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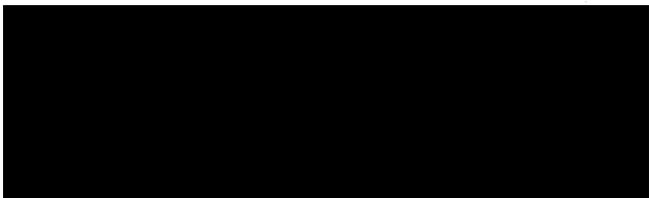
U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 05 156 52594 Office: CALIFORNIA SERVICE CENTER Date: DEC 05 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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a staffing agency for teachers, nurses, and other professionals. It seeks to employ the beneficiary as a teacher and to classify him 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 on the ground that the record fails to establish that the proffered position qualifies 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and copies of previously submitted materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and a letter to the service center, the petitioner described itself as a company established in August 2003 that provides services to teachers, nurses, and other professionals by placing them in schools, hospitals, and other healthcare facilities. The petitioner indicated

that it has a registry of credentialed teachers and submitted a list of schools in Greater Los Angeles with which it claims to have working relationships, copies of professional service agreements it had signed with two of the schools, and a letter from a third school advising of its need for teachers. The petitioner stated that it was seeking an elementary school teacher to place in one of the listed schools for a one-year period, that a bachelor's degree in education was required for the job, and that the beneficiary qualifies by virtue of his bachelor of arts degree in education, with a major in history, from Palawan State College in the Philippines, awarded in March 1984, along with a master of arts in education, majoring in administration and supervision, from Holy Trinity College in the Philippines, awarded in 1998. A copy was submitted of the teaching credential issued to the beneficiary by the State of California in the field of social science, authorizing the teaching of students from preschool through grade 12 as well as adult classes, with a five-year validity period from September 10, 2003 to October 1, 2008. In addition, the petitioner submitted copies of its offer of employment to the beneficiary, dated August 1, 2003, and the letter of agreement executed on August 28, 2003 whereby the beneficiary accepted employment with the petitioner, at an annual salary of \$36,420, as a "Teacher to be performed at such location(s) as the Employer may determine."

In the RFE the director indicated that the record was unclear whether the petitioner is the beneficiary's employer or acting as his agent to secure employment for him with other entities. The petitioner was requested to clarify its employment relationship with the beneficiary by submitting such evidence as letters from client companies about their work relationships with the beneficiary; contractual agreements and associated documentation from client companies that describe the beneficiary's duties; an itinerary of employment specifying the companies, work locations, and dates of engagement where the beneficiary will provide services during the period of requested H-1B classification; copies of the petitioner's vacancy announcements and advertisements for the proffered position; various business-related materials and documentation pertaining to prior H-1B employees. The petitioner was also requested to submit documentation pertaining to the schools the petitioner services and the petitioner's business operations such as tax returns, quarterly wage reports, and business licenses.

In response to the RFE the petitioner confirmed that it "acts as a representative for multiple employers." New documentation submitted by the petitioner included job announcements for teacher positions by schools with which the petitioner claims it has teacher placement contracts, as well as copies of federal income tax returns, state quarterly wage reports, and its business license. The only other materials submitted in response to the RFE were copies of previously submitted documents.

In his decision the director indicated that regardless of whether the petitioner is an employer or an agent, the critical issue is whether the proffered position meets the statutory definition of a specialty occupation. The director determined that the evidence of record did not show the specific project where the beneficiary would work, and contained no comprehensive description of the beneficiary's duties from an authorized representative of the school district or the school where the beneficiary would work. Without such evidence, the director stated, the petitioner had not demonstrated that a job exists for the beneficiary which meets the statutory definition of a specialty occupation. The director concluded that the petitioner had failed to establish that it qualifies as a United States employer or agent.

