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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 04 230 51678 Office: TEXAS SERVICE CENTER Date: AUG 11 2006

IN RE: Petitioner:
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:

[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, Chief
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 appeal will be dismissed. The petition will be denied.

The petitioner provides educational services including the recruitment and placement of foreign teachers, and seeks to employ the beneficiary as a teacher. 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 stating that the petitioner had not established that a bona fide position existed at the time the Form I-129 was filed in which the beneficiary would be employed, or that an employer/employee relationship would exist between the petitioner and the beneficiary. On appeal, counsel submits a brief stating that the offered position qualifies as a specialty occupation and that the petitioner would be the actual employer of the beneficiary.

The first issue to be discussed in this proceeding is whether the petitioner would be the actual employer of the beneficiary.

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 record demonstrates that the petitioner has a contract with the Fulton County School System to provide teachers for the school system, and that the teachers supplied would be the employees of the petitioner, not the school system. As such, the petitioner would pay the teachers for the services they perform, and would otherwise have authority over the teacher's employment including the right to hire, fire, supervise and control the work of the teacher. The director noted that the contract for services with the Fulton County School System was entered into subsequent to the filing of the present petition and could not be the basis for employment of this beneficiary since the contract for services was not executed prior to the filing of the petition. The petitioner, however, provided a copy of a contract entered into prior to the filing of the petition and that contract states that it shall automatically renew for one additional school year unless terminated in writing by either party. As such, the petitioner has overcome the director's concerns about the date of the contract for services. The petitioner seeks to engage a person to work in the United States, would have an employer-employee relationship with that person, and has an Internal Revenue Service Tax identification number. The petitioner would, therefore, qualify as an employer in this instance.

The final issue to be considered is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of 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.

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 are 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) 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 with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a teacher. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Teach science to school students using educational tools including films, computer resources such as educational software and the Internet, slides, overhead projectors and the latest technology in teaching including computers, telecommunication systems and videodiscs;
- Develop and maintain long range and daily instructional plans for students;
- Use a variety of teaching methods/strategies such as group work, lecture, mini-lessons, exploration, questioning, discussion, and other cooperative teaching techniques;
- Use appropriate techniques to encourage active participation in decision-making regarding such things as classroom rules, organization and topics of study, which communicate a caring attitude and trust of students and foster healthy self-esteem in students;
- Develop healthy self-esteem in students and promote interactive learning habits;
- Design classroom presentations to meet student needs and abilities and work if necessary with students individually to assist students where a student needs help;
- Evaluate students' performance and potential and use a variety of assessment strategies and prepare, administer and grade tests; and
- Prepare report cards, meet with parents and school staff to discuss academic progress or problems where necessary.

The petitioner requires a minimum of a bachelor's degree in education and sciences for entry into the offered position.

The director found that the proffered position was not a specialty occupation because the employment agreement between the petitioner and the beneficiary fails to identify specifics of the beneficiary's employment, such as the employment location and the exact nature of the beneficiary's teaching assignment. On appeal, counsel states that the beneficiary will work at the Fulton County School System. As supporting documentation, counsel submits a Teaching Services Agreement, signed on June 30, 2004, between the petitioner and Fulton County Schools.

The Teaching Services Agreement between the petitioner and the Fulton County School System is noted. The record, however, does not contain a comprehensive description of the proposed duties from an authorized representative of the petitioner's client Fulton County School System, where the beneficiary will ultimately

perform the proposed duties. Without this description, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. Moreover, as noted by the director in her decision, the employment location and the exact nature of the beneficiary's teaching assignment are unclear. The record contains a letter, dated December 3, 2004, from the director of the Fulton County Schools Employment Services, who states, in part: "The Fulton County School System does not assign teachers to specific schools until after their arrival in the United States. Assignment of teachers is a concrete, not a virtual activity." These comments are noted. The petitioner, however, bears the burden of establishing that the beneficiary will be coming to the United States to perform services in 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 proffered 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 proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's client, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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)(*1*). Accordingly, the AAO will not disturb the director's denial of the petition.

The director also found that the petitioner failed to identify the particular school and grade level where the beneficiary will be placed. The AAO agrees. 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.

In her request for evidence, the director asked for copies of contracts between the petitioner and the school system for the beneficiary's services. The director also asked for information regarding the location of the beneficiary's employment. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her discretion to request the contracts described above. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment or contracts of work to be performed. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.[1]

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[1] 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."

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified for the position because she does not hold the required teaching license. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Nor does the record of proceeding reflect that the beneficiary is certified to teach in the Fulton County Public Schools. The petitioner submitted a letter from the State of Georgia Professional Standards Commission indicating that the beneficiary was eligible for a non-renewable Level 5 Certificate in Math (6 – 12), valid five years, upon employment in a Georgia school system. The duties of the position reflect that the beneficiary will be teaching science, and the math certification is not relevant to the position. Further, the record does not reflect that the beneficiary is qualified to perform the services of a certified teacher in Georgia, as the proposed employment has not been proven. The petitioner has not identified the school where the beneficiary will be employed, nor has the Georgia School System guaranteed the beneficiary employment as a math teacher.

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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.