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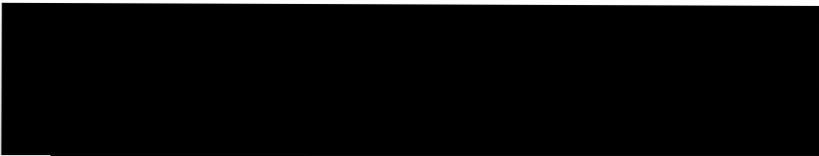
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FILE: SRC 05 209 50617 Office: TEXAS SERVICE CENTER Date: NOV 15 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for entry of a new decision.

The petitioner is an education consulting firm that seeks to employ the beneficiary as a teacher. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 basis of her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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, 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 proposed position.

The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii):

*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 AAO disagrees with the director’s finding that the petitioner would not act as the beneficiary’s employer. The evidence of record establishes that the petitioner will act as the beneficiary’s employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii).

The evidence of record includes an offer letter, dated July 29, 2005, executed by the petitioner and co-signed by the beneficiary, indicating that the petitioner would employ the beneficiary for a period of one year at a gross annual salary of \$41,940 with the DeKalb County School System in Georgia. The letter indicates that the petitioner will evaluate the beneficiary’s performance monthly, and that the petitioner may terminate the beneficiary’s employment with or without cause and in its sole judgment. The record contains a teaching services agreement between the petitioner and the DeKalb County Board of Education indicating that the petitioner will be the employer of the beneficiary, will pay the beneficiary’s salary, will provide teacher’s health, life, disability, and general liability insurance, and worker’s compensation coverage, and may remove a teacher from his/her position in the DeKalb County School System in its sole judgment.<sup>2</sup> The record also reflects that the petitioner paid the beneficiary \$38,460 in 2004. In view of this evidence, the AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director’s decision to the contrary.

The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation, that the employer has submitted an itinerary of employment, or that the petitioner will comply with the terms of the labor condition application (LCA). As the director has

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<sup>1</sup> See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

<sup>2</sup> The agreement also gives the DeKalb County Board of Education the right to request the removal of a teacher with or without cause.

not addressed these issues, the petition will be remanded in order for the director to make a determination on these issues.

The record is clear that the beneficiary would not perform his teaching duties at the petitioner's place of business. Rather, the beneficiary would teach at a school located in a school district with which the petitioner has a contract.

The AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record, including the May 2, 2005 "Teaching Services Agreement" between the petitioner and the DeKalb County Board of Education for the 2005-2006 school year, establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party organizations (school districts, in this instance).

The Teaching Services Agreement states that the petitioner may provide the DeKalb County Board of Education up to 60 teachers for the 2005-2006 school year. In an affidavit submitted on appeal, the petitioner states the following:

Each contract lasts for only one school year. At the end of that school year, if the school board wishes to obtain the services of the teacher for the next year, it must make a request to [the petitioner] that [the petitioner] provide the services of the teacher for a new year under the new contract with [the petitioner] for that year.

[The petitioner] may or may not agree. For instance, if [the petitioner] has submitted the name of the teacher to another school district it may not agree to submit the teacher to the first school district. . . .

Although the Form I-129 states that the beneficiary would work at [REDACTED] in Lithonia, Georgia for a period of three years, such employment is contingent upon (1) the petitioner and the DeKalb County Board of Education renewing the Teaching Services Agreement twice, and (2) the petitioner not submitting the beneficiary's name to another school district in a subsequent year. The record establishes that the beneficiary may be performing work at multiple work locations during the course of the proposed three-year period of employment.

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.

While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As neither the petitioner's contract with the beneficiary nor with DeKalb County extends beyond one year, the director should exercise her discretion in this case to require an itinerary of employment for the three-year period of requested employment.<sup>3</sup>

The record as presently constituted contains no contracts, work orders or statements of work from the entity for whom the beneficiary would provide his services. It does not contain an itinerary. Absent such

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<sup>3</sup> 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."

information, the petitioner has not established that it will employ the beneficiary in a specialty occupation for a three-year period.

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. The Teaching Services Agreement makes no mention of the beneficiary, and is valid for one year only. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition, as presently constituted, must be denied.

The record also does not establish that the proposed position is a specialty occupation. 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 proposed 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 proposed 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, in this case the DeKalb County Board of Education, 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 for classification 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). The petition, therefore, as presently constituted, may not be approved.

The record also does not establish that the petitioner will comply with the terms and conditions of the LCA, as required by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). The certified LCA indicates that the wage rate for the beneficiary will be \$39,200. The offer letter from the petitioner indicates that the petitioner will be paid a gross annual wage of \$41,940, less ten percent for administrative expenses. Subtracting ten percent of the gross wage (\$4,194) from the gross wage (\$41,940) yields a figure of \$37,746, which is below the wage rate promised on the LCA. The regulation at 20 C.F.R. § 655.731(c)(9)(ii) indicates that an employer may not recoup a business expense (including attorney fees and costs connected to the performance of H-1B program functions) from the wage rate. The regulation at 20 C.F.R. § 655.731(c)(9)(iii) indicates that an employee's acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization of such deduction. As the unauthorized deduction will lower the beneficiary's wage below the wage listed on the LCA, the petition may not be approved.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), that the employer has submitted an itinerary of employment, or that the employer will pay the wage rate on the LCA. As the director did not address these issues, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proposed position qualifies for classification as a specialty occupation, to provide an itinerary of services to be

performed with the dates and locations of the proposed employment, and to establish that it will pay the wage rate on the LCA. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's May 22, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.