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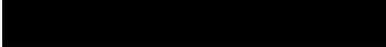
U.S. Citizenship
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Services

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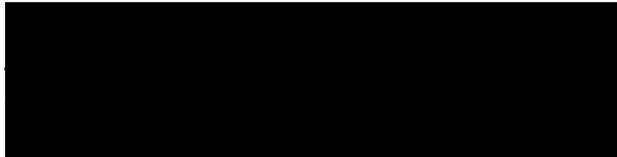
DL

FILE: WAC 04 188 51457 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 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 director of the California Service Center 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 placing teachers, nurses and other professionals in schools, hospitals and healthcare facilities, with 17 employees listed on its organizational chart. It seeks to employ the beneficiary as a special education teacher 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 record did not establish that the petitioner would employ the beneficiary in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

An 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, a petitioner must establish that its position meets one of four 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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 states that it seeks the beneficiary’s services as a special education teacher and that the position requires a bachelor of science in education. In response to the director’s request for evidence, the petitioner provided a copy of an April 9, 2004 letter of employment sent to the beneficiary listing the following as the duties she would be required to perform:

- Teaching one or more subjects to students, using various methods such as lectures, demonstrations, and audiovisual aids and other materials to supplement presentations;
- Preparing course objectives and the outline for courses of study in line with curriculum guidelines or requirements;
- Assigning homework and conducting examinations;
- Maintaining discipline and good values;
- Keeping track of students’ standings, academic and social;
- Meeting with parents to discuss student progress and problems;
- Assisting students in selecting courses of study;
- Counseling students in general adjustment and academic problems;
- Assisting in the implementation of school policies, regulations and new programs;
- Helping students improve their social and academic life; and
- Participating in faculty and professional meetings, educational conferences and teacher training programs.

The evidence of record demonstrates that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). However, the petitioner also initially indicated that the beneficiary could be employed under contract at any of the schools for which it provides staffing services. Therefore, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), the director, in his request for evidence, asked for an itinerary of the beneficiary's employment, as well as contracts specifying the duties to be performed by the beneficiary at the facilities where she would work. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that an employer who will employ a beneficiary in more than one location submit an employment itinerary. Upon review, the director properly exercised his discretion to request an itinerary.

In response to the director's request for evidence, the petitioner submitted the letter of employment noted above, a list of 19 schools where the beneficiary might be employed and a professional service agreement with the New Design Charter School in Los Angeles. On appeal, the petitioner states that the beneficiary would be assigned only to the Pomona school district and submits letters from the Pomona and Montebello Unified School Districts, both of which indicate that the petitioner provides contract teaching staff to each school system. The evidence submitted by the petitioner on appeal does not, however, establish that the beneficiary would be assigned to the Pomona school district for the period of time requested on the Form I-129. The letter of employment addressed to the beneficiary does not indicate the school(s) where she would work as a teacher. The petitioner's staffing agreement with the Pomona Unified School District does not identify the beneficiary. Accordingly, the evidence submitted by the petitioner does not comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). The petition must, therefore, be denied.²

The petitioner's failure to submit a contract describing the duties the beneficiary would perform as a teacher for the Pomona school district also precludes it from establishing the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record establishes that the petitioner is an employment contractor 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, a business that acts as an employment contractor – an entity placing employees at third-party companies to perform services under contract – 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

¹ See also 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.

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. Therefore, it is not the duties listed by the petitioner in response to the director's request for evidence, but those established under agreement with its client school that must demonstrate a degree requirement or its equivalent for the proffered position. As the petitioner has failed to provide evidence of the specific contractual duties to be performed by the beneficiary, it 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)(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 AAO also notes that the certified Labor Condition Application (LCA) submitted by the petitioner states that the location of the beneficiary's employment would be Los Angeles, while the petitioner, on appeal, indicates that the beneficiary would be employed in Pomona. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), a petitioner must comply with the terms of the certified LCA for the duration of the beneficiary's authorized stay in the United States. In that Pomona and Los Angeles are both covered by the same prevailing wage rate, the beneficiary's assignment to a school in Pomona would not compromise the petitioner's LCA compliance. The same is true for all but one of the 19 possible assignment locations listed by the petitioner in response to the director's request for evidence. However, the Mexican American Community Services Agency (MACSA), Inc. is located in San Jose, a city in Santa Clara County, which has a different prevailing wage rate. Accordingly, were the beneficiary to be assigned to San Jose, the petitioner would need to file an amended or new petition with the service center where the instant petition was filed. To reflect any material changes in the terms and conditions of employment or training or the alien's eligibility, a petitioner must file an amended or new petition, with fee, with the service center where the original petition was filed. *See* C.F.R. § 214.2(h)(2)(E).

For reasons related in the preceding discussion, the record does not establish that the duties of the proffered position qualify as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that the petitioner has met the filing requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) or that it has established compliance with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). Therefore, the AAO shall not disturb the director's denial of the petition.

The AAO notes that certain aspects of its decision differs from the reasoning relied upon by the director. 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 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.