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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 04 219 51814 Office: TEXAS SERVICE CENTER Date: AUG 25 2006

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:

[redacted]

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, Texas Service Center, denied the nonimmigrant visa petition. 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, provides, and relocates teachers from English speaking countries to the United States. The petitioner seeks to employ the beneficiary as a teacher. Accordingly, 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's August 24, 2004 request for further evidence (RFE); (3) counsel's November 22, 2004 response to the director's RFE; (4) the director's December 7, 2004 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On December 7, 2004, the director denied the petition determining that the petitioner had failed to establish that it would engage the beneficiary in work in the United States

On appeal, counsel for the petitioner submits a statement and attachments. Counsel indicates, in part, that the consulting teacher will be under the full control of the petitioner. Counsel notes that school systems rarely assign a teacher to a specific school when the teachers are not physically present. Counsel also indicates that a brief will be sent to the AAO on appeal within 30 days. However, careful review of the record reveals no subsequent submission of a brief or evidence; all of the petitioner's documentation in the record predates the issuance of the notice of decision. Accordingly, the record is considered complete.

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

When filing the Form I-129 petition, the petitioner averred that it employed 25 persons, and was engaged in "recruiting, orienting, providing, and relocating Mathematics and Sciences teachers from India and other

English speaking Asian Countries." Along with the Form I-129 petition, the petitioner submitted a letter in support of the petition, the beneficiary's academic credentials, and a Labor Condition Application (LCA).

The July 30, 2004 letter in support of the petition indicated the beneficiary would be the educational leader in the classroom and would ensure that the school program and curricula are implemented. The petitioner stated that the beneficiary in this capacity will:

a. Teach English to school students using educational tools including use [sic] 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[;]
b. Develop and maintain long range and daily instructional plans for students[;]
c. Use a variety of teaching methods/strategies such as group work, lecture, mini-lessons, exploration, questioning, discussion, and other cooperative teaching techniques;
d. 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;
e. Develop healthy self-esteem in students and [p]romote interactive learning habit [sic] among students[;]
f. Design classroom presentations to meet student needs and abilities and work if necessary with students individually to assist students where a student needs help[;]
g. Evaluate a student's performance and potential and use a variety of assessment strategies and [p]repare , administer and grade tests;
h. Prepare report cards, meet with parents and schools staff to discuss a student's academic progress or problems where necessary.

The LCA that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as Atlanta, Georgia. The petitioner indicated further in its July 30, 2004 letter that a qualified candidate for the position of teacher would possess, at a minimum, a Bachelor's Degree in the relevant subject matter and a one-year professional degree in education.

On August 24, 2004, the director requested additional evidence from the petitioner. The director noted that the teaching position described is not a specialty occupation as it related to the petitioner's organization. The director requested additional information regarding the United States employer that would supervise the beneficiary and the name of the school where the beneficiary would be working.

In a November 22, 2004 response, counsel for the petitioner indicated that the petitioner would supervise the beneficiary and provided a September 13, 2004 contract between the petitioner and the Charleston County School District. The contract provided: that the petitioner shall supply the school system with teachers on an "as needed" basis; that the petitioner understands and agrees that the agreement does not obligate the school system to accept any of the petitioner's teachers; that the school system shall have the right in its sole discretion to determine whether it needs any of the petitioner's teachers; that all teachers placed in the school

system through the petitioner shall be the petitioner's employees or independent contractors; that the school system would pay the petitioner a monthly rate for each teacher teaching in the school system as well as an annual administration fee; and that the petitioner must ensure that all teachers have and maintain a current appropriate state teaching license/certification for the corresponding job. The record also contains a blank copy of the Charleston County School District's application for teacher employment summer school 2004. The petitioner also provided an amended LCA showing that the beneficiary would be employed in Charleston, South Carolina. The record further contains a copy of a card apparently submitted by the Charleston County School District indicating the need for 20 math teachers and 20 special education teachers.

The director denied the petition on December 7, 2004. The director observed that the petitioner's contract with the Charleston County School District provided only that the petitioner would have a pool of candidates on call when the school district needed a teacher. The director determined that the regulations required that a United States employer engage a person to work within the United States and that the petitioner had not established that the beneficiary would be guaranteed a job.

As observed above, counsel for the petitioner submits a statement and attachments on appeal, reiterating that the consulting teacher will be under the full control of the petitioner and that a school system rarely assigns a teacher to a specific school when the teachers are not physically present. Counsel includes a December 3, 2004 letter from the Fulton County School System indicating that it does not assign teachers until after they arrive in the United States and an electronic mail attachment requesting elementary "LD" teachers, high school math teachers, and a biology teacher.

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
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> *(3)* Has an Internal Revenue Service Tax identification number.

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.

The petitioner in this matter is an employment contractor and a direct employer. The petitioner locates individuals for placement in a variety of school systems for a fee, and maintains a staff on its premises to administer its contracts with clients.

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.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.[1]

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an

The AAO will now discuss its finding that, based upon the evidence in the record at the present time, the proffered position is not a specialty occupation.

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. When determining whether a particular job qualifies as a specialty occupation, CIS does not only rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner has provided a generic description of the types of duties the beneficiary would perform upon her employment with the company, but no evidence that establishes the specific duties. Although the petitioner asserts that the beneficiary's duties would involve teaching of some type, the record does not prove that she would perform as a teacher. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

The client contract in this matter relevant to the beneficiary was entered into on September 13, 2004. The petitioner submitted the Form I-129 petition on August 11, 2004. As such, the contract did not exist when the petition was filed and, therefore, cannot demonstrate that the petitioner was offering a specialty occupation to the beneficiary when it filed the petition. *See* 8 C.F.R. § 103.2(b)(12). The lack of a defined job when the petition was filed is further confirmed by the petitioner's amendment to the LCA changing the location of the beneficiary's proffered job. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Moreover, the contract does not identify the beneficiary as the client's teacher, nor does it indicate the specific duties that the beneficiary would be required to perform, other than generally as a "teacher." Therefore, the record provides no evidence of the specific duties to be performed by the beneficiary for the Charleston County School District. Without a description of these duties, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

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additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner's submission of degree certificates and H-1B approval notices for previous employees does not establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The AAO also notes that the LCA submitted when the petition was filed did not list Charleston, South Carolina as the location of the beneficiary's proposed employment. Accordingly, the petitioner has not complied with the regulatory filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). While the petitioner provided a second LCA for the Charleston location in response to the director's request for evidence, a certified LCA covering the beneficiary's employment, including the location(s) of that employment, must be submitted at the time of filing. Where there are material changes in the terms and conditions of employment, the petitioner must file an amended petition with the service center where the original petition was filed, accompanied by a new LCA. *See* 8 C.F.R. § 214.2(a)(2)(i)(E).

Beyond the decision of the director, the AAO notes that the record fails to establish that the beneficiary is qualified to perform the duties of a public school teacher in South Carolina. The Department of Labor's *Occupational Outlook Handbook* indicates that requirements for teaching licenses vary by state. However, the teaching services agreement with the Charleston County School District submitted in response to the director's request for evidence indicates that it is the petitioner's responsibility to ensure that each contracted teacher has and maintains "a current appropriate state teaching license/certification for the corresponding job." The record does not demonstrate that the beneficiary holds any teaching license or certificate for South Carolina. Therefore, it does not establish her as qualified to perform the duties of a teacher in South Carolina. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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