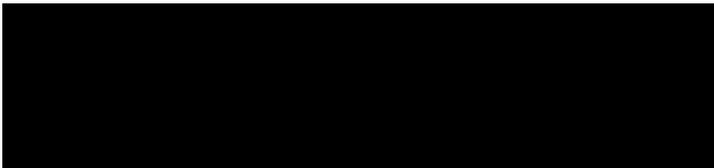




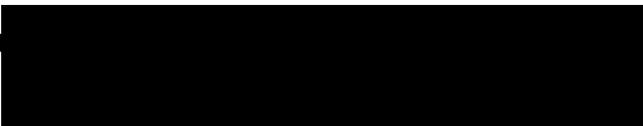
U.S. Citizenship
and Immigration
Services



FILE: LIN 03 251 51377 Office: NEBRASKA SERVICE CENTER

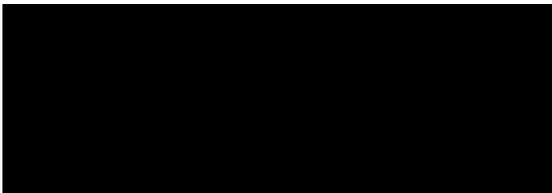
Date: DEC 10 2004

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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

**identifying information used to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The director of the Nebraska Service Center denied the nonimmigrant visa petition and a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an information consulting and software development company with offices in South Dakota, Illinois and Ohio. It provides high-tech solutions for complex business systems. It seeks to hire the beneficiary, previously granted H-1B status from February 7, 2001 until August 30, 2003, as a programmer analyst. The director denied the petition because he determined the petitioner had not established that, as of the time of filing, it had a specialty occupation for which it sought the beneficiary's services. Subsequently, counsel for the petitioner filed a motion to reopen, which was granted by the director. After review of the additional documentary evidence submitted by counsel, the director again denied the petition, noting that the petitioner still had not met its burden of proof with regard to establishing the existence of a specialty occupation at the time of filing and had failed to establish itself as a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii). On appeal, counsel submits a brief and documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; (4) counsel's motion to reopen; (5) the director's second denial of the petition; and (6) Form I-290B, with supporting evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issues to be discussed in this proceeding are whether the petitioner has established that it a) had a specialty occupation for which it was seeking the beneficiary's services at the time it filed the Form I-129, and b) qualifies as a U.S. employer with regard to the beneficiary. To meet its burden of proof in these areas, the petition must establish eligibility under the following regulatory requirements.

Classification as a specialty occupation -- Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a petitioner must establish that its position meets one of four criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Classification as a U.S. employer -- A petitioner seeking to classify an alien as an H-1B temporary employee must establish that it is a U.S. employer, as defined at 8 C.F.R. § 214.2(h)(4)(ii), that:

- (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.

To determine whether the petitioner has met its burden of proof with regard to the above requirements, the AAO now turns to a review of the record before it.

The petitioner states that it seeks the beneficiary's services as a programmer analyst. Evidence regarding the proffered position and the duties associated with that position include: the Form I-129; the petitioner's August 18, 2003 support letter accompanying the Form I-129; counsel's response to the director's request for evidence, including a September 22, 2003 letter submitted by the petitioner; and counsel's motion to reopen, with a September 26, 2003 letter from the petitioner.

On September 9, 2003, following his review of the petitioner's Form I-129 and supporting documentation, the director requested further evidence. As it appeared the petitioner intended to employ the beneficiary at more than one location, the director asked for an itinerary of the beneficiary's employment, as required in 8 C.F.R. § 214.2(h)(2)(i)(B). Further, the director required the petitioner to submit copies of its contractual agreements with client companies to establish that it was a viable concern with sufficient work at the H-1B level to employ the beneficiary at the location listed on the Labor Condition Application (LCA) and a copy of the contract between it and the beneficiary specifying the terms of employment. The director also asked the petitioner for evidence that the beneficiary had maintained his nonimmigrant status and to identify the other H-1B petitions that had already been filed in relation to the petitioner's LCA.

In response to the director's request for evidence, counsel to the petitioner provided the following information: a further explanation of how the petitioner intended to use the services of the beneficiary; twelve contracts with client companies; an employment contract signed by both the petitioner and the beneficiary, dated August 17, 2003; proof that the beneficiary had maintained his nonimmigrant status; and the file numbers associated with other H-1B petitions covered by the LCA.

The director denied the petition on September 30, 2003, finding that the petitioner had not established there was an existing specialty occupation for which the petitioner was seeking the beneficiary's services. He noted both that the contract signed between the petitioner and beneficiary provided no information as to the location of employment or the specific duties to be performed by the beneficiary, and that the petitioner had failed to provide an itinerary of definite employment, even though it had stated an intent to employ the beneficiary at multiple locations. The director also reviewed the various contracts submitted by the petitioner, but found them unpersuasive in establishing the existence of specific employment for the beneficiary.

