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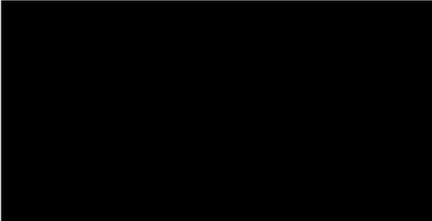
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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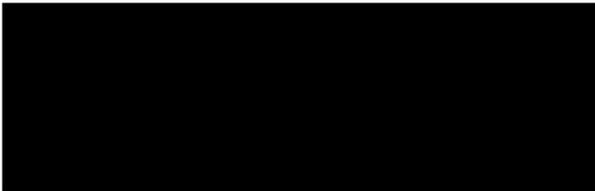
FILE: SRC 04 095 51288 Office: TEXAS SERVICE CENTER Date: NOV 22 2006

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 service center 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 recruits, orients, and employs teachers and provides exclusive educational services. It seeks to employ the beneficiary as a teacher. The petitioner, therefore, endeavors to classify the beneficiary 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 finding that the petitioner failed to establish that: (1) it met the definition of a "United States employer" at § 214.2(h)(4)(ii); and (2) there was a specialty occupation for the beneficiary to fill. Counsel submitted a timely appeal.

The first issue to be addressed is whether the petitioner would be the actual employer of the beneficiary.

Pursuant to 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 evidence of record reveals that the petitioner is the beneficiary's U.S. employer. The record discloses that the petitioner seeks to engage the beneficiary's services as a teacher, and that the petitioner has an Internal Revenue Service Tax identification number. The contract entered into between the petitioner and the Fulton County School System, which was submitted on appeal, indicates that the petitioner, not the school system, will be the employer of the teachers that it supplies to the Fulton County School System. Thus, 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.¹ Thus, the petitioner qualifies as a U.S. employer pursuant to 8 C.F.R. § 214.2(h)(4)(ii).

The AAO will now consider whether the proposed position qualifies as a specialty occupation.

¹ See also Memorandum from [REDACTED] 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).

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.

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 teacher. Evidence of the beneficiary's duties includes the Form I-129 petition with attachments and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Teach science to school students using educational tools including 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 and foster healthy self-esteem in students;
- Develop healthy self-esteem in students and promote interactive learning habits;
- 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; and
- Prepare report cards, and meet with parents and school staff to discuss academic progress or problems where necessary.

For the proposed position the petitioner requires a minimum of a bachelor's degree in education and sciences or the equivalent.

In the denial letter the director stated that the submitted evidence did not establish that the petitioner meets the definition of a U.S. employer and that the proposed position, as it relates to the petitioner's organization, qualifies as a specialty occupation.

The AAO finds that the record does not contain a comprehensive description of the proposed duties from an authorized representative of the petitioner's client, the Fulton County School System, where the beneficiary will ultimately perform the proposed duties. 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.

Without this job description, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. Moreover, the employment location and the exact nature of the beneficiary's teaching assignment are not specified in the record. Counsel on appeal stated that the petitioner did not specify the exact location of the beneficiary's worksite because the assignment of teachers is contingent "upon physical presence," and he states that the positions are not speculative but are "actual and existing employment positions." To support his assertion, counsel references a December 3, 2004 letter from the director of the Fulton County Schools Employment Services, which is contained in the record. In the letter the director 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, however, bears the burden of establishing that the beneficiary will be coming to the United States to perform services in a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 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.

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 the Aytes memorandum cited at footnote 1, CIS has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. The AAO notes that 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.²

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the proposed position. The record contains an evaluation of the beneficiary’s credentials from Multinational Education & Information Services, Inc., which indicates that the beneficiary holds the equivalent of a bachelor of science degree in biology and education from an accredited university in the United States, and the equivalent of a master of science degree in biology from an accredited university in the United States. The record contains copies of the beneficiary’s degrees. However, the petitioner has not demonstrated that the beneficiary is qualified for the position because she does not hold the required teaching license and is not certified to teach in the Fulton County Public Schools. The record does not reflect that the beneficiary is qualified to perform the services of a certified teacher in Georgia.

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 and the appeal shall accordingly be dismissed.

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

² 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.”