



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



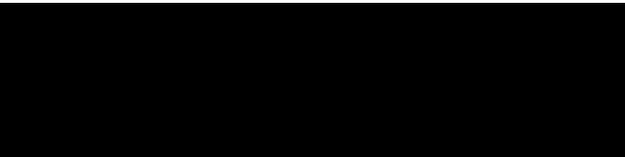
D 2

FILE: LIN 04 083 53195 Office: NEBRASKA SERVICE CENTER Date: OCT 04 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 appeal will be dismissed. The petition will be denied.

The petitioner is an Internet technology consulting and software developer that seeks to employ the beneficiary as a programmer analyst. 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, finding that the petitioner failed to provide sufficient evidence that it qualified as the beneficiary's employer, and that the proposed position is a specialty occupation.

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 AAO will first address the director's conclusion that the petitioner is not an employer under 8 C.F.R. § 214.2(h)(4)(ii).

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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;
- (3) Has an Internal Revenue Service Tax identification number.

Under the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F), the term *agent* is discussed and the section states that:

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, or 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 employment and to provide any required documentation.

In the denial letter, the director stated that according to the evidence, the petitioner often functions as a contractor and is a vendor to independent contracting companies, which then are brokers supplying the petitioner's employees to third parties at unknown locations. The director discussed *Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974), and how the decision in that case applies here. The director determined that the record indicated that a significant portion of the petitioner's business involves providing its employees to third party clients that ultimately control the key factors that relate to a proper employer-employee relationship. The director stated that if the beneficiary were to be employed under such an arrangement, which are the contractual arrangements found in the record, the petitioner would not qualify as a U.S. employer as contemplated by the regulation. The director discussed the need of the petitioner to submit work orders in order to demonstrate that a specialty occupation is available for the beneficiary at the location listed on the labor condition application.

On appeal, counsel states that the letter from Professional Rehabilitation Services, P.C. (PRS) confirms that the beneficiary will provide consulting services for PRS, and counsel asserts that the submitted agreement specifies the beneficiary's services and the assignment's duration. According to counsel, the petitioner is the beneficiary's employer and the terms and conditions of employment are summarized in the petitioner's January 31, 2004 letter.

The AAO finds that the evidence in the record establishes that the petitioner is an employer in accordance with the regulatory definition set forth at 8 C.F.R. § 214.2(h)(4)(ii). Although the director stated that the record contains contractual agreements, none of the contractual agreements were entered into between the petitioner and PRS. Nevertheless, the record reflects that the petitioner has engaged the beneficiary to work within the United States; in the January 31, 2004 letter, the petitioner states that it will pay, supervise, and control the beneficiary; and that the petitioner has an Internal Revenue Service Tax identification number. Based on this, the AAO finds that the petitioner qualifies as an employer under 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now turn to the director's conclusion that the proposed position fails to qualify as a specialty occupation.

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.

The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) states that an H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation.

The petitioner is seeking the beneficiary's services as a programmer analyst. The director found the petitioner did not establish that the beneficiary would perform specialty occupation duties as there was no evidence of current projects or signed contracts describing the beneficiary's duties and where they would be performed. The director stated that the undated letter from PRS did not provide the beneficiary's work location and the dates of projects. The director stated that according to the evidence, the petitioner often functions as a contractor and is a vendor to independent contracting companies, which then are brokers supplying the petitioner's employees to third parties at unknown locations. The director concluded that the beneficiary would not have a specialty occupation to occupy since the petitioner failed to submit a contractual agreement and active purchase orders with PRS. According to the director, the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reveals that employers do not require a bachelor's degree in a specific specialty for a computer programmer.

On appeal, counsel states that the PRS letter confirms that the beneficiary will provide consulting services for PRS, and that the submitted agreement specifies the beneficiary's services and the assignment's duration.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

In the April 27, 2004 letter, the petitioner claims that the beneficiary will work pursuant to an agreement with PRS on a project for PRS that will last for the duration of the beneficiary's employment with the petitioner; and in an undated letter, PRS states that it entered into an agreement with the petitioner for the placement of personnel at "several of our business locations." However, the PRS letter does not indicate the location where the services will be provided by the beneficiary; and although PRS states that the beneficiary will provide services for three years, the record contains no evidence of a binding contractual agreement and a work order between the petitioner and PRS regarding such an arrangement. Thus, this evidence does not establish that the beneficiary would perform services in a specialty occupation upon entry into the United States.

In addition, the AAO finds that the duties that the petitioner states the beneficiary will perform for PRS differ from those described in the petitioner's January 31, 2004 letter. The AAO finds that the different job descriptions indicate that no defined job existed for the beneficiary when the petitioner filed the I-129 petition, and that a defined job does not exist at the present time. The petitioner merely speculates on the types of duties that the beneficiary would perform upon his employment with the company. While the beneficiary's duties involve some kind of programming work, only a detailed job description from the entity that requires the beneficiary's services will suffice to meet the burden of proof in these proceedings. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The record does not contain such a job description from PRS. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

For these reasons, the AAO concurs with the director's determination that no evidence establishes that upon entry in the United States the beneficiary will perform services in a specialty occupation as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Consequently, the petitioner fails to establish that the proposed position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.