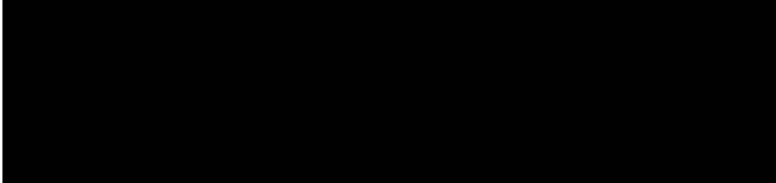




U.S. Citizenship
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Services

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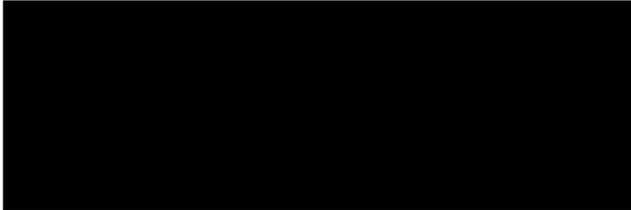
FILE: SRC 06 105 52869 Office: TEXAS SERVICE CENTER Date: NOV 14 2007

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 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 teacher recruitment and placement business that seeks to extend its authorization to employ the beneficiary as a 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 at the time the instant petition was filed on February 14, 2006, there was no contract with the school district where the beneficiary was to be employed, and thus no specialty occupation was available for the beneficiary. The director also found that at the time the initial petition was filed for the beneficiary, which resulted in the issuance of his H-1B visa on December 18, 2003, a specialty occupation was not available for the beneficiary, as the petitioner's contract with Hancock County School System was not signed until August 5, 2004.

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 director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner demonstrated that it had a specialty occupation position available for the beneficiary at the time the instant petition was filed. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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, 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) consistently 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 seeks the beneficiary's services as a teacher. Evidence of the beneficiary's duties includes: the Form I-129 petition, and letters from the petitioner and the academic coordinator of Ben Hill County Performance Learning Center in response to the director's RFE. As stated by the academic coordinator of Ben Hill County Performance Learning Center, the proposed duties are as follows:

- Develop and maintain long-range and daily instructional plans;
- Maintain required records, such as student attendance, evaluations, report cards, and discipline records;
- Use a variety of teaching strategies such as group work, lectures, mini-lessons, exploration, questioning, discussion, and other cooperative teaching techniques;

- Use a variety of assessment strategies;
- Assist in the development and implementation of the school improvement plan in order to improve student achievement and success;
- Use appropriate techniques to encourage active participation in decision-making regarding classroom rules, organization and topics of study, which communicate a caring attitude and trust of students;
- Develop and implement a system for student recognition; and
- Develop healthy self-esteem in students.

On appeal, counsel asserts that GTRR is the actual employer with full control over the beneficiary, and thus can freely redeploy the beneficiary. Counsel states, in part, as follows:

At the time the petition was filed, the [beneficiary] was still the employee of the employer/petitioner providing services to Fulton County Schools. . . . However, when the opportunity for a better placement presented itself in Hancock County Schools System, the employee was redeployed in August 2004. Before his redeployment, the beneficiary was deputed to provide services at the Fulton County Schools System as a Mathematics Teacher. This assignment did not end until August 2004. . . .

Another opportunity for a better posting presented itself in July 2006 at the Ben Hill County Schools System and the [beneficiary] was again redeployed to serve the growing need for [a] Mathematics teacher there. The relevant LCA that was already in effect in November 2005 for Ben Hill County School System, the requirements of which the employer had already satisfied, is also enclosed.

Counsel referenced an employment agreement between the petitioner, GTRR, Inc., and the beneficiary, dated February 2004, a Teacher Agreement of Employment between the petitioner and Fulton County Schools, located in Atlanta, Georgia, dated May 29, 2003, a Teachers Services Agreement between the petitioner and Hancock County School System, dated June 16, 2004, and a Teachers Services Agreement between the petitioner and Ben Hill County School System, dated July 22, 2005. Counsel asserts that these documents demonstrate that the petitioner had a specialty occupation available for the beneficiary "at all times."

The record contains the following documentation pertaining to the proffered position:

- Georgia Educator Certificate issued to the beneficiary on July 1, 2004, valid to June 30, 2009;

