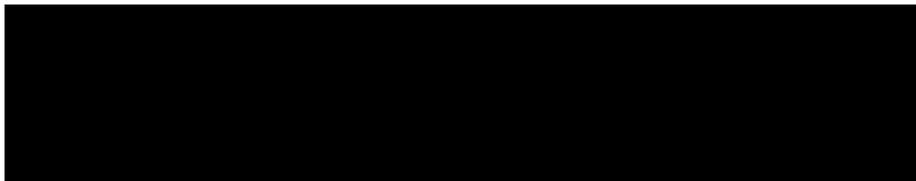




U.S. Citizenship
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Services

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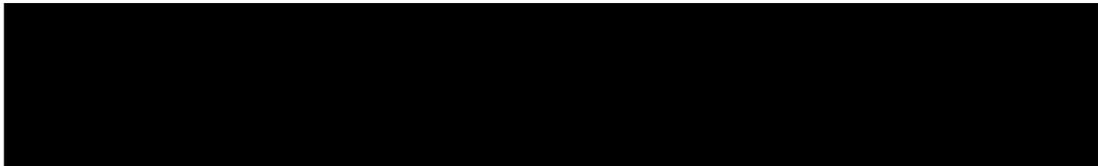
FILE: EAC 06 174 52253 Office: VERMONT SERVICE CENTER Date: **DEC 20 2007**

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.

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 filed May 19, 2006 and supporting documents; (2) the director's August 30, 2006 request for further evidence (RFE); (3) counsel for the petitioner's November 9, 2006 response to the director's RFE and supporting documents; (4) the director's January 16, 2007 denial decision; and (5) the Form I-290B, in support of the appeal. The Form I-290B, Notice of Appeal, indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. In response to a facsimile sent to the petitioner noting that the record did not contain a brief in support of the appeal, and requesting information regarding the submission of a brief, counsel for the petitioner stated: "[b]ecause the documents are many, we have put our response in March 2007 in the mail to the above given [AAO's] address." The AAO received a copy of the counsel's March 2007 brief and supporting documents. The AAO has reviewed the record in its entirety before issuing this decision.

On January 17, 2007, the director denied the petition determining that the petitioner had failed to establish that it had a valid job for the beneficiary at a school in the United States.

On appeal, counsel for the petitioner asserts: that the petitioner is the beneficiary's actual employer and that the petitioner has met its burden of proof.

Section 214(i)(1) of the Immigration and Nationality Act (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)(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.

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.

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.

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 proposed position.

The term "employer" is defined at 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.

When filing the Form I-129 petition, the petitioner averred that it employed more than 45 persons, and was engaged in recruiting, employing, and orienting teachers and providing exclusive educational services. The petitioner submitted a Form ETA 9035E, Labor Condition Application (LCA) listing the H-1B work location as in Atlanta, Georgia. The petitioner also provided evidence of the beneficiary's foreign academic education and letters from the beneficiary's prior foreign employers. The Form I-129 referenced an attachment for a description of the beneficiary's specific job duties, but the record of proceeding does not contain such an attachment. The initial record does include teaching services agreements with a number of United States school systems, including: Lancaster County, Lancaster, South Carolina; Sumter County, Americus, Georgia; Savannah-Chatham, Savannah, Georgia; DeKalb County, Decatur, Georgia; and Jasper County, Ridgeland, South Carolina.

The initial record also contains a May 10, 2006 letter signed by [REDACTED], Director of Employment Services for the Fulton County Schools. [REDACTED] indicated that Fulton County had contracted with the petitioner to facilitate the placement of math, science, and special education teachers from various countries into teaching positions within the school district. [REDACTED] further indicated: that teachers would be assigned to specific schools during the summer months prior to the beginning of the 2006-2007 school year; that the assignments would be communicated directly to the teachers; that Fulton County Schools would request licensure pursuant to the Georgia licensing rules for Exchange Teacher Certificates; and that the teachers' presence in the United States is required since they must obtain a social security number before they may be issued the Exchange Teacher Certificate.

The petitioner also provided a copy of a form employment agreement that had not been filled in, signed, or otherwise completed. It did not identify a specific "consulting teacher." The form employment agreement listed generic teaching duties and indicated that the consulting teacher would be assigned to teaching projects at the petitioner's clients' sites to be completed within a stipulated period in accordance with the petitioner's standards.

In response to the director's RFE, counsel for the petitioner stated that the beneficiary would be working in the State of Georgia with the Fulton Counsel School Systems and would be teaching middle school math. The record in response to the director's RFE includes:

A revised undated copy of [REDACTED] letter on behalf of Fulton County Schools indicating that the petitioner's teachers whose services are utilized in the school district are usually assigned to specific schools shortly after their arrival in the United States.

