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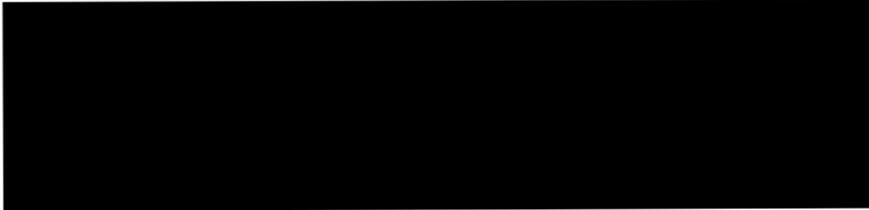
U.S. Department of Homeland Security  
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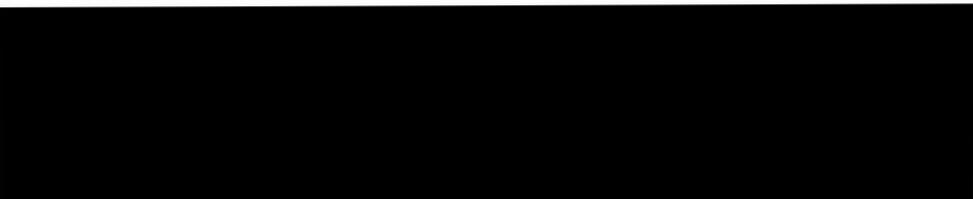


FILE: WAC 02 119 53844 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2006**

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center director denied the nonimmigrant visa petition and the petitioner appealed his decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter to the director for entry of a new decision. The director again denied the petition and certified his decision to the AAO. The director's decision will be affirmed. The petition will be denied.

The petitioner is an employment services and placement company, with 200 employees. It seeks to employ the beneficiary as a rehabilitation services coordinator 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 he determined that the record did not establish that the petitioner would employ the beneficiary in a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's initial request for evidence; (3) counsel's response to the director's request; (3) the director's initial denial letter; (4) Form I-290B, with counsel's letter and additional evidence; (5) the AAO's remand of the petition to the director; (6) the director's second request for evidence; and (7) the director's subsequent denial of the petition. The AAO notes that the petitioner did not respond to the director's second request for evidence, which sought additional documentation related to the proffered position. Accordingly, the evidence of record is that which existed at the time of the petitioner's appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the record establishes the proffered position as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

An 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, a petitioner must establish that its position meets one of four 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In its May 3, 2004 consideration of the petitioner’s appeal, the AAO found the duties described by the petitioner to reflect the employment of a rehabilitation counselor and the beneficiary to be qualified to perform such employment. It noted, however, that the record did not contain a job description of the proffered position from Orthopaedic Hospital, the client for which the beneficiary would provide services. Although the AAO acknowledged the November 1, 2001 supplemental staffing agreement between the petitioner and Orthopaedic Hospital, it found that the agreement failed to provide the comprehensive description of the beneficiary’s proposed duties required to establish the proffered position as a specialty occupation.

The evidence of record establishes that the petitioner is an employment contractor in that it would employ the beneficiary to perform services established by a contractual agreement for a third-party organization. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a business that acts as an employment contractor – an entity placing employees at third-party companies to perform services under contract – 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. Therefore, it is not the duties listed by the petitioner but those to be established by Orthopaedic Hospital that must demonstrate a degree requirement or its equivalent for the proffered position.

On appeal, the petitioner provided no contract, work order or statement of work describing the specific duties to be performed by the beneficiary for Orthopaedic Hospital. It has subsequently failed to respond to the

director's January 1, 2005 request for a description of the beneficiary's duties from Orthopaedic Hospital. Accordingly, the record offers no evidence of the duties of the proffered position and precludes the AAO from analyzing whether these duties would require a least a baccalaureate degree or its equivalent in a specific specialty, as required for classification as a specialty occupation.

For reasons related in the preceding discussion, the record does not establish the duties of the proffered position as a 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 shall not disturb the director's denial of the petition.

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 director's September 29, 2005 decision is affirmed. The petition is denied.