- Credentials evaluation report from World Education Services, Inc. (WES), concluding that the beneficiary holds the U.S. equivalent of a bachelor's degree in mathematics and education from a regionally accredited institution;
- Bachelor of Education degree issued to the beneficiary on December 27, 2001, from the University of Mumbai;
- Bachelor of Science degree issued to the beneficiary on December 2, 1998, from the University of Mumbai;
- Employment Agreement between the petitioner and the beneficiary, dated February 2004;
- Copy of the visa page in the beneficiary's passport reflecting an H-1B visa issued on December 23, 2003, and GTRR, Inc. listed as the petitioner;
- Copies of the beneficiary's I-94 Departure Record and passport stamp, reflecting his arrival to the United States on April 29, 2004 as an H-1B;
- Teacher Agreement of Employment (Appendix 1) (no contract) assigning the beneficiary to Fulton County School System, located in Atlanta, Georgia, with a reporting date of "July 29, 2003 or ASAP on Visa Approval";
- Teachers Services Agreement, signed on August 5, 2004, between the petitioner and Hancock County School System, located in Sparta, Georgia, and a work order assigning the beneficiary to Hancock Central High/Middle School with a start date of August 16, 2004;
- Letter, dated June 13, 2006, from the principal of Hancock Central High School, stating that the beneficiary began teaching in 2004 and is currently teaching mathematics to grades nine through twelve;
- Teachers Services Agreement, dated July 22, 2005 and signed on July 28, 2006, between the petitioner and Ben Hill County School System, located in Fitzgerald, Georgia, and a purchase order signed by the petitioner and the superintendent of Ben Hill County School System on July 20, 2006 and July 19, 2006, respectively, assigning the beneficiary to the Ben Hill County Performance Learning Center with a start date of August 1, 2006 (It is noted that the signing dates of the purchase order precede the signing date of the contract.);
- Letter, dated August 22, 2006, from the associate superintendent, human resources of Ben Hill County Schools, stating that the beneficiary is a mathematics teacher at the Performance Learning Center in the Ben Hill County School System located in Fitzgerald, Georgia;

- Beneficiary's 2005 Form W-2 Wage and Tax Statement, reflecting GTRR as the employer and \$30,157.74 in wages, tips, other compensation;
- Beneficiary's 2004 Form W-2 Wage and Tax Statement, reflecting GTTR as the employer and \$7,314.75 in wages, tips, other compensation;
- Petitioner's Labor Condition Application (LCA) reflecting Sparta, Georgia as the work location, certified on March 9, 2004, and valid from March 9, 2004 through March 8, 2007;
- Petitioner's LCA reflecting South Georgia, Georgia as the work location, certified on November 18, 2005, and valid from November 18, 2005 through October 17, 2008; and
- Petitioner's LCA reflecting Sparta, Georgia as the work location, certified on January 23, 2006, and valid from January 23, 2006 through January 22, 2009.

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.

The beneficiary's certification from the State of Georgia as a mathematics teacher for grades six through twelve is noted. Also noted is counsel's explanation that at the time the instant petition was filed on February 14, 2006, the beneficiary was teaching at Hancock Central High School located in Sparta, Hancock County, Georgia.¹ As discussed above, the director denied the petition because the petitioner has failed to establish that at the time the instant petition was filed on February 14, 2006, there was a specialty occupation available for the beneficiary. The Teaching Services Agreement between the petitioner and the Hancock County School System was signed by the petitioner on August 5, 2004, after the filing of the petition on February 14, 2006. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the record does not contain a certified LCA for the work location of Ben Hill County School System, located in Fitzgerald, Ben Hill County, Georgia. The AAO also notes that none of the three LCAs submitted by the petitioner is valid for the period of the requested extension reflected on the petition, March 9, 2006 through March 8, 2009. For these additional reasons, the petition may not be approved.

Beyond the decision of the director, it does not appear that the petitioner is in compliance with 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), its statement that it will comply with the terms of the LCA for the duration of the

¹ While the director has not instituted revocation proceedings for the beneficiary's previous visa petition and the issue of the beneficiary's previous employment is not before the AAO, the AAO notes that the petitioner has not demonstrated that a specialty occupation was available for the beneficiary as of the filing date of the initial petition for the beneficiary, which resulted in the issuance of his H-1B visa on December 18, 2003. The record indicates that the beneficiary initially arrived in the United States on April 29, 2004 as an H-1B to work for the petitioner. The beneficiary had an agreement of employment, signed on May 29, 2003, with Fulton County Schools located in Atlanta, Fulton County, Georgia. The beneficiary was not certified as a teacher by the State of Georgia until July 1, 2004, and his 2004 earnings, as reflected on his 2004 W-2, were only \$7,314.75. In view of the foregoing, it does not appear that a specialty occupation was available for the beneficiary at the time the initial petition was filed, which resulted in the issuance of the beneficiary's H-1B visa on December 18, 2003. In view of the foregoing, it appears that the initial petition may be subject to revocation on notice.

alien's authorized period of stay. The record reflects that the petitioner deducts \$273.78 from each of the beneficiary's paychecks for "placement." Administrative expenses such as recruitment fees are not authorized deductions under the LCA. *See*, 20 C.F.R. § 655.731(c)(9). As the petitioner is recouping its own business expenses from the beneficiary, it is not in compliance with the terms of the LCA. For this additional reason, the petition may not be approved.

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 petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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.