On November 7, 2003, the director granted a motion to reopen filed by counsel to the petitioner and considered new documentation related to the beneficiary's employment -- a services agreement with ISR Info Way, another high-tech consulting firm, and a work order specifying that the beneficiary would be assigned to the Gateway Corporation for the duration of his H-1B visa. The petitioner stated these documents had been unavailable at the time the director issued his request for evidence. After reviewing the additional evidence and determining that it did not establish that, at the time of filing, the petitioner had a specialty occupation for which it required the services of the beneficiary, the director again denied the petitioner's Form I-129. The director also concluded that the information provided in support of the motion to reopen undermined the petitioner's ability to qualify as a U.S. employer with regard to the beneficiary.

On appeal, counsel for the petitioner now submits a brief and documentation, including copies of a consulting services agreement with ISR Info Way, a work order different from that submitted with the motion to reopen, and a listing of the specific duties to be performed by the beneficiary under the work order. Counsel states that the submitted work order documents the existence of a bona fide job offer from the petitioner and asks that the petitioner's H-1B petition be approved based on the additional information provided.

The AAO first considers the new information submitted by counsel as part of his December 10, 2003 appeal. While counsel describes the consulting services agreement as revised, it appears identical to that submitted by counsel in his motion to reopen and will be discussed later. The other documents – a work order that no longer stipulates that the beneficiary will provide services to the Gateway Corporation and a description of the beneficiary's duties under that work order – have not been previously provided. A review of these documents leads the AAO to conclude that the petitioner is now offering a position to the beneficiary that differs from that identified at the time of the motion to reopen.

However, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may also not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As a result, neither the new/amended work order, nor the description of the beneficiary's duties under that order will be considered by the AAO and this proceeding will, instead, rely upon the record as it existed at the time the director granted counsel's motion to reopen.

The AAO now turns to that record and considers whether it establishes that the petitioner, at the time of filing, had an existing specialty occupation in which it sought to employ the beneficiary.

At the time of filing, the petitioner described the duties of its programmer analyst position as follows:

The Programmer Analyst will analyze the user's data, provide record keeping and general modes of operation and devise methods and approaches to solve the user's needs based upon his/her knowledge of data processing techniques and management information, statistical, audit and control systems.

The Beneficiary will devote a significant portion of his time to formatting designs, making technical decisions, implementing and maintaining sophisticated commercial and financial applications systems, and designing and developing new database files. Since project demands vary and change over time, it is difficult to provide a specific breakdown of the exact amount of time spent in performing a specific function. It is estimated that a minimum of 60% of the Beneficiary's time will be spent in performing user requirements analysis and the remainder of the Beneficiary's time will be spent in programming.

As the director determined that the petitioner intended to employ the beneficiary at more than one location to perform these duties, he, in his request for evidence, asked the petitioner to provide an itinerary with the dates

of and locations where the services were to be performed, per the requirements of 8 C.F.R. § 214.2(h)(2)(i)(B). However, the petitioner did not submit an itinerary in response to the director's request. Instead, it stated in a September 22, 2003 letter submitted with counsel's response, that the beneficiary would be employed at various locations throughout the United States, that he would work on "short/long-term development projects" in response to the needs of the petitioner's clients and that there was "no way to predict the duration of the assignment or the location of future work sites." The petitioner specifically stated that the only known site at which the beneficiary would be working was that of the company at which he was then employed.

Subsequently, at the time of counsel's motion to reopen, the petitioner submitted a consulting services agreement through which it had identified a specific project in which the beneficiary would participate for the duration of his H-1B visa, as well as a work order for that project identifying the client as the Gateway Corporation. It stated that this documentation would have been provided in response to the director's request for evidence but for unavoidable administrative delays. The consulting services agreement did not, however, describe what services were to be provided by the petitioner's employees and the work order did not specify the project to which the beneficiary was to be assigned, provide a location for the project, or describe what services the beneficiary would be required to perform.

At the time of filing, the petitioner stated it was a consulting and software development company in need of the beneficiary's services to meet its clients' needs. Yet, in response to the director's request for evidence, the petitioner could not identify the specific clients or projects for which it required the beneficiary's services. This failure is surprising in that the petitioner, in its letter of September 22, 2003, describes a hiring process that should have allowed it to provide such information readily:

Our business continues in outsourcing the computer consultants depending on the nature, skills and the exposure of the consultant towards the required software/project skills. Normally upon receipt of a resume from a potential applicant, our recruitment staff screens it to determine whether our clients could utilize the applicant's skills. The same is forwarded to our clients for review. If the client/s considers the resume, an interview is scheduled either by phone and/or Internet and the selection shall be made and we will be advised to file work visa. As we have long association with various large organizations, we are confident to place our consultant and provide software services to our clients.

