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U.S. Department of Justice

Immigration and Naturalization Service

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

File: WAC-01-109-54402 Office: California Service Center

Date: **JAN 31 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)

PUBLIC COPY

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 development and consulting business with one employee and an estimated gross annual income of \$200,000. It seeks to employ the beneficiary as a programmer analyst for a period of two years and ten and one-half months. 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 it is the beneficiary's employer, or that it had complied with the terms of the labor condition application.

On appeal, the petitioner submits an employment contract between it and the beneficiary.

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 as described in paragraph (h)(4)(iii)(A) of this section...

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."

In a Notice of Action dated May 20, 2001, the director requested the following:

- * Contractual agreements between you and the companies for which your organization/the beneficiary will be providing services or for whom you are acting as the agent. Contracts should specify the duties contracted to be performed by the "consultant" while working for the client.
- * A valid legally binding contractual agreement between you and the beneficiary under the terms which the beneficiary will be employed. If acting as an agent performing the function of an employer, you must guarantee the wages and other terms and

conditions of employment in the contractual agreement.

- * An itinerary of definite employment, listing the location(s) and organization(s) where the beneficiary (consultant) will be providing services. 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, venues, or location where the service will be performed by the beneficiary. If the services will be performed on site, specify that in the itinerary. The itinerary should include all service planned for the period of time requested - in this case until January 22, 2004....

In response to the Service notice, the petitioner submitted the following:

1. A Subcontractor Agreement between the petitioner [as subcontractor] and Corporate Computer Services, Inc., [as contractor] of Farmington Hills, Michigan. The agreement sets forth the terms and conditions under which the petitioner shall provide services as an agent of Corporate Computer Services, Inc., in support of third party customer requirements for services and products.
2. A letter from the petitioner that contains an offer of employment to the beneficiary.
3. A statement from the petitioner that specifies that the beneficiary will be providing information technology services at its address in Simi Valley, California.

The director concluded that the petitioner was acting as an agent for both the beneficiary and Corporate Computer Services, Inc., in this case. While the petitioner stated that the beneficiary will be providing information technology services at its corporate address, the petitioner did not submit any documentation listing either the specific duties of the offered position or a complete itinerary of services or engagements to be undertaken by the beneficiary in this position. Although the Subcontractor Agreement between the petitioner and Corporate Computer Services, Inc., states that the provision of products and services shall be described in a "Work Order," the petitioner did not include copies of such work orders or any other evidence to establish the specific nature of the duties and responsibilities that the beneficiary would be required to perform under this agreement. Moreover, a letter offering

employment cannot be considered as a valid legally binding contractual agreement between the petitioner and the beneficiary specifying the terms and conditions of employment in the proffered position.

On appeal, the petitioner submits an employment contract dated November 16, 2001, between it and the beneficiary. This contract states the following in pertinent part:

[The beneficiary] will be performing computer programming related assignment as a Programmer Analyst. The assignment will be conducted at the client location. Work may also be performed at Spectrum Technologies, if approved by the client.

The provisions of this employment contract directly contradict the prior statement of the petitioner that the beneficiary will be performing services only at its corporate address. It is further noted that the provisions of this contract contradict the labor condition application that was submitted with the initial petition, which also lists the petitioner's California address as the sole location where the H-1 nonimmigrant would work. Furthermore, the petitioner indicates that the beneficiary will perform computer programming assignments as a programmer analyst without providing a description of the specific tasks, projects, and activities that constitute such assignments. Without a comprehensive description of the beneficiary's proposed duties and the addresses of the specific locations where the beneficiary will perform such duties, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation.

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. However, the petitioner provides only a generalized description of the beneficiary's duties and conflicting information regarding the location where such duties are to be performed. 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.¹ To interpret the regulations any other way would lead to

¹ 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.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582 (Comm. 1988).

In this case, although the record contains an agency service and product agreement between the petitioner and Corporate Computer Services, Inc., the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of Corporate Computer Services, Inc. Without such a description, the petitioner has not demonstrated that any work that the beneficiary will perform at Corporate Computer Services, Inc., will qualify as a specialty occupation. In order to make a determination whether a specialty occupation position exists for the beneficiary, the director properly requested the above listed documents. The supporting documentation submitted by the petitioner does not persuasively demonstrate that a specialty occupation exists for the beneficiary, or that it has complied with the terms of the labor condition application. For these reasons, the petition may not be approved.

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.

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