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FILE: EAC 06 181 51574 Office: VERMONT SERVICE CENTER Date: **NOV 28 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 25, 2006 and supporting documents; (2) the director's September 22, 2006 request for further evidence (RFE); (3) the petitioner's December 6, 2006 response to the director's RFE and supporting documents; (4) the director's January 3, 2007 denial decision; and (5) the Form I-290B, counsel's brief, and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On January 3, 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 submits a brief. Counsel asserts that the petitioner is the actual employer of the beneficiary; that the petitioner has a valid contract with Fulton County School Systems, as well as other school systems; that the regulations do not prohibit employment consulting firms from petitioning for nonimmigrants, as long as the petitioner remains the alien's employer and has listed the alien's places of employment on the petition; and that Citizenship and Immigration Services (CIS) is aware that the petitioner actually currently employs a number of teachers.

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.

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: Richland County, Columbia, South Carolina; Lancaster County, Lancaster, South Carolina; Sumter County, Americus, Georgia; Fulton County, Atlanta, Georgia (June 30, 2004); Savannah-Chatham, Savannah, Georgia; Henry County, McDonough, 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, the petitioner provided a copy of a completed employment agreement with the beneficiary. In the December 6, 2006 letter in response to the director's RFE, the petitioner indicated that the beneficiary will:

Teach and demonstrate experiments in science with specific interest in Biological Sciences to High School students using laboratory equipment & a variety of teaching tools, settings & strategies including various lab equipment, etc.

The petitioner referenced its agreement with Fulton County Schools Systems regarding the actual placement of the teacher in a particular school. The record in response to the director's RFE includes:

A March 6, 2006 employment agreement between the petitioner and the beneficiary, indicating the beneficiary would "perform teaching/administrative duties, or/and other specialized technical work as he/she is directed to perform by [the petitioner] for [the petitioner's] clients" within a stipulated time period.

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 December 17, 2004 letter authored by a teacher certification specialist of the Georgia Professional Standards Commission addressed to the beneficiary, indicating that the

beneficiary was eligible for a non-renewable level 4 teaching certificate in biology (6-12) listing the requirements she must fulfill prior to or during the validity period of the non-renewable [teaching] certificate.

The director denied the petition on January 3, 2007. The director observed that the petitioner's contract with Fulton County Schools did not identify a specific location where the beneficiary would work or the grade level the beneficiary would teach. The director determined that such a broad arrangement was neither secure nor permanent. The director concluded that the petitioner had not established that it had a valid job offer for the beneficiary at a school or school district for the requested three years of H-1B employment.

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.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). The AAO finds that the petitioner will be the beneficiary's employer. However, the petition may not be approved, as the evidence of record does not establish that the beneficiary will be employed in a specialty occupation or that the employer has submitted an itinerary of employment.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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

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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).

alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 in its letter in response to the director's RFE indicates that the beneficiary will perform general duties related to teaching and demonstrating experiments in biological sciences to high school students. 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. The information in the March 6, 2006 employment contract with the beneficiary provides an even more generic statement, indicating that the beneficiary would "perform teaching/administrative duties, or/and other specialized technical work as he/she is directed to perform by [the petitioner] for [the petitioner's] clients." The beneficiary's proposed ultimate employer indicates 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 petitioner 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 CIS 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 (5<sup>th</sup> 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)(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 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 that 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 her immediate entry into the United States.

Beyond the decision of the director, the AAO notes that the record does not include an itinerary listing all the places of the beneficiary's employment and the length of the employment. Although the director did not request an itinerary in the RFE, when the evidence of record indicates that 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 [REDACTED] 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 should have exercised his discretion to require an itinerary of employment.<sup>2</sup> As the petition will be denied on the ground cited above, the AAO finds no need to remand the matter to request an itinerary of the beneficiary's proposed employment.

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

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<sup>2</sup> 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."