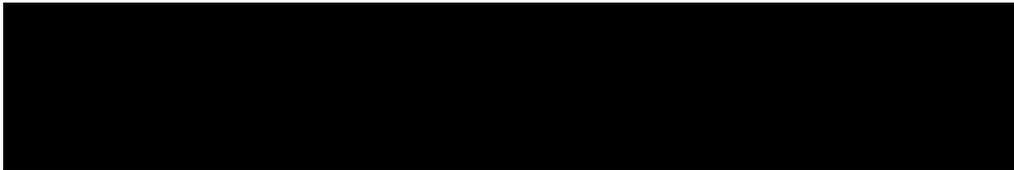


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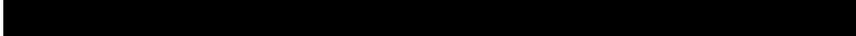
U.S. Citizenship
and Immigration
Services

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DZ

FILE: SRC 04 220 51776 Office: TEXAS SERVICE CENTER Date: **AUG 15 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 materials 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. 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 provider of teacher recruitment, employment, and placement services. It seeks to employ the beneficiary as a teacher and to classify her 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 failed to establish that the petitioner had a valid teaching position for the beneficiary at the time the petition was filed and for the three years of requested H-1B classification.

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 supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including Form I-129 and an accompanying letter, the petitioner described its business as recruiting, orienting, providing and relocating mathematics and science teachers from India and other English-speaking Asian countries to underserved inner city and rural locations in the United States. The petitioner stated that it was established in 2001, has 25 employees and a gross annual income of \$318,414 (in 2002), and proposed to employ the beneficiary as a math and science teacher for three years, at an annual salary of \$36,000. The duties of the proffered position were listed as follows:

- Teach math and science to school students using educational tools including use of 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.
- Develop healthy self-esteem in students and promote interactive learning habit among students.
- 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 a student's performance and potential and use a variety of assessment strategies and prepare, administer and grade tests.
- Prepare report cards, meet with parents and school staff to discuss a student's academic progress or problems where necessary.

The petitioner stated that the minimum educational requirement for the proffered position is a baccalaureate degree in education and sciences or the equivalent thereof. The beneficiary is qualified for the position, the petitioner declared, by virtue of the three degrees she earned at Osmania University in Hyderabad, India during the 1990s, including a bachelor of science, a master of science in applied mathematics, and a bachelor of education specializing in physical science, mathematics, and computer education.

In response to the RFE the petitioner submitted its articles of incorporation; various tax and payroll documentation, including its federal income tax return for 2003 recording gross receipts of over \$770,000 for that year; a statement from Fulton County Schools, dated December 3, 2004, confirming that it has a "Teaching Service Agreement" with the petitioner to furnish teachers to the school system; and a letter to the beneficiary from the State of Georgia, Professional Standards Commission, [REDACTED] stating that she was "currently eligible for a Nonrenewable Science (6-12) and Mathematics (6-12) Level 4" teaching certificate in a Georgia school system, and advising her of the steps that must be taken "to qualify for Clear Renewable certification" as a Georgia teacher.

In her decision the director referred to [REDACTED] statement from Fulton County Schools to the petitioner as a services contract between the parties, which postdated the filing of the instant petition in August 2004 by four months. The director noted that the document did not identify a specific location where the beneficiary would be working during her three years of requested H-1B classification. The director concluded that the proffered teaching position did not exist at the time the petition was filed, as required for the beneficiary to be eligible for H-1B classification, and that the record thus failed to demonstrate an employer-employee relationship between the petitioner and the beneficiary, as defined in the regulations.

On appeal counsel asserts that the petitioner is the beneficiary's employer and meets the definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii). Counsel submits copies of two identically-worded "Teaching Services Agreements" signed by the petitioner and Fulton County Schools in January 2002 and June 2004, and refers to various provisions therein – one of which states that "[a]ll Teachers placed in the SCHOOL SYSTEM through GTRR shall be employees or independent contractors of GTRR" – as evidence of the employer-employee relationship between the petitioner and the employer. In conformance with the Teaching Services Agreement counsel indicates that the petitioner cannot designate a work location for the beneficiary at the time the petition is filed because the school system has that role and does not assign a teacher to a specific location until (s)he is physically present in the United States. As further evidence of the school system's role in determining work location counsel refers to several communications submitted on appeal from school systems in South Carolina requesting information about the availability of teachers from GTRR.

The Teaching Services Agreements submitted on appeal are one-year contracts between the petitioner and Fulton County Schools, with one-year renewal options, to provide teachers on an as-needed basis. The second of the two contracts, dated June 30, 2004, was in force at the time the instant H-1B petition was filed in August 2004.¹ Key provisions of the agreement read as follows:

WHEREAS the SCHOOL SYSTEM sometimes encounters difficulty filling all of its teaching positions . . . GTRR will recruit and hire certified teachers . . .

Art. 2(a): [G]TRR shall supply the SCHOOL SYSTEM with Teachers on an "as-needed" basis [T]his agreement does not obligate the SCHOOL SYSTEM to accept any GTRR teachers and that the SCHOOL SYSTEM shall have the right, in its sole discretion, to determine whether it needs any GTRR teachers.

Art. 2(d): GTRR shall ensure that each Teacher has and maintains a current Georgia teaching license/certification for the position in which the Teacher is placed.

Art. 2(g): All Teachers placed in the SCHOOL SYSTEM through GTRR shall be employees or independent contractors of GTRR. GTRR shall enter into a separate teacher contract with each teacher

Art. 3(b): The SCHOOL SYSTEM will pay GTRR a monthly rate for each Teacher teaching in the SCHOOL SYSTEM GTRR will submit monthly invoices to the SCHOOL SYSTEM

Art. 8: Teachers assigned to the SCHOOL SYSTEM under this Agreement shall not be employees or agents of the SCHOOL SYSTEM. GTRR shall comply with all applicable federal, state, and local laws relating to payment of wages . . . and other employment-related laws.

¹ The director erred in finding that the letter of December 3, 2004, verifying the existence of the Teaching Services Agreement between Fulton County Schools and GTRR, represented a contract between the parties.

The foregoing provisions clearly state that any teacher placed with the school system remains an employee of and will be paid by the petitioner. The Teaching Services Agreement [REDACTED] establishes 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).² The Agreement between the petitioner and Fulton County Schools gives the school system total discretion to decide how many teachers, if any, it wishes to use, for how long it wishes to use them, and where it wishes to place them in the system. Under the Agreement the school system could, if it wished, use one GTRR teacher for numerous assignments in different schools, with different locations, and for limited periods of time interrupted by periods of no work. The school system may also choose not to use the services of any particular teacher(s).

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 Teacher Services Agreement, as discussed above, would allow the beneficiary to be assigned to numerous work locations during the period of requested H-1B status.

In her 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, cited at footnote 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 her discretion to request an employment itinerary. No such employment itinerary was produced by the petitioner.

Thus, the evidence of record 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." The petitioner bears the burden of proof, however, to establish 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

² See also 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).

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 establishing 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. 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). Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified for the position. 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 show 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 advising the beneficiary that she was eligible for a Nonrenewable Science (6-12) and Mathematics (6-12) Level 4 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 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 biology teacher. For this additional reason the petition must be denied.

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.