support specialists install, modify, clean, and repair computer hardware and software. They also may work on monitors, keyboards, printers, and mice.

Technical support specialists answer phone calls from their organizations' computer users and may run automatic diagnostics programs to resolve problems. They also may write training manuals and train computer users how to properly use the new computer hardware and software. In addition, technical support specialists oversee the daily performance of their company's computer systems and evaluate software programs for usefulness.

A review of the DOL's *Handbook* at page 173 finds that while there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs, while other jobs may require only a computer-related associate degree. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not demonstrated that its client has, in the past, required the services of individuals with baccalaureate or higher degrees in engineering, for the offered position. Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to its client. The occupation reports from America's CareerInfoNet that have been submitted by the petitioner are noted. The petitioner has not demonstrated, however, that the proposed duties of the proffered position are as complex as those listed for electrical and electronic engineers in the occupation report. For example, the description of duties for electrical and electronic engineers is as follows: "Design, develop, test, and supervise the manufacturing and installation of electrical and electronic equipment, components, or systems for commercial, industrial, military, or scientific use. . . ." Furthermore, the occupation report specifies that the typical educational level for the positions of electrical and electronic engineering technicians and technologists is an associate degree. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.