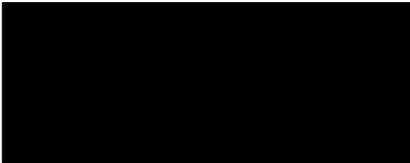




U.S. Citizenship  
and Immigration  
Services

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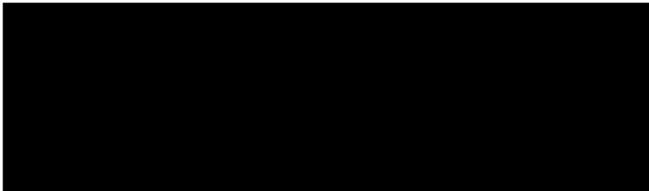
DS

FILE: SRC 05 213 51887 Office: TEXAS SERVICE CENTER Date: JAN 04 2008

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 nonimmigrant visa petition was approved by the service center director. Based upon further review, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the visa petition and her reasons therefore, and ultimately revoked the approval of the 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 teacher recruitment 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).

In the NOIR dated May 24, 2006, the director requested additional evidence from the petitioner, including copies of the contracts between the petitioner and the beneficiary and between the petitioner and the public school district in Georgia for whom the beneficiary would be performing services. The director revoked the petition because the petitioner failed to submit evidence in response to the NOIR, and because the petitioner does not meet the definition of a U.S. employer.

On appeal, the petitioner's new counsel submits a brief and asserts that the director erred when she determined that no additional evidence was provided in response to the NOIR. Counsel submits an affidavit signed by the petitioner's vice president on June 14, 2006, who states that, in accordance with the attached contract, an employer-employee relationship exists between the petitioner and the beneficiary. Counsel also submits: a teaching services agreement, effective on May 2, 2005, between the petitioner and the DeKalb County Board of Education; an employment offer from the petitioner to the beneficiary; a 2005 W-2 Wage and Tax Statement identifying the petitioner as the employer and the beneficiary as the employee; and a letter, dated June 16, 2006, from the director for employment services of the DeKalb County School System, stating that the beneficiary is an employee of the petitioner, not of the DeKalb County School System.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Counsel's assertion on appeal that additional evidence was provided in response to the NOIR is noted. The record, however, contains no evidence, such as a postmarked mailing receipt, in support of counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534

(BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be adjudicated based on the record of proceeding before the director.

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.

At the time of filing, the petitioner submitted the following documentation:

- A Form ETA 9035, Labor Condition Application (LCA), which identifies the beneficiary's work location as Ellenwood, Georgia; and
- A Georgia Educator Certificate issued by the Georgia Professional Standards Commission, affirming that the beneficiary has met the requirements for the "International Exchange Interrelated Special Educ[ation] (P-12)," valid from 07/01/02 to 06/30/05.

Upon review of the record, the petitioner has not established that an employer-employee relationship exists between the petitioner and 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.

To qualify as a United States employer, all three criteria must be met. The Form I-129 indicates that the petitioner has an Internal Revenue Service Tax Identification Number. However, despite the director's specific request that the petitioner provide contracts between the petitioner and the beneficiary and between

the petitioner and the public school district in Georgia for whom the beneficiary would be performing services, the petitioner did not respond to the director's request. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)). In view of the foregoing, the petitioner has not demonstrated that it would have an employer-employee relationship with the beneficiary with the authority to hire, pay, fire, supervise, or otherwise control the work the beneficiary would perform.

The AAO also finds that the petitioner has not established that it has met the regulatory requirements as an agent for the beneficiary. 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.

The AAO determines that the petitioner has not complied with the regulatory requirements for an agent in that it has failed to submit an itinerary of services or engagements. In a letter dated July 26, 2005, the petitioner's president stated, in part, that the petitioner has contracts with several counties in Georgia to provide qualified primary and secondary school teachers, and that it has offered the beneficiary the position of teacher. While the petitioner may have a definite employment commitment with the beneficiary, however, it is not relieved of its regulatory obligation to provide an itinerary of services or engagements as the agent on an H-1B petition.<sup>1</sup>

Therefore, the petitioner has failed to establish that it meets the regulatory requirements for an agent of an H-1B petition.

The record contains evidence that CIS has approved another H-1B petition for the petitioner in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the other H-1B petition was approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was erroneous, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

As related in the discussion above, the petitioner has not established that an employer-employee relationship exists between the petitioner and the beneficiary. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the LCA filed by the petitioner is not valid. The LCA lists the work location as Ellenwood, Georgia, which is in Clayton County. The evidence of record indicates that the beneficiary will work for the petitioner's client, the DeKalb County School System. As such, the LCA does not cover all of the geographical areas of proposed employment. For this additional reason, the petition may not be approved.

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<sup>1</sup> The AAO notes that the employer of a beneficiary who will work in multiple locations is also required to submit an itinerary of services with the dates and locations of services. 8 C.F.R. § 214.2(h)(2)(i)(B).

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.

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