

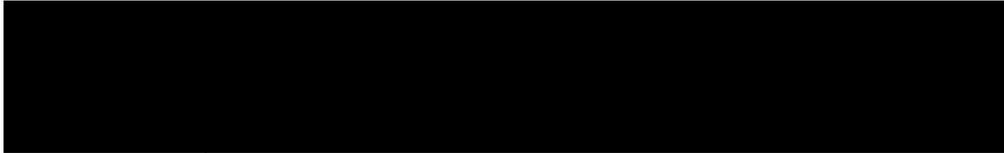
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 205 53007 Office: NEBRASKA SERVICE CENTER Date: DEC 04 2007

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

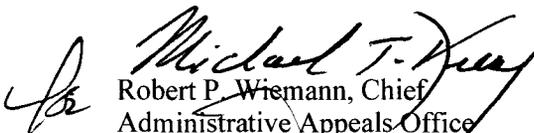
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

The petitioner is an information technology and consulting firm seeks to employ the beneficiary as a computer software engineer. The petitioner, therefore, endeavors to employ 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 on the basis of his determination that the beneficiary had exhausted the six-year maximum period of authorized H-1B stay, pursuant to 8 C.F.R. § 214.2(h)(13)(iii).

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to documentation contained in the record of proceeding, the beneficiary first entered the United States in H-1B status on October 27, 1999. He departed the United States on June 13, 2001. Except for a six-week business trip beginning on November 4, 2001 (in B-1/B-2 status), he did not re-enter the United States until December 1, 2002 (in L-1 status).

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, the following:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief periods for brief trips for business or pleasure, for the immediate prior year.

The petitioner contends that the beneficiary has satisfied 8 C.F.R. § 214.2 (h)(13)(iii)(A) in that he spent over one year of physical presence outside the United States (from June 13, 2001 until December 1, 2002), and that his six-week business trip in 2001 was the type of brief trip for business referenced in the regulation. As a result, according to the petitioner, the beneficiary began a new six-year maximum period of authorized H-1B stay on December 1, 2002.

The AAO agrees with the petitioner's assertion. The beneficiary resided and was physically present outside the United States between June 13, 2001 and December 1, 2002, save for a six-week period from November 4, 2001 through December 17, 2001. The AAO finds that, in this particular case, in which a six-week business trip occurred during a nearly-eighteen month period of physical presence outside the United States, the beneficiary's trip constitutes the type of "brief period for a brief trip" contemplated by 8 C.F.R. § 214.2 (h)(13)(iii)(A). Accordingly, the AAO finds that the beneficiary started a new six-year maximum period of authorized stay on December 1, 2002, the date he entered the United States in L-1 status. Accordingly, the beneficiary is eligible for H-1B classification for the entire period of employment requested in the petition (through June 26, 2008), and the director's decision to the contrary is withdrawn.

However, the petition as presently constituted may not be approved, as the record does not establish that the beneficiary will be employed in a specialty occupation, or that the employer has submitted an itinerary of employment. Section 214(i)(1) of 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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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.

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 (CIS) 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 proposed position.

The term “employer” is defined at 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 evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

While the [REDACTED] cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the record indicates that the beneficiary would be placed at various work locations to perform services established by contractual agreements for third-party companies, the director should exercise his discretion and request an itinerary of employment for the three-year period of requested employment.²

The record as presently constituted contains no contracts, work orders or statements of work from the entity for whom the beneficiary would provide his services. It does not contain an itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform.

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition, as presently constituted, cannot be approved.

The record also does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

¹ See also Memorandum from [REDACTED] Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or its equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

Based on the foregoing analysis, the AAO has determined that the record fails to establish (1) that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1); and (2) that the employer has submitted an itinerary of employment. The petition, therefore, may not be approved at this time.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), or that the employer has submitted an itinerary of employment. However, the director did not address these issues. Therefore, the director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide: (1) evidence pertinent to the issue of whether the proposed position qualifies for classification as a specialty occupation; and (2) an itinerary of services to be performed with the dates and locations of the proposed employment. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's November 30, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.