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U.S. Citizenship
and Immigration
Services

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FILE: SRC 04 222 52645 Office: TEXAS SERVICE CENTER Date: **AUG 07 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 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 is a teacher recruitment and placement business that seeks to employ the beneficiary as a full-time teacher. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 the petitioner has not demonstrated that an employer-employee relationship exists or that the proffered position is a specialty occupation. The director found further that the petitioner had not demonstrated that the beneficiary is qualified to perform a specialty occupation. On appeal, counsel submits a brief and additional evidence including an employment agreement between the petitioner and the beneficiary, a teaching services agreement between the petitioner and the Fulton County School System, and payroll and tax documents.

The AAO will first address the director's conclusion that the petitioner has not demonstrated that an employer-employee relationship exists.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a United States employer is defined as follows:

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 director found that a bona fide employer-employee relationship does not exist because the exact nature of the petitioner's business and the identity of the beneficiary's actual employer and its location, are unclear. On appeal, counsel states, in part, that the petitioner provided all evidence to meet the criteria of an employer. Counsel states further that the terms of the agreement between the petitioner and the beneficiary demonstrate that the petitioner has clear control over the work of its employees. Counsel also states that the agreement between GTRR and the Fulton County School District expressly states that the teachers assigned to the school system under this agreement shall not be employees of the school system, and that the petitioner "shall comply with all applicable federal, state and local laws relating to payment of wages, unemployment compensation, workers' compensation, wage and hour laws, social security, F.I.C.A., employment discrimination, immigration, income tax, payroll taxes, and other employment-related laws."

The record contains evidence including an employment agreement signed by the petitioner's vice president and the beneficiary, payroll sheets, and tax documents to show that it meets the definition of U.S. employer, pursuant to 8 C.F.R. § 214.2(h)(4)(ii). In view of the foregoing, the petitioner has established an

employer-employee relationship with the beneficiary. The petitioner, therefore, has overcome this portion of the director's objections.

The AAO will secondly address the director's conclusion that the petitioner has not demonstrated that the proffered position is 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.

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 petitioner is seeking the beneficiary's services as a full-time teacher. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's July 30, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform the following duties: teaching science to school students; developing and maintaining long-range and daily instruction plans; using a variety of teaching methods and strategies; encouraging active student participation; developing healthy self-esteem in the students; designing classroom presentations; evaluating the students' performance and potential; preparing report cards; and meeting with parents. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in education and sciences, or an equivalent thereof.

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 stated 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 [REDACTED] 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 a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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). Accordingly, the AAO shall 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 his request for evidence, the director asked for copies of contracts between the petitioner and the schools to whom it provides teachers. 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

The AAO will now address the director's conclusion that the petitioner has not demonstrated that the beneficiary is qualified for the proffered position because he does not hold the required teaching license. Counsel does not address this issue on appeal. It is noted, however, that 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.² The petitioner submitted a letter from Fulton County Schools indicating that the beneficiary is currently eligible for a nonrenewable teaching certificate upon employment in a Georgia School System. 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 proved. 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 science 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.

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

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."

² The AAO notes that in Georgia, teachers are required to be certified, but substitute teachers are not required to be certified. Georgia law, O.C.G.A 20-2-200, stipulates that "the professional Standards commission shall provide, by regulation, for certifying all certified professional personnel employed in the public schools of this state. No such personnel shall be employed in the public schools of this state unless they hold certificates issued by the commission certifying their qualifications and classification in accordance with such regulations." Under Georgia Educator Certification Rule 505-2-.36, substitute teachers are not required to hold state certification and may provide substitute teaching with a high school equivalency. https://www.gapsc.com/TeacherCertification/Documents/Cert_Rules_12_03/complete_cert_rules.pdf