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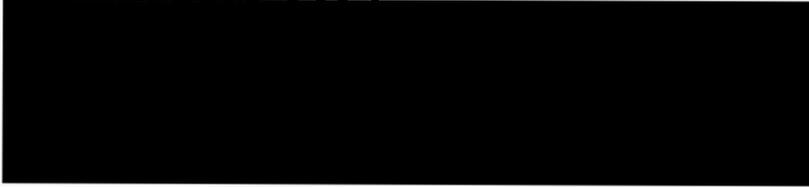
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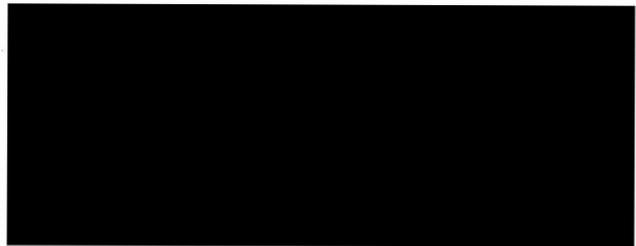
FILE: SRC 04 222 52874 Office: TEXAS SERVICE CENTER Date: **AUG 25 2006**

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.

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

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 recruiting and placement firm that seeks to employ the beneficiary as a 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 on the ground that petitioner failed to demonstrate “that there exists a specific position for which the beneficiary’s services would be requested” in that the contract between the petitioner and the public school system in which the beneficiary would be employed did not indicate a specific location at which the beneficiary would work. The director also denied the petition on the ground that “the evidence supplied by the petitioner does not demonstrate an employer-employee relationship” as defined in 8 C.F.R. § 214.2(h)(4)(ii)(4). **On appeal, the petitioner submits a brief.**

The record of proceeding before the AAO contains: (1) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a teacher. Evidence of the beneficiary’s duties includes the I-129 petition and supporting documents and the petitioner’s response to the director’s request for further evidence. According to this evidence, the beneficiary would perform duties as follows:

- Teach Science to schools 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
- 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 among students
- 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
- Prepare report cards, meet with parents and school staff to discuss a student’s academic progress or problems where necessary

The director found that the petitioner had not established that it would be the employer of the beneficiary. Counsel contends that the evidence sufficiently demonstrates that the petitioner will be the actual employer of the beneficiary. Counsel notes that the agreement between the petitioner and the beneficiary provides that the

petitioner will direct and designate the client site at which the beneficiary will work, and will retain authority to terminate the beneficiary with or without cause. Counsel further observes that the agreement between the petitioner and the Fulton County School District (District), with which the petitioner claims it intends to place the beneficiary, provides that the teachers assigned to the District under the agreement will not be employees or agents of the district and all issues related to compensation will be handled by the petitioner. The AAO finds that the record establishes that the petitioner will be the employer of the beneficiary under the terms of the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

The director determined that the petitioner had not established that it would employ the beneficiary in 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 AAO agrees with the director that the petitioner did not establish that it would employ the beneficiary in a specialty occupation. The duties described by the petitioner indicate that the proffered position is for a teacher. The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at another location or multiple locations to perform services established by contractual agreements

for third-party public or private schools. The record does not indicate that the petitioner is a school or directly provides education to students.

In response to the director's request, counsel states that "[t]he beneficiary will be working in a public or private school", a statement which raises doubts as to whether the petitioner intends to place the beneficiary with the District. Whether the beneficiary will perform services in a public school or in a private school is relevant to determining if the proffered position is a specialty occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2006-2007 edition, indicates that the minimum educational and licensure requirements for public school teachers are not identical to those of their counterparts in private schools. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

The AAO finds that the petitioner is an employment contractor, and thus only the "token employer" of the beneficiary, similar to the petitioner in *Defensor*. The agreement between the petitioner and the District states that the district "shall have the right, in its sole discretion, to determine whether it needs any [of the petitioner's] teachers." It also provides that if the District, "in its sole discretion, determines that the services provided by the Teacher are not satisfactory", the petitioner "shall locate a replacement teacher" within three week of notification by the District. The District also "shall have the right to interview and approve the replacement teacher before the assignment is made." If the petitioner cannot locate a replacement teacher, then the District's "obligation to compensate [the petitioner] for the initial Teacher's services shall be limited to the days actually worked by such Teacher". In other words, under the agreement, it is the District, not the petitioner, that ultimately decides if a teacher provided by the petitioner begins and continues working at one of the District's schools. If the District, or other school or school system under similar contract with the petitioner, decided not to accept or retain the services of the beneficiary, the petitioner would not be able to employ the beneficiary in the proffered position of teacher. The record indicates that the petitioner is not a school and does not provide education to students. Thus, the petitioner is an employment contractor and the *Defensor* decision applies.

As the record contains insufficient and inconsistent documentation establishing the specific duties the beneficiary would perform under contract for the petitioner's clients, 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 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 director also found that the petitioner failed to identify the particular school and grade level where the beneficiary will be placed. The AAO agrees. 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 her 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. The director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary.¹ Upon review, the director properly exercised her discretion to request the contracts described above. However, the record contains no documentation regarding the dates and locations of the beneficiary's employment or contracts of work to be performed.

The petitioner indicates that the beneficiary will be employed as a teacher in the District, but does not specify the school at which the beneficiary will teach or even whether the beneficiary will teach in a primary or a secondary school. The agreement between the petitioner and the District does not list the specific duties the beneficiary will perform for the District. It does not reference the beneficiary in particular, and there is no work order or other document in the record indicating that the beneficiary will be placed with the District. 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.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified for the position because she does not hold the required teaching license. 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). Nor does the record of proceeding reflect that the beneficiary is certified to teach in the Fulton County Public Schools. The petitioner submitted a letter from the State of Georgia Professional Standards Commission indicating that the beneficiary was eligible for a non-renewable Level 5 Teaching Certificate in Physics (6-12) and Science (6-12) upon employment in a Georgia school system. The record does not reflect that the beneficiary is qualified to perform the services of a certified teacher in Georgia, as the proposed employment has not been proven. The petitioner has not identified the school where the beneficiary will be employed, nor has the Georgia School System guaranteed the beneficiary employment as a teacher.

As demonstrated in the discussion above, the petitioner has failed to submit an itinerary of employment and has failed to establish that the proffered position is a specialty occupation, or that the beneficiary is qualified to perform the services of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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). 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."

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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.