U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 27 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on July 27, 2011. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a non-profit educational foundation that operates charter schools, which was established in 1997. In order to continue to employ the beneficiary in what it designates as a computer science teacher position, the petitioner seeks to classify her 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).[1]

The director denied the petition on October 31, 2012, finding that the petitioner failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner had not established the beneficiary to be exempt from the requirement. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that all evidentiary requirements were satisfied.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence dated December 21, 2011 (first RFE); (3) the response to the first RFE; (4) the director's request for evidence dated July 18, 2012 (second RFE); (5) the response to the second RFE; (6) the director's denial letter; and (7) the Form I-290B and

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[1] The instant petition was filed as a continuation of previously approved employment without change. However, there are discrepancies in the record as to whether the petitioner indeed intends to continue to employ the beneficiary "without change." The petitioner has indicated that that the beneficiary will teach at at the (a high school located in As noted below, no itinerary was provided. With the exception of one organizational chart, the petitioner has submitted no other evidence establishing that the beneficiary has been employed at the Notably, in support of the initial I-129 petition, the petitioner provided copies of 2010 and 2011 quarterly wage reports filed with the State of California for the petitioner's and its corporate office in California. The beneficiary does not appear on any of the various quarterly reports submitted by the petitioner. The petitioner also submitted 2009 and 2010 W-2, Wage and Tax Statements, issued for its The beneficiary does not appear on any of the W-2s provided for this location. Instead, the petitioner provided two W-2s issued by the petitioner to the beneficiary for 2009 that contain addresses for the petitioner in CA, Neither of these addresses corresponds to either of the beneficiary's work sites as stated on the instant LCA. The petitioner provided the beneficiary's W-2 for 2010 with an address corresponding to the address on the instant LCA. No explanation for the discrepancies in the beneficiary's work address was provided by the petitioner. Thus, it is not apparent from the evidence provided that the instant Form I-129 petition was properly filed as a "continuation of previously approved employment without change."

Further, in the Form I-129, the petitioner indicated the beneficiary's gender as male, whereas a copy of the beneficiary's passport provided with the submission indicates the beneficiary's gender as female. The record provides no explanation for this inconsistency. Thus, the AAO must question whether the information provided in the Form I-129 petition is correctly attributed to this particular position and beneficiary.

supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner has not established the beneficiary is exempt from the requirement. Accordingly, the appeal will be dismissed, and the petition will be denied.

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a computer science teacher in San Diego, California and Los Angeles, California from July 30, 2011 to July 29, 2014.[2] In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Secondary School Teachers, Except Special and Career/Technical Education" - SOC (ONET/OES) code 25-2031, at a Level I (entry level) wage.

The director reviewed the initial evidence and found it insufficient to establish eligibility for the benefit sought. The director issued RFEs on December 21, 2011 and July 18, 2012. The petitioner was put on notice that additional evidence was required and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO notes that in the second RFE, the director specifically requested that the petitioner provide evidence of the beneficiary's California teaching credential or evidence that the beneficiary is exempt from the licensing requirements. The director further stated, "If a credential is not available from the [California] Commission on Teacher Credentialing, the petitioner may submit other comparable documentation that satisfies the licensure requirement along with evidence from the Commission granting such authorization."

On July 26, 2012, the petitioner and counsel responded to the RFE by submitting a letter from the petitioner and a printout entitled "Charter Schools FAQ Section 5." In the letter, dated July 23, 2012, the petitioner indicated that the beneficiary is not required to have a teaching credential because "[t]eachers of noncore classes are exempt from credentialing requirement as explained in [the] enclosed FAQs of education code by California Department of Education."

The director reviewed the information provided by the petitioner and determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary either possesses the requisite license or is exempt from the licensure requirements. The director denied the petition on October 31, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

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[2] The LCA filed in the instant case indicates that the beneficiary will be employed at two work sites: San Diego County, CA and Los Angeles County, CA. The petitioner has provided no explanation as to how the beneficiary will divide her time between these two sites, which are located approximately 150 miles apart. The AAO further notes that the Form I-129 petition lists the San Diego address as the beneficiary's place of employment and states, "Also see Attached LCA." The home address provided for the beneficiary on the Form I-129 is approximately 150 miles away from the San Diego work site. No explanation was provided.

The issue before the AAO is whether the petitioner has established eligibility for the benefit sought. More specifically, whether the petitioner has demonstrated that the beneficiary either possesses the requisite license or is exempt from the licensure requirements.

The AAO first notes that in adjudicating petitions pursuant to the "preponderance of the evidence" standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). The preponderance of the evidence standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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.

Section 214(i)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." The regulations at 8 C.F.R. §§ 214.2(h)(4)(v)(A) to (E) state the licensure requirements for H classification.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), where, as here, a state or local license, registration, or certification is required for an individual to fully perform the duties of an occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that credential prior to approval of the petition. The regulation states:

> *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

There are regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license. The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) addresses situations where the beneficiary has been issued temporary licensure. It states:

> *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

In response to the second RFE, the petitioner stated that the beneficiary is not required to have a teaching credential because "[t]eachers of noncore classes are exempt from credentialing requirement as explained in [the] enclosed FAQs of education code by California Department of Education." The petitioner further stated that "[s]ince [the beneficiary] is teaching Computer Science, a non-core subject and at a middle-school grade level, she is eligible to teach without credentials."[3]

The AAO observes that the State of California generally holds charter schools to the same standard as public schools. Specifically, section 47606(l) of the California Education Code, which became effective on January 1, 1999, states:

> Teachers in charter schools shall hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and are subject to periodic inspection by the chartering authority.

However, the section provides "flexibility" to charter schools as follows:

> It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

Id.

