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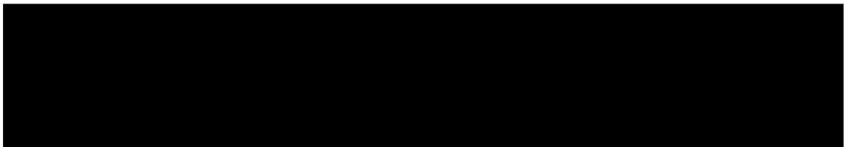


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FILE: SRC 04 230 52430 Office: TEXAS SERVICE CENTER Date:

**JUL 31 2006**

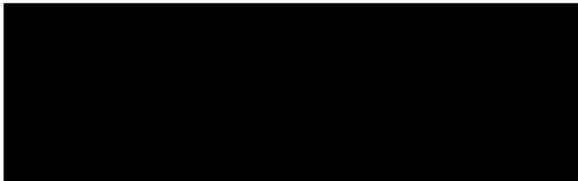
IN RE: Petitioner:



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.

*for*  
*Michael T. Kelley*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 is a foreign teacher recruitment, employment and placement service that seeks to employ the beneficiary as a school 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 because he determined that the proffered position is not a specialty occupation and because the petitioner did not establish that it would have an employer-employee relationship with the beneficiary. On appeal, counsel states that the position is a specialty occupation, and submits further documentation.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence (RFE), dated September 7, 2004; (4) the petitioner's response to the RFE; (5) the director's denial letter; and (6) Form I-290B and supporting documentation, and counsel's appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner states that it is seeking the beneficiary's services as a school teacher. Evidence of the beneficiary's duties includes: the Form I-129 petition, and the petitioner's letter in response to the director's RFE. The petitioner specified the job duties as follows:

- Teach school students using educational tools including use of 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 manage long range and daily instructional plans for students;
- Use a variety of teaching methods/strategies such as group work, lectures, 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;
- Promote interactive learning habits among students;
- Design classroom presentation 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;
- Prepare, administer and grade tests; and
- Prepare report cards, meet with parents and school's staff to discuss a student's academic progress or problems where necessary.

On appeal, counsel asserts that an employer-employee relationship exists between GTRR, Inc. and the beneficiary, that the petitioner meets the definition of employer, and in the alternative, that the petitioner is an agent of a U.S. employer. Counsel referenced an employment agreement between the petitioner, GTRR, Inc., and the beneficiary, dated June 3, 2004, and a teaching services agreement between the petitioner and Fulton County Schools, located in Atlanta, GA, dated June 30, 2004. Counsel asserts that

together these two documents establish the employer-employee relationship between the petitioner and the beneficiary. Counsel further asserts that the proffered position is a specialty occupation.

Upon review of the record, the petitioner has established that an employer-employee relationship exists between the petitioner and the beneficiary.

The AAO first turns to the issue of whether or not the petitioner would be the beneficiary's employer. 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.

To qualify as a United States employer, all three criteria must be met. The payroll records indicate that the petitioner engages persons to work in the United States, and the Form I-129 indicates that it has an Internal Revenue Service Tax Identification Number. The petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, or otherwise control the work the beneficiary would perform.

The AAO also finds that the petitioner is an agent. 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 AAO determines that the petitioner will be the agent as defined in the regulation. The AAO also finds that the petitioner has not complied with the regulatory requirements for an agent in that it has failed to submit an itinerary of services or engagements. The petitioner states that the school system will not accept a teacher until that person is in the United States and after a personal interview. While the school system may refuse to enter into an agreement with a foreign teacher until that person is in the United States, the petitioner is not relieved of its regulatory obligation to provide an itinerary of services or engagements as the agent on an H-1B petition.<sup>1</sup>

Therefore, the petitioner has failed to establish that it meets the regulatory requirements for an agent of an H-1B petition.

The petitioner states that the petition should be approved because CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions were approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approvals were granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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<sup>1</sup> The AAO notes that the employer of a beneficiary who will work in multiple locations is also required to submit an itinerary of services with the dates and locations of services. 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO also finds that, based upon the evidence in the record, the proffered position is not a specialty occupation.

