

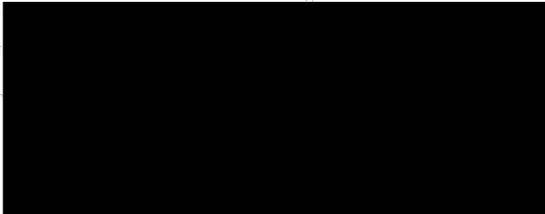


U.S. Citizenship
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Services

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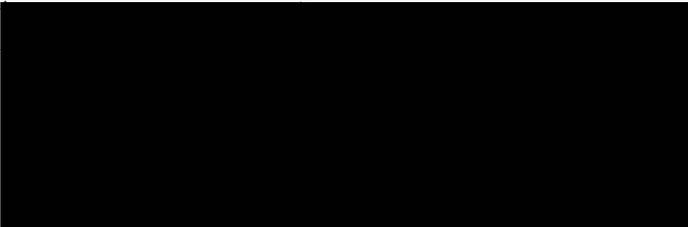
FILE: WAC 04 800 58066 Office: CALIFORNIA SERVICE CENTER Date: JUL 26 2006

IN RE: Petitioner:
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:



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

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 a software consulting and development company that seeks to employ the beneficiary as an engineer. 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 establish that it met the definition of a "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii), that the proposed position qualified as a specialty occupation, and that the labor condition application (LCA) was valid as to the beneficiary's location of intended employment. Counsel submits a timely appeal.

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 (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.

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

The evidence of record, including the contractual agreements with various companies, establish 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).

In the request for evidence, the director asked for the beneficiary's employment itinerary. The record contains a professional services work order entered into between the petitioner and IT Tech US, in which the petitioner designates the beneficiary as assigned to provide services for Rapidigm starting February 5, 2005 for a period of 12 months. The record reflects that Rapidigm is a consulting services company that provides computer software professionals for other companies. The petitioner's January 23, 2005 letter indicated that the beneficiary may be transferred to client sites. The petitioner therefore needed to submit an itinerary listing the dates and locations of definite employment of the beneficiary that covered the entire period of time requested in the petition. Employers, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location. The petitioner failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must thereby be denied.²

The AAO notes that on appeal the petitioner states that the beneficiary will work from its office on an in-house project if the need should arise. However, because the petitioner's January 23, 2005 indicated that the beneficiary may be transferred to client sites, the petitioner needed to submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

On appeal, the petitioner submitted an AAO decision to show that the petitioner need not comply with 8 C.F.R. § 214.2(h)(2)(i)(B). The AAO notes that the cited Aytes memorandum allows the director to exercise discretion when requesting an itinerary for multiple worksites. The AAO finds that the director

¹ See also Memorandum from Michael L. Aytes, 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."

properly exercised his discretion in requesting an itinerary in this case as required by 8 C.F.R. § 214.2(h)(2)(i)(B). Further, the facts in the AAO decision differ from those in the present proceeding. In the AAO decision, the petitioner indicated that the beneficiary will work at the beneficiary's facility at Bellevue (now Kirkland), Washington and in Redmond, Washington, where Microsoft is located. With the case here, although the petitioner indicated that the beneficiary will work from the petitioner's office if the need should arise, the petitioner also stated that the beneficiary may be transferred to various client sites. Thus, unlike the facts in the AAO decision, which indicated that the beneficiary will work either at the petitioner's office or at the Microsoft office, the beneficiary's duties in the instant petition will be performed at various client sites.

The director found that the petitioner failed to establish the offered position as a specialty occupation. The director stated that the petitioner did not submit a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client where the beneficiary will perform the proposed duties. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

The record contains a work order between the petitioner and IT Tech US, in which the petitioner designates the beneficiary as assigned to provide services for Rapidigm for a period of 12 months. The record reflects that Rapidigm is a consulting services company that provides computer software professionals for other companies. The record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the company where the beneficiary will provide consulting services. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform for Rapidigm's client will qualify as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.