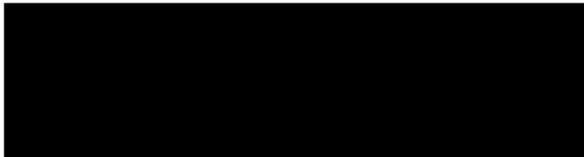


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



*D2*

FILE: SRC 05 213 51261 Office: TEXAS SERVICE CENTER Date:

NOV 24 2008

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

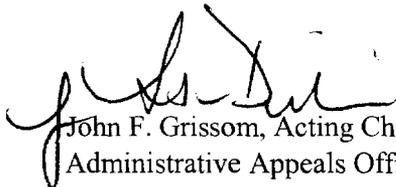
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for entry of a new decision.

The petitioner provides educational services including the recruitment and placement of foreign teachers, and seeks to employ the beneficiary as a teacher. 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 stating that the petitioner has not established that an employer/employee relationship would exist between the petitioner and the beneficiary. On appeal, counsel submits a brief and additional information stating that the petitioner would be the actual employer of the beneficiary.

The issue to be discussed in this proceeding is whether the petitioner would be the actual employer of the beneficiary.

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.

The record establishes that the petitioner has a contract with the Dekalb County Board of Education (Dekalb) to provide teachers for the school system, and that the teachers supplied would be the employees of the petitioner, not the school system. As such, the petitioner would pay the teachers for the services they perform, and would otherwise have authority over the teachers' employment including the right to hire, fire, supervise and control their work. The contract specifically provides that the petitioner may, in its sole discretion, terminate the services of any of its teachers. Under the Teaching Services Agreement entered into by the parties, Dekalb may demand that the petitioner remove a teacher from its contracted teaching position, subject to the terms of the parties contract, with or without cause. Dekalb does not, however, have the authority to terminate a teacher as the teacher is the employee of the petitioner. If removal did occur, the teacher would still be employed by the petitioner who could then determine whether to place the teacher in another teaching position or terminate its employee. The petitioner seeks to engage a person to work in the United States, would have an employer-employee relationship with that person, and has an Internal Revenue Service Tax identification number. The petitioner does, therefore, qualify as an employer in this instance, and the director's decision to the contrary is withdrawn.

This matter shall be remanded to the director to determine whether the proffered position qualifies as a specialty occupation, and, if so, whether the beneficiary is qualified to perform the duties of the position. The director may request such additional evidence as she deems necessary in rendering her decision.

It should be noted that the record does not establish specifically where the beneficiary would work, or the specifics of the teaching position. While the record does contain a Teaching Services Agreement under which the

petitioner would recruit and employ teachers to be assigned to Dekalb teaching positions, it does not contain a work order or similar document signed by Dekalb (the end user of the beneficiary's services) specifically setting forth a comprehensive duty description for the beneficiary, or detailing where the beneficiary would work. Without this description, the petitioner has not demonstrated that the proffered position meets the statutory definition of a specialty occupation. The petitioner bears the burden of establishing that the beneficiary will be coming to the United States to perform services in a specialty occupation. 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. As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's client, it is not possible to analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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 and the appeal shall accordingly be dismissed.

ORDER: The director's decision is withdrawn. This matter is remanded to the director to enter a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner, shall be certified to the AAO for review.