To determine whether the duties described at the time of filing are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) & (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; Factors considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to Teachers — Preschool, Kindergarten, Elementary, Middle, and Secondary school teachers, the *Handbook* at <http://www.bls.gov/oco/ocos069.htm>, states:

All 50 States and the District of Columbia require public school teachers to be licensed. Licensure is not required for teachers in private schools in most States. Usually licensure is granted by the State Board of Education or a licensure advisory committee. Teachers may be licensed to teach the early childhood grades (usually preschool through grade 3); the elementary grades (grades 1 through 6 or 8); the middle grades (grades 5 through 8); a secondary-education subject area (usually grades 7 through 12); or a special subject, such as reading or music (usually grades kindergarten through 12).

Requirements for regular licenses to teach kindergarten through grade 12 vary by State. However, all States require general education teachers to have a bachelor's degree and to have completed an approved teacher training program with a prescribed number of subject and education credits, as well as supervised practice teaching.

It is noted that while the proffered position is listed as "teacher" the petitioner does not describe the capacity in which the proffered duties will be performed. Without a description of the duties from the place where the alien will be employed, the AAO is unable to determine whether the position is a specialty

occupation. While a certified teacher would qualify as a specialty occupation, for example, a substitute teacher would not.

As noted by the court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000), a petitioner that is an employment contractor is merely a “token employer.” The entity ultimately employing the alien or using the alien’s services is the more relevant employment. *Defensor v. Meissner*, *id* at 4. Thus, 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.<sup>2</sup>

As the petitioner has not submitted a description of employment from the ultimate work location, it cannot be determined whether or not the position is a specialty occupation.

While the *Handbook* points to a teaching license and a degree requirement for public school teachers, the AAO is unable to classify the proffered position to determine whether the proffered duties will require a teaching license or a bachelor’s degree or its equivalent.<sup>3</sup> Without proper classification, the AAO is unable to determine whether the proffered duties will be that of a certified teacher and will require the level of training of a specialty occupation.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner did not submit any documentation to establish the academic credentials of other teachers in its employ. Counsel asserts that the petitioner has similarly situated

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<sup>2</sup> 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 additional requirement that a position must meet, in addition to the statutory and regulatory definition.” *See id.* at 387.

<sup>3</sup> The AAO notes that in Georgia, teachers are required to be certified, but substitute teachers are not required to be certified. Georgia law, O.C.G.A 20-2-200, stipulates that “the professional Standards commission shall provide, by regulation, for certifying all certified professional personnel employed in the public schools of this state. No such personnel shall be employed in the public schools of this state unless they hold certificates issued by the commission certifying their qualifications and classification in accordance with such regulations.” Under Georgia Educator Certification Rule 505-2-.36, substitute teachers are not required to hold state certification and may provide substitute teaching with a high school equivalency.

employees, and submitted various payroll records and W-2s. However, these records, without more, do not establish similarity of the positions with the proffered position. A person may perform as a substitute teacher with a GED diploma. O.C.G.A. Rule 505-2-.36. Paraprofessionals in the Georgia public schools also do not require a degree in a specialty. [www.gapsc.com/paraPro/GAParapro.asp](http://www.gapsc.com/paraPro/GAParapro.asp). The AAO notes that although the petitioner stated the wages for the proffered position would be \$36,000, of the 25 W-2s submitted, 15 show W-2 wages of less than \$20,000. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See 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)). Therefore, the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. As previously discussed, the petitioner provided no further detail about the ultimate employment to enable the AAO analyze whether the position requires a degree, or its equivalent, in a specialty. If the position, for example, is a substitute teacher, the position would not require a degree in a specialty under state law. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation. If the beneficiary will work as a teacher, Georgia state law requires that she be certified. There is no evidence of certification in the record. Thus, the beneficiary is not qualified to perform the services of a specialty occupation. 8 C.F.R. § 214.2(h)(4)(v)(A). For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner 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.

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.