If, as the petitioner describes above, its practice is to file the Form I-129 only after a client has selected a specific consultant to meet its needs, information regarding at least the initial location of the beneficiary's employment itinerary and duties should have been available to provide to the director. The petitioner's statement in its September 22 letter -- that it did not know where the beneficiary would work -- leads to the conclusion that it had not followed the hiring process described above and, therefore, did not have a client or specific employment to offer the beneficiary at the time it filed its petition.

The petitioner's September 22, 2003 statement that it did not know at what locations the beneficiary would work was also made subsequent to the date on which it entered into the consulting services agreement and work order it submitted with counsel's motion to reopen. Although, as asserted by the petitioner, this

documentation may have been unavailable at the time the petitioner responded to the director's request for evidence, the AAO is concerned by the petitioner's failure to mention the signing of the services agreement with ISR Info Way and the resulting work order when asked for information about the position to be filled by the beneficiary. The petitioner's assertion, that it had no idea at what locations the beneficiary would work, casts doubt upon the evidence it submitted at the time of counsel's motion to reopen or, at the least, raises a serious inconsistency that it has failed to address.

Based on its review of the record before it, the AAO concurs in the director's determination that the petitioner has failed to establish that, at the time of filing, it had an existing job for which it required the beneficiary's services. This decision is based both on the petitioner's failure to provide the director with the employment itinerary he requested per 8 C.F.R. § 214.2(h)(2)(i)(B), and the inconsistencies in the record regarding the date of the consulting services agreement and work order submitted by the petitioner with counsel's motion to reopen. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. 8 C.F.R. § 103.2(b)(14). Further, the AAO notes that where there are inconsistencies in the record, it is incumbent upon the petitioner to resolve them by independent objective evidence and that 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Based on both a lack of evidence and the unresolved inconsistencies in the record, the AAO concludes that the petitioner has failed to establish that it had an existing position at the time it filed the Form I-129.

An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has failed to prove that, at the time of filing, the beneficiary was coming to the United States to perform services in a specialty occupation.

The AAO also concurs with the director's finding that the petitioner has failed to establish that its position of programmer analyst is a specialty occupation. To determine whether a job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning business' operations, are factors that CIS considers. CIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

As already noted by the director, the petitioner, at the time of its motion to reopen, provided evidence that the beneficiary was to be assigned to a single client for the duration of the H-1B visa, but no information on the project to which the beneficiary was to be assigned, nor his specific duties with regard to the project. As a result, the director correctly concluded that the petitioner had failed to establish the proffered position is a specialty occupation. With no evidence in the record as to the type of project contemplated, nor any indication of the beneficiary's specific duties, the AAO also finds that petitioner has failed to establish that its position, as identified in its motion to reopen, qualifies as a specialty occupation under one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to whether the petitioner qualifies as a U.S. employer with regard to the beneficiary.

In his denial, the director found that the documentation submitted by the petitioner to support its motion to reopen undermined its ability to qualify as a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii). The director focused on a) the agreement signed by the petitioner and ISR Info Way for the performance of unspecified services, b) the work order under which the beneficiary was to provide unidentified services to the Gateway Corporation, and c) the absence of any agreement between the Gateway Corporation and the petitioner. He concluded that, under the contractual arrangements established by the petitioner, it would have no relationship with the Gateway Corporation regarding the beneficiary's services. Relying on *Matter of Pozzoli*, 14 I&N, Dec. 569 (BIA 1974), which deals with employer-employee relationships in L visa cases but which the director found relevant to the instant case, he concluded that, as the petitioner lacked a direct contract with the Gateway Corporation, it did not control the key factors related to the employer-employee relationship and, therefore, did not qualify as a U.S. employer.

The AAO also finds that the evidence provided by the petitioner at the time of its motion to reopen undermines its ability to qualify as a U.S. employer under 8 C.F.R. § 214.2(h)(4)(ii). In the absence of a contract between the petitioner and the Gateway Corporation, or ISR Info Way and the Gateway Corporation specifying that the beneficiary would continue to be supervised by the petitioner, the petitioner cannot establish that it meets the second of the criteria under 8 C.F.R. § 214.2(h)(4)(ii) that requires it to "hire, pay, fire, supervise, or otherwise control the work" of its H-1B employees.

For reasons related in the preceding discussion, the petitioner has failed to establish that, at the time it filed the Form I-129, it had an existing specialty occupation for which it was seeking the beneficiary's services. Further, the petitioner has not established that it qualifies as a U.S. employer with regard to the beneficiary. As a result, the AAO will not disturb the director's denial of the petition.

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. The petition is denied.