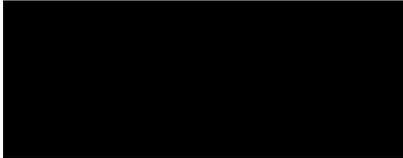


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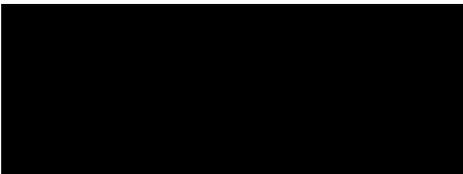
D2

FILE: WAC 03 021 50817 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

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 director of the service center 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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a consulting company that seeks to employ the beneficiary as a technical trainer. The petitioner, therefore, 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 failed to establish that the beneficiary will be employed in a specialty occupation. On appeal, counsel submits a brief.

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.

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

The petitioner is seeking the beneficiary's services as a technical trainer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the company support letter. According to this evidence, the beneficiary would perform duties that entail analyzing Xerox Laser printing machines to ensure high performance standards and reliability; training and supervising employees; and providing technical assistance and customer service. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in engineering.

The director determined that the petitioner failed to comply with the terms of the labor condition application (LCA) and thus the position could not be classified as a specialty occupation. According to the director, the petitioner did not submit requested evidence that would establish available employment for the beneficiary. Because the petitioner failed to submit the requested evidence, the director could not determine the validity of the submitted labor condition application.

On appeal, counsel states that the beneficiary will not provide consulting services, but will be an employee of the petitioner. Counsel maintains that the beneficiary will primarily work onsite at the petitioner's facility where he will train and supervise employees in the remanufacturing process. Counsel states that the beneficiary may visit client locations to provide training and maintenance of their machines; that no contractual or employment relationship will exist between the beneficiary and the clients; and that the petitioner will retain control over the beneficiary. Counsel emphasizes that the beneficiary will assist clients, and answer questions about their machines. According to counsel, because the petitioner had explained the beneficiary's terms of employment in its initial letter to the director, it did not provide consultant contracts between itself and the beneficiary since none existed.

The record contains the director's request for evidence and the petitioner's response. In the request for evidence, the director requested: (1) contracts between the petitioner and the beneficiary, and the petitioner and the clients where the beneficiary will perform services; (2) a complete itinerary of services or engagements and where the beneficiary will perform those services; and (3) an advisory evaluation of the beneficiary's foreign educational credentials, a description of the material evaluated, and evidence of the evaluator's credentials. In response, the petitioner submitted an educational evaluation from Morningside Evaluations and Consulting; however, it failed to respond to the director's request for contracts and an itinerary of services or engagements and where the beneficiary will perform those services. The petitioner did not submit a statement or other explanation to the director indicating that it was not a subcontractor for the beneficiary's services. Counsel states that because the petitioner had explained the beneficiary's terms of employment to the director in its initial letter, it did not need to submit contracts. The evidentiary record reveals that the petitioner's response did not discuss the beneficiary's terms of employment. Only the September 29, 2002 company letter submitted with the petition explained the beneficiary's terms of employment. Following the receipt of the initial petition and the attendant documents such as the company letter, the director sought additional evidence about the beneficiary's terms of employment.

The AAO finds that it was not error for the petitioner to fail to submit consultant contracts in light of its statements on appeal that it is not a contractor for the beneficiary's services. The petitioner has established that it will be the beneficiary's employer and that the beneficiary will be working within the geographical areas of the LCA.

The petition may not be approved, however, as the AAO finds that the record does not establish that the position of the technical trainer is a specialty occupation. The director may request evidence from the petitioner to assist him in making the determination of whether or not the position is a specialty occupation and, if so, whether the beneficiary is qualified to perform the occupation. The director failed to address this issue, and the petition will be remanded for further action. The evidence in the record indicates that the proffered position would be performed by a supervisor of industrial machinery installation, repair, and maintenance workers, an occupation that does not require a bachelor's degree in a specific specialty.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 9, 2003 decision is withdrawn. The petition is remanded for action consistent with the directives of this opinion and for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.