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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

JUN 25 2003

File: WAC-01-038-51977 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting business with 15 U.S. employees and a gross annual income of $1,550,000. It seeks to employ the beneficiary as a programmer analyst 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 beneficiary would be employed in H-1B status.

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 for its U.S. business, or provided an itinerary where the beneficiary would work. On appeal, counsel states, in part, that the beneficiary will work at the location specified on its labor condition application [Milpitas, CA]. Counsel submits an "Engineering Services Agreement" dated June 2001, between the petitioner and V-SOFT INC., including "Exhibit A", which designates the beneficiary to perform engineering services at V-SOFT INC., located at 39899 Balentine Dr., Suite 100, Newark, CA 94560.

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 a Bureau 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 March 28, 2001, counsel submitted a copy of the employment contract between the petitioner and the beneficiary. As such, 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 may share an employer-employee relationship, as with employment agencies as petitioners, the Bureau 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 absurd results: if the Bureau 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.

Furthermore, Bureau regulations specifically allow a director to request additional evidence in appropriate cases, as the Bureau may reasonably inquire about a job contract between a petitioner and its client if a beneficiary will be performing services at client sites. *See* 8 C.F.R. § 103.2(b)(8). The director properly requested such a contract on Form I-797, Notice of Action, dated February 12, 2001.

In this case, although the record contains an "Engineering Services Agreement" dated June 2001, between the petitioner and V-SOFT INC., including "Exhibit A", which designates the beneficiary to perform engineering services at V-SOFT INC., there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of V-SOFT INC., where the beneficiary will ultimately perform the proposed duties. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted a certified labor condition application for the jobsite in Newark, CA. In addition, the record does not contain any evidence that the credentials evaluator is 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, these issues need not be examined further.

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

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

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.