On appeal the petitioner asserts that "as a registry and staffing agency [it] qualifies as a United States employer or agent." The petitioner cites its service agreements with schools in greater Los Angeles and asserts that it has a "definite employment commitment" with respect to the beneficiary "regardless of whether or not he will be actually placed [in] an educational institution for the period of employment requested in the

Form I-129.” The petitioner stated that the beneficiary would perform the duties of a secondary school teacher, which include the following:

- Planning, preparing and delivering lessons to a range of classes;
- Marking work and giving appropriate feedback;
- Maintaining appropriate records of student progress and development;
- Researching new topic areas and maintaining up-to-date subject knowledge;
- Devising and writing new curriculum materials, including selecting and using a range of different learning resources and equipment;
- Undertaking pastoral duties, including taking on the role of form tutor and supporting students on an individual basis through academic or personal difficulties;
- Administering and “invigilating” subject examinations, including managing student behavior in the classroom and on school premises, applying appropriate and effective measures in cases of misbehavior;
- Participating in and organizing extracurricular activities;
- Participating in departmental meetings, parents’ evenings and whole school training events; liaising with other professionals such as learning mentors, careers advisers, educational psychologists and education welfare officers;
- Creating a positive atmosphere in the classroom to help ensure success for individual student learning;
- Setting a plan for classroom management;
- Modeling and instructing virtuous character traits, including facilitating character coaching opportunities between secondary and elementary students.

The duties listed above reflect the duties of the teaching position offered to the beneficiary in the petitioner’s offer of employment letter of August 2003. The “Letter of Agreement” between the petitioner and the beneficiary, dated August 28, 2003, states that the beneficiary “accepts employment as [a] Teacher to be performed at such location(s) as the Employer may determine.” It also provides that the petitioner will pay the beneficiary an annual salary of \$36,420 and may terminate the beneficiary if he does not adequately perform the job. The petitioner has submitted copies of two virtually identical “Professional Service Agreements” it executed with New Design Charter School (New Design) and Inglewood Preparatory Academy Charter School (Inglewood) in September 2004 and March 2005, respectively, which state that the petitioner is to provide staffing for all teaching positions at the schools. The agreements provide that the schools are to pay the petitioner a fee for its staffing services, in the form of a daily rate for each teacher provided, and specify that the petitioner is the employer of the teachers it provides, with responsibility for payment of wages, federal and state income taxes, and benefits. The agreements provide that the schools “have the right to control the details and the manner in which work is performed” by the teacher, and “shall determine the procedures to be followed by [teachers] regarding the time and performance of their duties.”

The foregoing documents establish that the petitioner will act as the beneficiary’s employer and meets the definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii).¹

¹ Under 8 C.F.R. § 214.2(h)(4)(ii), a petitioner qualifies as a United States employer, if it:

- (1) Engages a person to work within the United States;

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. The AAO determines that this regulation applies to the instant petition because the employment contract between the petitioner and the beneficiary, as discussed above, would allow the beneficiary to be assigned to multiple schools and work locations during the period of requested H-1B status.

In his RFE the director asked for the beneficiary's employment itinerary including where and in what school(s) the work would be performed. As indicated in the Aytes Memorandum,² the director has the discretion to request that an employer who will employ the beneficiary in multiple locations submit an itinerary. "The purpose of this particular regulation [8 C.F.R. § 214.2(h)(2)(i)(B)]," the memorandum noted, "is to insure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment." Upon review of the instant petition, the AAO determines that the director properly exercised his discretion to request an employment itinerary. No such employment itinerary was produced by the petitioner.

The evidence of record does not contain a comprehensive description of the proposed duties from an authorized representative of New Design, Inglewood, or any other school with which the petitioner has a service contract. Nor is there any documentary evidence that the beneficiary would be assigned to any particular client school(s) of the petitioner's. The petitioner's statement on appeal that it will employ the beneficiary "regardless of whether or not he will be actually placed [in] an educational institution for the period of employment requested in the Form I-129" suggests that there may be no position for the beneficiary with a client school. Thus, the petitioner has failed to show that the beneficiary has an itinerary of definite employment, and the work location(s) of such employment, for the one-year period of requested H-1B classification, as required under 8 C.F.R. § 214.2(h)(2)(i)(B). Going on record without supporting documentation does not satisfy the petitioner's burden of proof. See *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)). The petitioner bears the burden of proof to establish that the beneficiary will be coming to the United States to perform services in a specialty occupation.

The record indicates that the petitioner is an employment contractor in that the petitioner will place the beneficiary at one or more work locations to perform services established by contractual agreements for one or more third-party schools. 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

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- (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.

² Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.F. § 214.2(h)(4)(ii) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

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 from client schools establishing the specific duties the beneficiary would perform for them pursuant to professional service agreements with the petitioner, 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. Thus, 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)(I). Therefore, the AAO will not disturb the director's denial of the petition.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will dismiss the appeal.

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