

D2

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

File: WAC-01-276-54600

Office: CALIFORNIA SERVICE CENTER

Date: MAY 12 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:

**PUBLIC COPY**

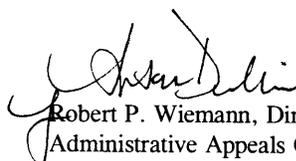
INSTRUCTIONS:

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consultancy business with one employee and a projected gross annual income of \$500,000. It seeks to employ the beneficiary as a programmer analyst for a period of three years. The director determined the petitioner had not established that a specialty occupation position exists for the beneficiary.

On appeal, counsel states, in part, that the proffered position is an in-house position and, currently, no other job sites have been determined.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the term "specialty occupation" is defined as:

an 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.

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 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.

The record contains, in part, the following:

- Technical Services Agreement dated 01/10/2001 between the petitioner and Kanrad Technologies, Inc., for the petitioner to provide software development services;
- Letter dated September 6, 2001, from the president of Good Shepherds, Inc., addressed to the petitioner, appointing the petitioner to provide software development services;
- Letter dated November 1, 2001, from the operations manager of Worldwide Travel, Inc., addressed to the petitioner, ordering custom software development services from the petitioner.

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. Even though the documentation in the record demonstrates that the petitioner and beneficiary 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.<sup>1</sup> 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.

In this case, although the record contains a sample contract and two letters from the petitioner's clients, Worldwide Travel, Inc. and Good Shepherds, Inc., requesting software development services, nowhere in the record is there any indication as to where the beneficiary will perform the duties of the proffered position. Counsel's assertion that the beneficiary will perform in-house services is noted. In a letter dated July 2, 2001, however, the petitioner's president states, in part, as follows:

Our mission is to provide our clients on time, on-budget and quality service in the areas of Software design, development, implementation & maintenance by working with them to swiftly implement the latest Information - technologies thereby helping them retain the competitive edge.

A review of the record indicates that the beneficiary will be providing computer-related services to the petitioner's clients. As such, a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client for which the beneficiary will ultimately perform the proposed duties is required. 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.

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 the above listed contracts. Absent a contract of a project where the beneficiary would work, however, the petitioner has not persuasively demonstrated that a specialty occupation exists for the beneficiary, or that it has complied with the terms of the

---

<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.

labor condition application. For this additional reason the petition may not be approved.

It is additionally noted that in its *Occupational Outlook Handbook*, 2002-2003 edition, at page 168, the Department of Labor states, in part, as follows:

Employers using computers for scientific or engineering applications usually prefer college graduates [computer programmers] who have degrees in computer or information science, mathematics, engineering, or the physical sciences. . . . Employers who use computers for business applications prefer to hire people who have had college courses in management information systems (MIS) and business and who possess strong programming skills.

The petitioner has not demonstrated that its clients, such as Worldwide Travel, Inc. and Good Shepherds, Inc., would use computers for scientific or engineering applications rather than for business applications. As such, the petitioner has not demonstrated that it requires the services of a computer programmer for scientific or engineering applications or that the proffered position requires an individual with a knowledge of sophisticated programming techniques normally associated with the duties of a programmer/analyst. For this additional reason, 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.