U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

D1

PUBLIC COPY

[redacted]

FILE: LIN 05 136 50767 Office: NEBRASKA SERVICE CENTER Date: DEC 05 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of operational and educational services to public and private schools. It seeks to employ the beneficiary as a science/physics teacher and to continue his classification 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 on the ground that the record fails to establish that the petitioner has an employer-employee relationship with the beneficiary, as required to qualify as a "United States employer" under applicable regulations.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, a letter from counsel, and copies of materials already in the record. The AAO reviewed the record in its entirety before issuing its decision.

The initial issue before the AAO is whether the record establishes that 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), a petitioner qualifies as a U.S. employer, if it:

> *(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.

With regard to U.S. agents, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) provides that:

> 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, or in place of, the employer as it[s] 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 his denial, the director found that the petitioner failed to establish that it would control the work being performed by the beneficiary and, was, therefore, not a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO agrees.

The petitioner has submitted a copy of its "Support Services Agreement" with the Horizon Science Academy in Columbus, Ohio (HSA-Columbus), dated September 1, 2004, which states that it is responsible for "interviewing, hiring and firing of employees, including international teachers" to be placed with HAS-Columbus. The record also includes the "Employment Agreement" executed by the petitioner, HAS-Columbus, and the beneficiary on May 24, 2005, which states that the petitioner "hereby employs the [beneficiary] at HSA-Columbus . . . to perform the duties of a Teacher for HSA-Columbus" during the 2005-2006 academic year, and that the beneficiary's employment could by terminated by the petitioner, in its sole discretion, at any time. Other provisions of the employment agreement, however, state that the beneficiary will "perform the duties of a Teacher for HSA-Columbus . . . together with any other duties that may be assigned by the Administrators of HSA-Columbus." Specific duties to be performed by the beneficiary are listed in Exhibit A ("Teacher Responsibilities"). Of the 15 listed duties, only two are performed at the direction of the petitioner, while 13 are performed at the direction of HSA-Columbus. The employment agreement provides that HSA-Columbus will pay the beneficiary's annual salary of $42,000, plus benefits, and stipulates that the beneficiary "must comply with the general, educational, and Teacher policies including the philosophies and goals of HSA-Columbus." In a letter to the service center dated June 1, 2005 the petitioner confirmed that "HSA-Columbus will be responsible for paying [the beneficiary's] wages; ensure that [the beneficiary] maintains his Ohio teacher's license; evaluate his teaching services; and make sure he follows all curriculum standards." The letter also indicated that if HSA-Columbus no longer has the need for a physics/physical science teacher, the beneficiary "may be subject to transfer to one of the other Charter Schools under the management and operation of [the petitioner]," located in Toledo, Cleveland, Cincinnati, or Chicago. While confirming that the petitioner "is responsible for hiring and firing or all teachers," it stated that all such actions are "based on evaluations conducted by our school." Thus, the evidence of record establishes that HSA-Columbus, as the entity that would assign the beneficiary's duties, supervise his performance, and pay his salary, is the beneficiary's employer for the purposes of filing this 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 the beneficiary's employer, HSA-Columbus.

In reaching this decision the AAO notes that the director of HSA-Columbus has indicated that his school is a part of the petitioner's business, Concept Schools, Inc., and that the employment agreement signed by the petitioner, HSA-Columbus, and the beneficiary describes the beneficiary as employed "by Concept Schools at HSA-Columbus." The evidence of record does not establish, however, 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 shows that the two entities are distinct.

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, assign his duties, and supervise his work. The foregoing evidence establishes HSA-Columbus, not the petitioner, is the beneficiary's employer for the purposes of filing the Form I-129, Petition for a Nonimmigrant Worker. Thus, the director's decision will be upheld.

While the record does not establish that the petitioner is a U.S. employer, as defined in 8 C.F.R. § 214.2(h)(4)(ii), 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 HSA-Columbus in securing teaching staff from outside the United States. Since the director of HSA-Columbus, as well as petitioner's counsel, expressly state that the beneficiary could be transferred to another of the charter schools managed by the petitioner should HAS-Columbus cease to require his services, the AAO determines that the petitioner has established that it is the U.S. agent for HSA-Columbus and the other charter schools under its management and operation in Toledo, Cleveland, Cincinnati, and Chicago.

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 case, the petitioner cites its May 24, 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 letter from the director of HSA-Columbus, dated June 1, 2005, states that the beneficiary's employment contract is "conditioned on the need for a Physics/Physical Science teacher at HAS-Columbus" and that "he may be subject to transfer to one of the other Charter Schools under the management and operation of Concept Schools Inc." Based on the foregoing evidence, the AAO determines that the petitioner has not established that the beneficiary would be employed for three years at HSA-Columbus performing the list of duties appended to the employment agreement. Nor does the documentation of record establish that the beneficiary would continue to be employed as a physics/science teacher in one of the other charter schools should his services cease to be required at HSA-Columbus prior to the end of the three-year period of H-1B classification the petitioner has requested.

The letter from the HSA-Columbus director, dated June 1, 2005, states that the beneficiary could be transferred to one of the petitioner's other charter schools in Ohio or Illinois should his HSA-Columbus employment come to an early end. That evidence does not satisfy the regulatory requirement for a complete itinerary of employment covering the period of requested H-1B classification, however, since the other charter schools may not have need of a physics/science teacher either. 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 for the entire period of requested H-1B classification. In the instant case, however, the only documentation submitted by the petitioner to establish the beneficiary's employment itinerary is the contract with HSA-Columbus and the beneficiary for the 2005-2006 school year. Thus, 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.

As 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 of whether the proffered position is a specialty occupation or the beneficiary qualifies to perform the services 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 physics/science teacher for the three years requested on the Form I-129 also precludes it from establishing that the proffered position is a specialty occupation.

Without proof that the beneficiary would perform the duties of a physics/science teacher for the three-year period of requested H-1B classification, 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. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B). For this reason as well the appeal will be dismissed.

The AAO notes that its decision differs from the director's with respect to the bases for denial. 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 the reasons discussed in this decision, the record does not establish that the petitioner will be the employer of the beneficiary, as defined in 8 C.F.R. § 214.2(h)(4)(ii), or 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 petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will dismiss the appeal.

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