



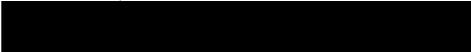
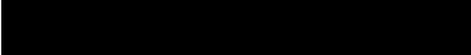
U.S. Citizenship
and Immigration
Services

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FILE: WAC 01 079 54215 Office: CALIFORNIA SERVICE CENTER Date: **FEB 25 2004**

IN RE: Petitioner: 
Beneficiary: 

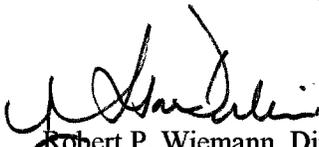
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides engineering consulting services in software and semiconductor technologies and seeks to employ the beneficiary as a software engineer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the petitioner did not establish that a bona fide position existed in which to employ the beneficiary. The director determined that the petitioner might be an agent, rather than the direct employer. Based on the possibility that the petitioner is an agent, the director found that the labor condition application (LCA) was not valid.

On appeal, counsel submits a brief stating that the position is a specialty occupation and that the petitioner is not an agent.

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)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following 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.

Citizenship and Immigration Services interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes: the I-129 petition and its letter of support and the petitioner's response to the director's request for evidence. According to the April 26, 2001 response to the request for evidence, the beneficiary

would perform duties that entail: providing engineering support for "in house R&D projects as well as [the petitioner's] clients"; having responsibility for customer interface and support on projects; and performing design, development, implementation and testing of various networking and communications applications. The January 11, 2001 letter from the petitioner submitted with the petition states that the beneficiary's duties include: networking design; development, implementation and testing of various systems, including networking protocols and network management; and development, debugging, testing and implementation and documentation of various network modules.

In the decision issued by CIS on July 26, 2001, the director stated:

The computer programming duties the petitioner has provided shows that the position requires a theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. However, it is not the petitioning entity that will be providing these duties to the beneficiary. The petitioner is in the consulting business, locating aliens with computer backgrounds and placing these aliens on projects with firms that use computer programmers to complete their projects. Basically the petitioner is a contractor of hardware and software engineering programming services.

The director has determined that the proffered position is a specialty occupation, so the issues remaining to be resolved are those regarding whether there is a bona fide position for the beneficiary to fill, whether the petitioner is, in fact, an agent, and whether the labor condition application is valid.

The first issue is whether the petitioner is an agent. The director found that the petitioner is likely an agent, because it contracts with other companies to provide computer consulting services and it sends individuals to the client sites to work. The AAO finds that the petitioner is a consultant, rather than an agent, in that it provides a service in the form of a completed end product to its clients. It does not contract for a certain individual or a certain number of individuals to go to the client's worksite to work under the authority of the client. It retains control over the employees, the work and the final product. On appeal, the petitioner submits five contracts, all which of state that the petitioner is an independent contractor, not an agent, and one of which expressly states that the petitioner "shall use his/her own discretion in performing the tasks assigned." The director's remarks on this issue are withdrawn.

Since the director's concerns regarding the labor condition application were based on the possibility that the petitioner was an agent, and the AAO has determined that the petitioner is not an agent, the director's remarks on the LCA are also withdrawn.

The final issue is whether the proffered position is bona fide.

In the director's request for evidence, the director asked the petitioner to submit:

Contractual agreements between the petitioner and the companies for which the petitioning organization (the beneficiary) will be providing services. Contracts should specify the duties contracted to be performed by the "consultant" while working for the client. Include copies of statements of work, work orders and any other documents or appendices. Documentation should specify duties, dates of services requested[, and] specific duties to be performed.

In reply, the petitioner submitted a summary of its projects, listed by client, a list of present and prospective clients, and a summary of the dollar amount of sales by customer for 1999, 2000 and February 2001. None of this information is responsive to the director's request. On appeal, counsel provides a description of the in-house project on which the beneficiary would be working, and states that the petitioner provided a list of clients with whom it has contracted for consulting projects in response to the director's request. Counsel also submits five contracts on appeal. Three of the contracts do not state what services the petitioner would provide. Two contracts refer to "systems development and programming services." None of the contracts cite specific projects or duties. In addition, the AAO notes that at the time of the appeal, two of the contracts had already expired. Two did not have end-dates, and one was for the duration of the project, with no specific end-date.

Since a portion of the beneficiary's work would be for the petitioner's clients, it is incumbent on the petitioner to submit the client's project requirements, specifically those that would require the services of the beneficiary. The contracts submitted with the appeal have no such information.

While the petitioner and counsel state that the beneficiary would also be working directly on projects for the petitioner (rather than outside consulting projects), the information from the petitioner's website submitted in response to the director's request for evidence clearly states that it provides "project contract services" and consulting services to its clients. Prior to the appeal, there is nothing in the record, beyond the petitioner's letter and the offer letter, to indicate that the company also has need for in-house services. On appeal, counsel submits a description of the in-house project, but there is no indication of how much time the beneficiary would be spending on this project.

The petitioner has not established that there is a bona fide position for the beneficiary to fill. It submitted no client contracts specific to the beneficiary's services, and only on appeal was there any detailed description of the in-house project in which the beneficiary was to be involved. The AAO notes that this project's initial completion date was November 2002, with customization to the project to be completed by December 2003. Since this project has presumably been completed, and it is the only project where the beneficiary was specifically intended to work, it is not clear that any position exists for the beneficiary at this time.

As related in the discussion above, the petitioner has failed to establish that the proffered position is bona fide. Without evidence that the beneficiary would have employment in the specialty occupation, the petition cannot be approved. Accordingly, the AAO shall 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.