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U.S. Citizenship and Immigration Services

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FEB 06 2004

FILE: WAC 02 134 50068 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a transportation consulting business that seeks to employ the beneficiary as a transportation planning associate. 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 it had enough contracts to ensure that the beneficiary would be working in a specialty occupation. The director also suggested that the petitioner might be an agent rather than an employer. On appeal, counsel submits a brief and supporting documents.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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 (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 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, counsel's brief and supporting documentation. The AAO reviewed the record in its entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as a transportation planning associate. Evidence of the beneficiary's duties includes the I-129 petition and a February 11, 2002 position description. The petition and position description indicate that the beneficiary would perform duties that entail, in part: demographic data processing and analysis; statistical analysis and traffic flow modeling; and mapping using automated mapping software.

The director found that the petitioner did not establish that the proffered position existed.

On appeal, counsel states that the director erred in presuming that the petitioner is an agent rather than an employer, and submits a number of contracts to show that it has significant work available and, therefore, the proffered position is bona fide.

In his request for evidence, the director asked that the petitioner:

> Submit copies of contracts between the petitioner and the beneficiary. Also submit copies of contracts between the petitioner and the clients where the beneficiary will perform services. Additionally, include a complete itinerary of services or engagements where the beneficiary will perform those services. The itinerary should specify the dates of each service or engagement. The names and addresses of the actual employers, and the names and addresses of the establishment, venue, or locations where the service will be performed by the beneficiary. The itinerary should include all services planed [sic] for the period of time requested.

The petitioner responded:

> [P]lease be advised that [the beneficiary] is a full time employee of [the petitioner] and is utilized to work on any of the contracts that we are working on based on the requirements of the contract, his knowledge of the task we are working on and his available time.
>
> We are his sole employer and he works on behalf of our company and does not have a direct contract with any of our customers.

The director stated that this reply did not include corroborative evidence to show that the beneficiary will have a job available without contracts specific to his services. The director also stated that without specific contracts, the petitioner could not show that the beneficiary would be working in a specialty occupation.

The director determined that the reply was non-responsive, in that it does not include contracts to establish that the petitioner has enough work to warrant hiring the beneficiary. The petitioner, however, stated that there were no contracts specific to the beneficiary, and that the beneficiary works for the petitioner, not for the petitioner's clients. The request for evidence implied that the petitioner is an agent rather than a direct employer, and the petitioner responded based on that understanding. On appeal, counsel submits a number of contracts, as well as summaries of contracts that have been completed, all with similar specifications.

When counsel or a petitioner submits information on appeal that could have been submitted earlier, it is generally not taken into account. In this case, however, the contracts establish that there is work for the

beneficiary, and given the wording of the request for evidence, it is understandable why the contracts were not submitted at that time.

Additionally, the director found that in the absence of the contracts, he could not determine that the beneficiary would be working in a specialty occupation. The AAO notes that the petitioner provides fairly specific services to its clients, and, as such, is in a position to provide the position description for the proffered job without the client's input. The director does not need to have the petitioner's clients provide a position description; the client contracts with the petitioner for a particular end result, and the petitioner provides that result utilizing the beneficiary's and other employees' services. In this case, it is the petitioner's position description that is relevant.

Because the director did not make any determination on the merits of the petition, the matter is now remanded to the director to do so.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform such an occupation, and any other evidence the director may deem necessary. 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 remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 18, 2002 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.