

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dr

FILE: SRC 04 137 50046 Office: TEXAS SERVICE CENTER Date: JUN 29 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. 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 petitioner has not provided sufficient evidence that it will have sole discretion to hire, pay, fire, supervise or otherwise control the work of the beneficiary. On appeal, counsel states, in part, 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 states further 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 now 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 April 5, 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. That contract, however, was signed on June 30, 2004, after the filing of the petition on April 14, 2004. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, the AAO notes that, even if this agreement were dated prior to the petition's filing date, the record still 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 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. Absent a comprehensive description of the beneficiary's proposed duties including specific information pertaining to the beneficiary's teaching assignment, as described above, the petitioner has not persuasively demonstrated that the proffered position is a specialty occupation, or that a specialty occupation exists for the beneficiary. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Accordingly, the AAO shall not disturb the director's denial of the petition.

The director also found that the petitioner failed to identify the location and name of the teaching assignment where the beneficiary will be placed. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states that when a petition requires services to be performed in more than one location, it must be accompanied by an itinerary with the dates and locations of the services to be performed. As the petitioner has failed to provide an itinerary of services, the petition may not be approved.

Beyond the decision of the director, the AAO also finds that the petitioner is an agent. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an

itinerary of definite employment and information on any other services planned for the period of time requested.

- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

The AAO determines that the petitioner will be the agent as defined in the regulation. The AAO also finds that the petitioner has not complied with the regulatory requirements for an agent in that it has failed to submit an itinerary of services or engagements. The petitioner states that the school system will not accept a teacher until that person is in the United States and after a personal interview. While the school system may refuse to enter into an agreement with a foreign teacher until that person is in the United States, the petitioner is not relieved of its regulatory obligation to provide an itinerary of services or engagements as the agent on an H-1B petition.¹

¹ The AAO notes that the employer of a beneficiary who will work in multiple locations is also required to submit an itinerary of services with the dates and locations of services. 8 C.F.R. § 214.2(h)(2)(i)(B).

Therefore, the petitioner has failed to establish that it meets the regulatory requirements for an agent of an H-1B petition.

The AAO also finds that the petitioner has not demonstrated that the beneficiary is qualified to perform a specialty occupation. 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). The record of proceeding does not reflect that the beneficiary is certified to teach in the Fulton County Public Schools.²

For these additional reasons, the petition may not be approved.

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.

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