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FILE: WAC 06 178 50755 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 healthcare staffing agency that seeks to employ the beneficiary as a dietician. 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 did not establish that it qualified as a United States employer or agent; that the petitioner had not submitted an itinerary of employment; and that the petitioner's failure to provide contracts for the work to be performed by the beneficiary at various petitioner client locations precluded a determination of whether the petitioner had valid Labor Condition Applications (LCA) for the beneficiary's intended work locations. On appeal, the petitioner submits a brief stating that it is a valid United States employer, and that the proffered position qualifies as a specialty occupation and is otherwise approvable.

The first issue to be determined is whether the petitioner qualifies as a United States 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.

The record establishes that the petitioner will be the employer of the beneficiary, and the director's decision to the contrary shall be withdrawn. The petitioner is a staffing agency that provides healthcare workers for various clients. At all times, the services to be provided are performed by the petitioner's employees, and the petitioner is responsible for, and controls all aspects of employment for the personnel it assigns to client projects. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The fact that the beneficiary may perform services at a client facility and be subject to that client's work rules and regulations does not change the employer/employee relationship existing between the petitioner and the 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 finding to the contrary is withdrawn.

The next issue to be determined is whether the petitioner provided a complete itinerary¹ for the beneficiary's work to be performed from April 10, 2006 to April 9, 2009. 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. As noted by the petitioner in its letter of April 12, 2006, it provides healthcare workers for a number of clients pursuant to contracts entered into with those clients.

¹ 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).

In her request for evidence, the director asked for copies of contracts between the petitioner and its clients for the beneficiary's services. The director also asked for information regarding the location of the beneficiary's employment. In the Aytes memorandum cited at footnote 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 her discretion to request the contracts described above. However, the documentation submitted does not establish a complete itinerary for the beneficiary from April 10, 2006 through April 9, 2009. The petitioner stated in its letter of April 12, 2006, that it has contracts with a number of hospitals and healthcare facilities in the United States, and it works with those clients in the development and deployment of healthcare professionals. The petitioner did not, however, provide copies of any contract or work order establishing the work assignment where the beneficiary would actually be placed, or who the end-user of the beneficiary's services would be. The petitioner noted that the beneficiary's work assignments would be determined by the petitioner. The petitioner has failed to provide a complete work itinerary for the beneficiary during her period of intended stay in the United States. The uncorroborated statement of the petitioner as to the proposed itinerary for the beneficiary is not sufficient to establish the itinerary. Simply going on the 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 190 (Reg. Comm. 1972)). 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

The director also found that the petitioner's failure to provide contracts establishing the beneficiary's work locations during her entire period of intended stay in the United States precludes CIS from determining whether a valid LCA was certified by the Department of Labor prior to the filing of the Form I-129 petition. The AAO agrees. The petitioner submitted an LCA valid for Los Angeles. The record indicates that the petitioner places workers at locations across the United States. Without an itinerary of employment it cannot be determined that the LCA is valid for all intended work locations.

Beyond the decision of the director, the petitioner has not established that the petition is a specialty occupation. As previously noted, the evidence of record establishes that the petitioner is a healthcare staffing organization, in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as 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.

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."

As the record does not contain any documentation for whom the beneficiary will provide services that establishes the specific duties the beneficiary would perform under contract for any of 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)(ii)(B)(1). For this additional reason, the petition may not be approved.

It is further noted that the record does not contain an evaluation of the beneficiary's foreign education to determine whether her degree is equivalent to a bachelor's degree obtained at an accredited institution of higher learning in the United States. Also, the record does not establish that the beneficiary has complied with California registration requirements for dietitians. Thus, the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation. For this additional reason, the petition must be denied.

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 failed to sustain that burden.

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