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U.S. Citizenship and Immigration Services

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FILE: WAC 05 169 50811 Office: CALIFORNIA SERVICE CENTER Date: FEB 26 2007

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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 staffing agency and seeks to employ the beneficiary as a secondary school teacher. The petitioner 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 stating that the petitioner had not established that it qualified as a United States employer, and that the petitioner had not established that the proffered position is a specialty occupation. On appeal, the petitioner submits a brief stating that the offered position qualifies as a specialty occupation and that the petitioner would be the actual employer of the beneficiary.

The first issue to be discussed in this proceeding 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 record demonstrates that the petitioner has a contract with New Design Charter School to provide teachers for that institution. The contract specifically provides that the petitioner shall be the employer of the teachers it provides under the contract. As such, the petitioner would pay the teachers for the services they perform, and would otherwise have authority over the teacher's employment including the right to hire, fire, supervise and control the work of the teacher. The fact that the beneficiary would perform services at a client facility and is subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and beneficiary. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The final issue to be considered is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 are 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) 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 with the petitioner's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a secondary school teacher. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Teach one or more subjects to students;

- Facilitate, instruct, and teach students using various teaching methods, such as lectures, demonstrations, and audiovisual aids and other materials to supplement presentations;
- Prepare course objectives and outlines for courses of study in line with the curriculum guidelines or requirements of the state and school;
- Give out homework and examinations to evaluate student progress;
- Maintain discipline and good values;
- Keep track of students' standing in academic and social aspects;
- Meet with parents to discuss student progress and problems;
- Assist students in selecting a course of study and counsel students in general adjustment and academic problems;
- Assist in the implementation of the school's policies and regulations;
- Assist in the implementation of new programs;
- Help students improve their social and academic life; and
- Participate in faculty and professional meetings, educational conferences and teacher training programs.

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 school system for the beneficiary's services. The director also asked for information regarding the location of the beneficiary's employment. In the Aytes memorandum cited below, [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 his discretion to request the contracts described above and an itinerary for the beneficiary's services during her intended period of stay in the United States. 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.[2]

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[1] *See* 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).

[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."

The director found that the proffered position did not qualify as a specialty occupation because the record contains no evidence of the specific project where the beneficiary would work. The director noted that there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of the school or school district where the beneficiary would actually perform her duties. The director also noted that the record contains no evidence of the specific project where the beneficiary would work. While the petitioner submitted a contract between it and New Design Charter School whereby the petitioner would provide teachers for the school, the contract did not contain a work order or other documentation assigning the beneficiary to work at that school, nor did the contract identify what subject[s] the beneficiary would teach or the grade level for any instruction. In fact, the petitioner stated in its letter of March 28, 2005, that as of that date it had not been determined at what school the beneficiary would actually work. The petitioner is an employment contractor in that it will place the beneficiary at third party locations to perform services. The AAO agrees with the director that without a description of services from the entity where the beneficiary will work, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation.

The petitioner 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 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)(*1*). Accordingly, the AAO will not disturb the director's denial of the petition.

The petitioner states on appeal that the beneficiary will be performing services as a secondary school teacher, and that a secondary school teacher is a specialty occupation. The petitioner points to its contract with New Design Charter School in support of its position that the position is a specialty occupation. The AAO notes that the contract between the petitioner and the New Design Charter School is for substitute teachers. The state of California issues emergency substitute teaching permits to prospective teachers with a minimum of 90 semester units of course work from a regionally accredited college or university. Thus, a substitute teaching position may only require three years of baccalaureate education and would not be a specialty occupation. CIS requires the job description from the location that will actually employ the beneficiary in order to analyze whether the position is a specialty occupation. As the petitioner has not provided such a description, it has not established the position as a specialty occupation.

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.