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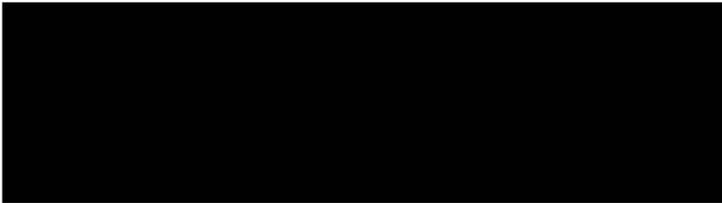
FILE: LIN 05 136 50668 Office: NEBRASKA SERVICE CENTER Date: NOV 28 2006

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, Nebraska 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 is a non-profit organization that provides support services to various schools. The petitioner seeks to employ the beneficiary as a science/physics 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 April 1, 2005 Form I-129 and supporting documents; (2) the director's May 4, 2005 request for further evidence (RFE); (3) counsel's July 21, 2005 response to the director's RFE; (4) the director's September 16, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On September 16, 2005, the director denied the petition determining that the petitioner had failed to establish that it would engage the beneficiary in work in the United States. On appeal, counsel for the petitioner submits a statement and attachments.

The initial issue before the AAO is whether the record establishes the petitioner is a U.S. employer or agent, the entities authorized by regulation to file a Form I-129 to classify a beneficiary as an H-1B worker.

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.

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F):

A United States agent may file a petition, in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
- (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

In a March 25, 2005 letter appended to the petition, the petitioner indicated that it provided guidance and assistance to new schools throughout the United States, including identifying the need for teachers and administrators and facilitating the employment of teachers. The petitioner stated that pursuant to a support services agreement, commencing May 24, 2005,¹ it was submitting a petition on behalf of the beneficiary for employment as a science/physics teacher at Horizon Science Academy in Columbus, Ohio (HSA, Columbus). The petitioner indicated that the beneficiary would be responsible for:

Teach[ing] physical science classes to 6-8 grade students; teach[ing] physics/elective classes to 9-12 grade students; prepar[ing] daily and annual teaching plans; attend[ing] staff meetings, educational conferences, and teacher training workshops; attend[ing] parent-teacher conferences; sponsor[ing] curricular and extracurricular activities.

The petitioner provided a copy of the support services management agreement between the petitioner and HSA, Columbus dated September 1, 2004. The agreement included provisions relating to the petitioner's obligation to interview, hire, train, and fire employees, including international teachers and to develop curricula and programs for the school. The petitioner submitted two LCAs filed with the Department of Labor (DOL), one listing the beneficiary's proposed places of work as Dayton and Cincinnati, Ohio and the second listing the beneficiary's proposed places of work as Cleveland and Columbus, Ohio. The petitioner's March 21, 2005 letter appended to the petition noted that the petitioner wished to employ the beneficiary as a science/physics teacher for a period of three years at a salary of \$35,000 per year.

¹ The petitioner submitted a support services agreement commencing September 1, 2004.

On May 4, 2005, the director requested, among other things, evidence as to which entity would pay the beneficiary; a complete itinerary of definite employment and information on the services the beneficiary would perform, as the beneficiary would be performing services at a location other than the petitioner's facility; the dates of each service or engagement at each work site location; the name(s) and address(es) of the actual employer responsible for paying, hiring, firing, supervising, and controlling the work of the employee; and the location of each work site where the beneficiary would perform services. The director also requested a copy of the contract between the petitioner and the beneficiary.

In a July 21, 2005 response, counsel for the petitioner indicated that the beneficiary had been contracted to work specifically at HSA located at 1329 Bethel Road in Columbus, Ohio, pursuant to an April 15, 2005 contract executed by the petitioner, the beneficiary, and HSA, Columbus. Counsel submitted a copy of the contract which provided that HSA, Columbus agreed to pay the beneficiary and that the beneficiary, as a teacher, would have those duties normally associated with those of a teacher along with any other duties that the administrators of HSA, Columbus might assign. The April 15, 2005 contract listed its term through June 30, 2006. The petitioner also included a copy of a June 1, 2005 letter from the director of HSA, Columbus that listed the beneficiary's duties at the school as:

1. Teach physical science classes to 6-8 grade students – 35% of time;
2. Teach Physics/elective classes to 9-12 grade students – 15% of time;
3. Prepare daily and annual teaching plans – 20% of time;
4. Attend staff meetings, educational conferences, and teacher training workshops – 15% of time;
5. Attend parent-teacher conferences – 5% of time;
6. Sponsor curricular and extracurricular activities – 10% of time[.]

The director of HSA, Columbus noted in the June 1, 2005 letter that the beneficiary's contract is conditioned on the need for a physics/physical science teacher at the 1329 Bethel Road School and that the beneficiary may be subject to transfer to one of the other charter schools under the management of the petitioner. The director further indicated that the petitioner is responsible for the hiring and firing of teachers at the school, based on evaluations conducted by the school.

The director denied the petition on September 16, 2005. The director observed that the petitioner must establish that the organization is a viable concern, has sufficient work at the H-1B level to employ the beneficiary at the location listed on the LCA, that the duties to be performed qualify as those requiring the attainment of a baccalaureate degree or higher, and that the petitioner actually intends to employ the beneficiary. The director determined that HSA, Columbus would be paying, supervising, and controlling the beneficiary's work, as it did not seem possible for the petitioner, located in Illinois, to satisfactorily supervise or otherwise control the beneficiary's work in Columbus, Ohio. The director determined that the petitioner in this matter does not qualify as a "United States employer" as contemplated by regulation.

