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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

**PUBLIC COPY**



MAY 01 2003

File: WAC 01 027 53005 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:  
[Redacted]

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

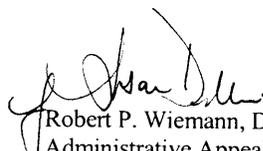
INSTRUCTIONS:

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 is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is an engineering and computer consulting business with approximately 100 employees and a gross annual income of \$12 million. 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 it is the beneficiary's employer, or that it had complied with the terms of the labor condition application (LCA).

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 C.F.R. § 214.2(h)(4), 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 LCA.

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 CFR part 274a.

The term "United States employer" is defined at 8 C.F.R. § 214.2 (h) (4) (ii) as:

*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."

In a Notice of Action dated February 2, 2001, the director requested the following:

Please submit copies of contracts between the petitioner and the beneficiary. Also, please submit copies of contracts between the petitioner and the clients where the beneficiary will perform services. Additionally, include a complete itinerary of services or engagements where the beneficiary will perform those 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, venue, or locations where the service will be performed by the beneficiary. The itinerary should include all service planned for the period of time requested - in this case until November 1, 1003.

In response, the petitioner submitted a copy of the employment agreement between it and the beneficiary. The petitioner declined to provide copies of contracts between OSI Consulting and its clients. The company's president and CEO [REDACTED] stated in a letter dated March 28, 2001:

Due to confidentiality and nondisclosure agreements between OSI Consulting and our clients, we cannot legally release copies of consulting contracts between the company and said clients.

On appeal, counsel states:

First, the Petitioner has already stated in its Response to the Service, dated March 28, 2001, that it could not provide the Service with copies of actual contracts between the Petitioner and its clients, due to confidentiality and nondisclosure agreements between the two parties. If the Petitioner had submitted the requested contracts to the Service, it would have opened

itself up to litigation by its clients for breach of contract! Additionally, the contracts include work schedules that detail the project and scheduled work to be done that further exposes confidential client information, which is not an option . . . .

In a letter dated March 28, 2001, [REDACTED] the President and CEO of OSI Consulting, stated:

[The beneficiary] is a full-time, permanent employee who we expect to contribute to the following projects over the next three years:

Present through December, 2001 - On-Site Technical assistance in the area of Oracle Database Administration for SiteLite, Incorporated in Ranch Santa Margarita, CA. Specifically, he will provide technical support for Administering and maintaining the Oracle Database. Other responsibilities include: performance tuning, system security, PL/SQL programming and unix scripting.

2002 - Continue Oracle Database Administrative support for SiteLite, Incorporated is likely to continue through the first quarter. Additional clients may include: Ingram Micro, CalKey, PaperPak, Toyota Motor Sales Corporation North America, NET, The City of Chandler and/or Alpha Therapeutic [sic]. On-Site technical support and Database administration will be in the area of Oracle Database and Oracle Financials Applications.

Beyond 2002 - Continued Database Administration support for the above listed clients as well as any new clients requiring expertise in the area of Oracle and Oracle Financials Database Administration.

The director focused on the question of whether the petitioner is the beneficiary's employer or agent and whether the petitioner has work for the beneficiary to perform at the H-1B level. As with employment agencies as petitioners, however, 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.<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.

Although the petitioner states that the beneficiary will be providing on-site technical support for Oracle database administration, the record does not contain a detailed description of the specific tasks, projects, and activities that constitute the beneficiary's assignments from an authorized representative of SiteLite Corporation or from other current or prospective clients. Without a comprehensive description of the beneficiary's proposed duties, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues. The director may request any additional evidence he deems necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director will enter a new decision.

**ORDER:** The decision of the director is withdrawn. The matter is remanded to him for further consideration and action consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

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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.