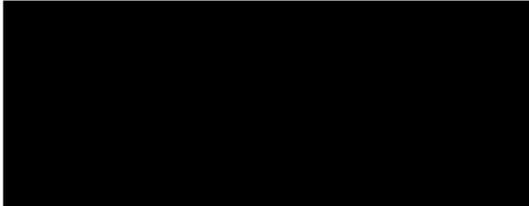


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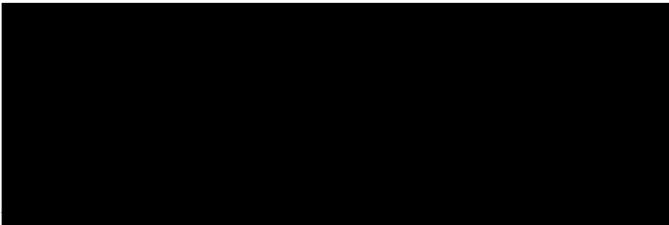
02

FILE: WAC 05 110 51145 Office: CALIFORNIA SERVICE CENTER Date: JAN 24 2007

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 director of the 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 health services staffing agency that seeks to employ the beneficiary as a medical records and health information officer. 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 finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation. Counsel submitted a timely appeal and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date the AAO has not received any additional evidence into the record; the record is therefore complete.

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)(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) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a medical records and health information officer. Evidence of the beneficiary's duties includes the Form I-129; the attachments accompanying the Form I-129, the petitioner's support letter, and its response to the RFE. The petitioner's letter of March 3, 2005, which was submitted along with the Form I-129, indicates that the beneficiary will plan, direct, or coordinate medical and health services in hospitals, clinics, managed care organizations, public health agencies, or similar organizations; compile, process, and maintain medical records of hospital and clinic patients in a manner consistent with medical, administrative, ethical, legal, and regulatory requirements of the health care system; and process, maintain, compile, and report patient information for health requirements and standards.

The director denied the petition. He stated that although the record demonstrates that the petitioner and the beneficiary have an employer-employee relationship, *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) indicates that if the petitioner is an employment agency the ultimate employment of the beneficiary must be examined to determine whether the position constitutes a specialty occupation. The director found that the record contained no contracts of work entered into between the petitioner and client companies, no evidence of the specific project(s) that the beneficiary would work on, and no comprehensive description of the beneficiary's proposed duties from an authorized representative of the client company where the beneficiary would ultimately perform services. The director stated that in the absence of such evidence the petitioner failed to demonstrate that it would employ the beneficiary in a specialty occupation.

On appeal, counsel states that the petitioner will be the beneficiary's employer and that the petitioner indicates that the beneficiary will perform services as a medical records and health information officer for the petitioner at its office and will not be contracted out to third parties.

Based on the evidence in the record, the AAO agrees with the director's finding that the record fails to establish that the beneficiary would be employed in a specialty occupation.

The petitioner's March 3, 2005 letter and its February 14, 2005 memorandum, which describes the job vacancy for the medical records and health information officer, indicate that the beneficiary will provide services to third party clients. These documents state that the beneficiary will "plan[,] direct, or coordinate medicine and health services in hospitals, clinics, managed care organizations, public health agencies, or similar organizations" and will "[c]ompile, process, and maintain medical records of hospital and clinic patients." The record also contains a description of the medical records and health information officer in the document "Attachment D," which describes the beneficiary as responsible for "developing, designing, and ensuring appropriate internal evaluation of the hospital's medical records system" and submitting "reports to health authorities (if required) of suspected and confirmed cases of viral/bacterial infections" encountered in the hospital. It is noted that although the beneficiary will be responsible for a "hospital's medical records system," and will "maintain medical records of hospital and clinic patients," and submit "reports to health

authorities” of suspected infections in a hospital, the petitioner is a staffing agency, not a hospital. The document “Attachment E” also depicts the beneficiary’s duties as relating to a hospital. Thus, it is found that the evidence in the record does not support the petitioner’s assertion in its August 2, 2005 letter that the “beneficiary’s services are needed by the petitioner, and not by [the] petitioner’s clients” and that the beneficiary’s “services will not be subcontracted to other entities” and that the beneficiary will only work at the petitioner’s office. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The submitted evidence in the record establishes that the petitioner is an employment contractor in that it will place the beneficiary at multiple work locations to perform services 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 clients. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform for clients, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

The director stated that he must examine the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation, as stated by the *Defensor* court. It is noted that the petitioner in *Defensor*, Vintage Health Resources (Vintage), is a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” The court found that Vintage “is at best a token employer.” In analyzing the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(2), which provides the definition of an U.S. employer, the court stated that: “merely being able to “hire” or “pay” an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee’s work.” The *Defensor* court did not determine whether Vintage qualifies as an employer under the regulations. It stated:

For even if Vintage is an employer, the hospital is also an employer of the nurses and a more relevant employer at that. The nurses provide services to the hospitals; they do not provide services to Vintage. Even if Vintage mails the nurses’ paycheck, the nurses are paid, in the end, by the hospital and not Vintage. The hospitals are the true employers of the nurses, since at root level the hospitals “hire, pay, fire, supervise, or otherwise control the work” of the nurses, even if an employer-employee contract existed only between Vintage and the nurses. As such, the INS interpreted “employer” in § 214.2(h)(4)(iii)(A) to refer to the true employer—namely the hospitals—even though Vintage was the only “employer” petitioning for

visas. Under this interpretation, the INS required Vintage to provide information regarding the hospitals' requirements for the nursing position.

To interpret the regulations any other way would lead to an absurd result. If only Vintage's requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

Based on the above passages, the court in *Defensor* 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 *Defensor* 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 facts in the instant case are similar to those in *Defensor*. The AAO has already determined that the evidence reflects that the beneficiary will not provide services to the petitioner, but will be placed at client sites to perform services for the petitioner's clients. Like the hospital that the court considers the true employer of the nurses, the true employer of the beneficiary is the petitioner's clients. As *Defensor* indicates that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner, the petitioner here needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by the clients for whom the beneficiary will provide consulting services, and the evidence needed to indicate the duration of the assignment and identify the beneficiary as assigned by the client to provide consulting services as a medical records and health information officer. As the record does not contain any documentation of the specific duties the beneficiary would perform for the petitioner's clients, the AAO cannot analyze whether her 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)(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).

Furthermore, 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.<sup>1</sup> In his RFE, the director asked for the beneficiary's employment itinerary and client contracts. 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 his discretion to request an employment itinerary and client contracts. As the petitioner submitted no evidence of an employment itinerary and client contracts, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), and the petition must therefore be denied.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.

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<sup>1</sup> 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).