An August 10, 2005 teaching services agreement between the petitioner and the Fulton County School System for a term of one year, automatically renewable for additional one-year terms that indicated the petitioner would supply the school system with teachers on an "as-needed" basis; and that for each teacher placed, the school system would sign and execute a Schedule A stating the name of the teacher, the period of the teacher's assignment,

the teacher's annual salary as well as an annual administration fee. The record does not contain a Schedule "A."

A January 16, 2002 teaching services agreement between the petitioner and the Fulton County School System for one year that would automatically renew for one additional school year which indicated that the petitioner would supply the school system with teachers on an "as-needed" basis; and that for each teacher placed, the school system would sign and execute a Schedule A stating the name of the teacher, the period of the teacher's assignment, the teacher's annual salary as well as an annual administration fee. The record did not contain a Schedule "A."

An October 24, 2006 letter authored by a teacher certification specialist of the Georgia Professional Standards Commission addressed to the beneficiary, indicating the beneficiary was eligible for a non-renewable level 5 teaching certificate in science and middle grades mathematics listing the requirements he must fulfill prior to or during the validity period of the non-renewable [teaching] certificate.

The director denied the petition on January 16, 2007. The director determined that the petitioner had failed to establish an employer-employee relationship between the petitioner and the beneficiary. The director also determined that the petitioner had failed to provide a description of the services the beneficiary would perform for the ultimate employer and thus had not established that the proffered position is a specialty occupation.

The AAO disagrees with the director's finding that the petitioner would not act as the beneficiary's employer. 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. Thus, the evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). The AAO finds that the petitioner will be the employer of the beneficiary and withdraws the director's decision to the contrary.

On appeal, counsel for the petitioner indicates that the petitioner provided a copy of the employment agreement between the petitioner and the beneficiary and that the petitioner inadvertently omitted Schedule "A." The record on appeal contains a copy of a Schedule "A" labeled a work order between the petitioner and the Fulton County School System, identifying the beneficiary as a "teacher," his salary, his start date as August 1, 2006, the duration of the work order, and identifying the school where the beneficiary would be placed. The Schedule "A" is dated April 26, 2006. The record on appeal also includes a copy of an undated letter from Rick White, Recruitment Coordinator for Fulton County Schools, indicating that the beneficiary

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).

will be a mathematics teacher on a contract that will be renewed on a yearly basis. The letter also provides a description of the beneficiary's proposed duties as a mathematics teacher.

In this matter the director specifically requested the name and location of the school that would employ the beneficiary in the RFE. Thus, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Moreover, the AAO observes that the petitioner, instead of submitting the requested information, indicated with a letter from Rick White of the Fulton County School system that the information would not be available until the beneficiary entered the United States. 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).

While the petitioner has established that it will employ the beneficiary, the petition may not be approved, as the evidence of record before the director did not establish that the beneficiary would be employed in a specialty occupation or that the employer had submitted an itinerary of employment.

As the director observed, 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.

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.

Counsel for the petitioner in its letter in response to the director's RFE indicated that the beneficiary would be teaching middle school math in the State of Georgia. This information does not indicate whether the position will be as a teacher, a teacher's assistant, a teacher's aide, or a student teacher waiting for licensing. In an undated letter, the beneficiary's proposed ultimate employer indicated only that the Fulton County School System needs math, science, and special education teachers and in an August 10, 2005 teaching services agreement that the teacher would supply teachers on "as-needed" basis. The contract does not identify the beneficiary as the individual proposed to teach in the Fulton County School System, nor does the contract indicate the specific duties that the beneficiary would be required to perform, other than generically as a "teacher."

Therefore, the record does not provide sufficient evidence to enable the adjudicator to determine that the beneficiary would be performing the duties of a teacher identifiable as a specialty occupation. 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 record provides no evidence of the specific duties to be performed by the beneficiary. 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)(4)(iii)(A).

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, the petitioner is precluded from meeting any of the requirements of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position as required by the first criterion or that the position's duties are 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 alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner has not established that it previously employed only 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 petitioner has not provided evidence that it has a valid specialty occupation available for the beneficiary upon his immediate entry into the United States.

Although the director requested the name and address of the location where the beneficiary would work in the RFE, the record does not include an itinerary listing all the places of the beneficiary's employment and the length of the employment. When the evidence of record indicates the petitioner is an employment contractor placing the beneficiary at work locations to perform services established by contractual agreements for third-party entities, submission of an itinerary with the dates and locations of such employment is required. 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 in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly requested the name and address of the location where the beneficiary would work. For this additional reason, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.