On appeal, counsel for the petitioner re-submits the documentation previously submitted and asserts that the petitioner is a viable employer and that a specialty occupation exists based on all the Support Services Agreements the petitioner has executed with various charter schools. Counsel notes that the contract between

the petitioner and the beneficiary and the school where the beneficiary is to be assigned, as well as the letter from the school where the beneficiary is to be assigned states that the charter school pays the beneficiary's wages and conducts teacher evaluations and that the petitioner reviews the evaluations and bases any decision to fire on those evaluations as well as ensuring that the beneficiary maintains and adheres to all curriculum standards.

Counsel's assertions are not persuasive. HSA, Columbus is the entity that would pay the beneficiary's wages, evaluate his teaching services, and make sure he follows all curriculum standards, and that the beneficiary, as a teacher, would have those duties normally associated with those of a teacher along with any other duties that the administrators of HSA, Columbus might assign. Thus, the record establishes that HSA, Columbus as the entity assigning, supervising and paying the beneficiary's wages would be the beneficiary's employer for the purposes of filing an H-1B petition. The petitioner's responsibility for hiring the beneficiary under its support services agreement with HSA, Columbus is an administrative service provided to HSA, Columbus, the beneficiary's employer.

The record does not offer evidence establishing that the petitioner and HSA, Columbus are the same organization. Going on record without supporting documentation is not sufficient to meet the burden of proof in this proceeding. *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)). Instead, the September 1, 2004 support services agreement between the petitioner and HSA, Columbus as well as the April 15, 2005 employment agreement treats them as distinct entities. Moreover, while the employment agreement signed with the beneficiary may describe the petitioner as the beneficiary's employer, it also indicates, as just discussed, that HSA, Columbus would pay the beneficiary's salary and assign his duties. Accordingly, it establishes HSA, Columbus, not the petitioner, as the beneficiary's employer for the purposes of filing the Form I-129, Petition for a Nonimmigrant Worker. Accordingly, the director's decision will be upheld.

The AAO finds, however, that while the record does not establish the petitioner as a U.S. employer, it does provide evidence that the petitioner is an "entity authorized by the employer to act for, or in place of, the employer," i.e., a U.S. agent as defined by the regulation at 8 C.F.R. § 214.1(h)(2)(i)(F). The petitioner's support services agreement with HSA, Columbus offers sufficient proof that it is authorized to act on behalf of the entity in securing teaching staff from outside the United States. In this instance, both the director of HSA, Columbus and counsel acknowledge that the beneficiary would be transferred to another of the charter schools managed by the petitioner should HSA, Columbus cease to require his services. Thus the AAO finds the petitioner to have established that it is the U.S. agent for the charter school identified in the record by the support services agreement.

As a U.S. agent representing multiple employers, the petitioner is required to support its filing of the Form I-129 with a "complete itinerary" of the beneficiary's employment, i.e., evidence establishing the dates and locations of the employment to be performed by the beneficiary during the time period requested. In the instant matter, the petitioner has submitted its April 15, 2005 employment agreement with HSA, Columbus and the beneficiary as proof of the beneficiary's employment as a science/physics teacher for a period of three years. The AAO notes, however, that the term of the agreement is for one year, specifically the 2005-2006 school year, and that the HSA, Columbus director's letter of June 1, 2005 indicates that the beneficiary's

employment contract is "conditioned on the need for a Physics/Physical Science teacher" and that he "may be subject to transfer to one of the other Charter Schools under the management and operation of Concept Schools Inc." Accordingly, the AAO does not find the evidence submitted by the petitioner to establish that the beneficiary would be employed for three years at HSA, Columbus to perform the list of duties appended to the employment agreement. Neither does it find the petitioner to have submitted the evidence necessary to demonstrate that the beneficiary would continue to be employed as a Physics/Physical Science teacher should his services cease to be required at HSA, Columbus prior to the end of the three-year period the petitioner has requested.

The support services agreement submitted by the petitioner potentially allow it to place the beneficiary at one of the other Ohio charter schools should his HSA, Columbus employment come to an early end. However, the evidence that establishes the petitioner's ability to place the beneficiary at another charter school in need of a science teacher and the locations where such placement could potentially occur does not satisfy the regulatory requirement for a complete itinerary covering the period of requested H-1B employment. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F)(2) requires the petitioner as a U.S. agent representing multiple employers to submit evidence that establishes the dates of service or engagement, the names and addresses of actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. However, in the instant matter, the only documentation submitted by the petitioner to establish the beneficiary's employment is its contract with HSA, Columbus and the beneficiary for the 2005-2006 school year. Therefore, the petitioner has failed to comply with the H-1B filing requirements imposed on U.S. agents by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F)(2). Accordingly, the appeal will be dismissed.

In that the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(F)(2), the AAO will not proceed with an analysis as to whether the proffered position is a specialty occupation or the beneficiary qualified to perform the duties of a specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(iii)(A) and (C). It notes, however, that the petitioner's failure to submit proof that the beneficiary would be employed as a science/physics teacher for the three years requested on the Form I-129 also precludes it from establishing the proffered position as a specialty occupation.

Without proof that the beneficiary would perform the duties of a science/physics teacher for the three years requested, the record does not establish that the duties of the proffered position, over the course of the beneficiary's employment, would require the application of a body of highly specialized knowledge and the minimum of a baccalaureate degree in a directly related field, as required by section 214(i)(1) of the Act. Accordingly, the record fails to establish that the beneficiary would be employed in a specialty occupation. An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). For this reason, as well, the appeal will be dismissed.

The AAO notes that the basis for its decision differs from that relied upon by the director. However, 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).

For reasons previously discussed, the record does not establish that the petitioner will be the employer of the beneficiary, that it has complied with H-1B filing requirements at 8 C.F.R. § 214.2(h)(2)(i)(F)(2) or that the beneficiary would be coming to the United States to perform services in a specialty occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B). Accordingly, the AAO will not disturb the director's denial of the petition.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.