

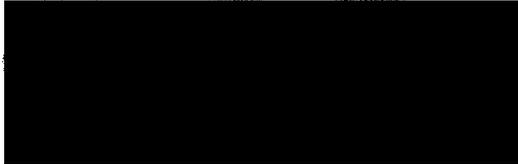
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**U.S. Citizenship
and Immigration
Services**



FILE: EAC 01 126 50478 **Office:** VERMONT SERVICE CENTER **Date:** FEB 25 2004

IN RE: **Petitioner:** [Redacted]
 Beneficiary: [Redacted]

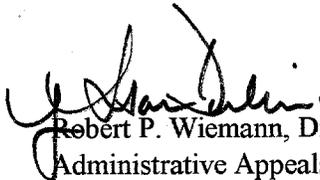
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 is a software development and computer consulting company that seeks to employ the beneficiary as a business analyst. 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 position is not a specialty occupation. The director also found that the petitioner did not establish that a bona fide position existed in which to employ the beneficiary.

On appeal, counsel submits a brief stating that the position is a specialty occupation.

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.

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. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business analyst. 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 March 9, 2001 letter submitted with the petition, the beneficiary would perform duties that entail, in part: analyzing business operations pertaining to the development and implementation of software; suggesting and implementing methods to improve efficiency and reduce costs; conferring with personnel of organizational units involved to analyze current operational procedures and identify problems; writing a detailed description of business plans, needs and steps required to develop or modify the business plan; improving the efficiency of scheduling manpower and resolving customer complaints; evaluating the effectiveness of information processing systems; preparing workflow charts and diagrams to specify operations to be performed by personnel in the system; and planning and preparing business reports and other materials to document corporate development.

In the decision issued by CIS on July 31, 2001, the director stated:

Nothing has been submitted to show that the company has grown so much that the person currently carrying out the duties of business analyst cannot continue to do so. Any claim that the business will grow to such a size that a separate business analyst is justified would be speculative. Even if the work of the position being petitioned for is so complex as to qualify as a "specialty occupation," there simply is not enough of it at the H1B level.

While the director stated that the position offered does not qualify as a specialty occupation, the discussion reflects the director's concern that the petitioner did not establish that there was sufficient work to warrant hiring a business analyst, even if the position were a specialty occupation. Therefore, the issue to be resolved is whether there is a bona fide position for the beneficiary to fill.

In the director's request for evidence, the director asked the petitioner to submit, "[E]vidence that your company has sufficient work and resources available to satisfy this service that the beneficiary will be performing services in a specialty occupation for the requested period of employment."

In reply, counsel stated:

Please be advised that [the petitioner] is currently expanding. The company has made consulting agreements with several companies. Expert staff needs to be supplemented to support this expansion. Although the petitioner is a small organization with only two employees at present, they are in the process of hiring more professionals. They require the services of a Business Analyst to analyze the company's business operations pertaining the [sic] development of new information systems to meet the current and projected needs of the clients.

Please note that the owner of the company does not think that it is feasible for her to handle the Business Analyst work at this time, as the petitioner is expanding and they need more professionals to support this expansion.

Counsel submitted a number of corporate documents, along with several contracts. On appeal, counsel resubmitted most of the same contracts and included two new ones. These contracts are all for providing consultants to the client companies. Of the 14 contracts submitted, seven of them included actual purchase orders, designating a specific individual to be provided to work for the client company. The rest were simply

contracts stating that at some time in the future, the client company may choose to use the petitioner's services. Of the seven contracts that included purchase orders (two of which covered two people each), only three were still in effect at the time the petition was filed. One that was submitted on appeal went into effect after the date the petition was filed. A portion of the beneficiary's job description involves: scheduling manpower with clients and resolving the client complaints; preparing workflow charts and diagrams to specify the operations to be performed by personnel; conducting studies regarding development of new information systems to meet current needs; developing information processing systems to improve workflow; and conferring with personnel of organizational units to analyze operational procedures. Five of the nine enumerated duties are listed above, and in the absence of more than three active contracts and two in-house staff, it is difficult to see how these duties—even combined with the remaining four listed duties—could ensure that the beneficiary would be working in a specialty occupation.

The petitioner is a young company that had two employees at the time the petition was filed. Counsel and the petitioner assert that there are plans for the company to expand. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

As related in the discussion above, the petitioner has failed to establish that there is enough work to support the beneficiary in a specialty occupation. 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.