The petitioner and counsel interpret this clause to mean that certain charter school teachers are "exempt" from the licensure requirement. In a letter dated July 23, 2012 provided in response to the RFE, the petitioner stated that "[t]eachers of noncore classes are exempt from credentialing requirement[s] as explained in [the] enclosed FAQs of education code by California Department of Education." In support of this assertion, the petitioner provided a document entitled "Charter Schools FAQ Section 5: Questions and answers regarding charter schools staffing issues." The AAO reviewed the document. In pertinent part, the FAQ states the following:

> Q.1. What qualifications are required of charter school teachers?
>
> California Education Code (EC) Section 47605(l) (outside source states that teachers in charter schools are required to hold a Commission on Teacher Credentialing

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[3] The AAO observes that the petitioner has represented that the beneficiary is teaching middle school and high school courses. Specifically, on the LCA, the petitioner provided the addresses of its [redacted] (a middle school), and its [redacted] (a high school located in [redacted]). Further, the LCA is certified as a "secondary teacher," not a "middle school teacher." In its letter of support dated July 19, 2011, the petitioner indicated that the beneficiary will "[t]each Computer Science and Computer Science concepts to middle and high school charter students, teaching computer skills and networking courses for grades 6th – 12th." Thus, the petitioner has represented that the beneficiary will be teaching at the high school level. No explanation was provided for the petitioner's subsequent claim that the beneficiary would only be teaching at the middle school level.

> certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. However, this law also states that it is the intent of the Legislature that charter schools be given flexibility with regard to noncore, non-college preparatory courses . . . .

The AAO reviewed the FAQ in its entirety, and observes that it does not state that charter school teachers of noncore classes are "exempt" from credentialing requirements. Rather, the FAQ cites the language of the statute that "[i]t is the intent of the Legislature that charter schools be given flexibility with regard to noncore, non-college preparatory courses." Cal. Educ. Code § 47605(l) (West 2013).

The AAO notes that California law does not define "flexibility" as used in section § 47605(l) of the California Education Code. However, the California Commission on Teacher Credentialing has provided specific guidance on this topic. The agenda of the Commission's meeting on November 5-6, 1998 reflects the following opinion of the Commission, as contained in a report from the Commission's Director of Certification, Assignment and Waivers, dated October 23, 1998:

> The final sentence of § 47605 (l) expresses the "intent" of the Legislature that flexibility be given to charter schools with regard to "noncore, noncollege preparatory courses." Staff is of the opinion that the flexibility intended by the Legislature is meant to apply to the chartering authority as it inspects documents and assignments in individual charter schools and to the Commission in the exercise of its authority as it inspects documents and assignments in individual charter schools and to the Commission in the exercise of its authority to grant credentials, permits and waivers. Although intent statements are not binding, they do give an important indication of the context within which the negotiated language of the law was reached. In this case, the intent statement strongly suggests the spirit in which the language of the law should be carried out.

California Commission on Teacher Credentialing, Agenda for November 5-6, 1998, A Review of the Effects of AB 544 [o]n Teachers in Charter Schools, available on the Internet at http://www.ctc.ca.gov/commission/agendas/1998/1998-11.pdf (last visited November 22, 2013).

The report further notes that as the "Commission has little or no flexibility when making decisions about awarding credentials to individual applicants" or emergency permits, *"[i]t is in the area of its waiver granting authority that the Commission would appear to have some degree of flexibility that could be applied to charter school staffing* (emphasis added)." *Id.* The Commission's report also identified the issue of defining which courses are properly considered "noncore, noncollege preparatory" as anticipated by the statute. *Id.*

On November 16, 1998, the executive director of the Commission issued Coded Correspondence 98-9821, which states, "Effective January 1, 1999 *all teachers in charter schools* will be required to hold either [sic] a teaching credential, a long term emergency permit or a waiver of credential requirements approved by the California Commission on Teacher Credentialing (emphasis added)." *See* California Commission on Teacher Credentialing, Coded Correspondence 98-9821:

Implementation of AB 544 (Lempert) Related to Qualifications for Teachers in Charter Schools (Nov. 16, 1998), available on the Internet at http://www.ctc.ca.gov/notices/coded/1998/989821.pdf (last visited in November 22, 2013).

On April 21, 1999, the Commission's Credentials and Certificated Assignments Committee issued a report entitled "The Impact of AB 544 Related to Credentialed Teachers in Charter Schools." The report observes that "[t]he terms 'teacher' and 'noncore, noncollege preparatory courses' are not defined in the statute and are open to various interpretations." *See* California Commission on Teacher Credentialing, Agenda for May 5-6, 1999, The Impact of AB 544 Related to Credentialed Teachers in Charter Schools, available on the Internet at http://www.ctc.ca.gov/commission/agendas/1999/1999-05.pdf (last visited November 22, 2013). The report reviews various possibilities regarding the definition of "noncore, noncollege preparatory courses" and concludes that chartering authorities would be permitted to define the term.[4] *Id.* However, the Committee again reiterated that "[c]harter schools must . . . use the appropriate process to obtain credentials, emergency permits or variable term waivers *for teachers in all subjects taught in schools* (emphasis added)." *Id.*

The AAO thus finds that public sources indicate the California Commission on Teacher Credentialing interprets the credentialing "flexibility" afforded to charter schools by California law as flexibility "in the area of its waiver granting authority." The Commission has further indicated that "teachers in all subjects taught in [charter] schools" must obtain a credential, emergency permit, or waiver. The petitioner has not presented evidence that the beneficiary has a credential, emergency permit, or a waiver from the California Commission on Teacher Credentialing, nor has it presented sufficient evidence to established that a credential, emergency permit, waiver is not required. Notably, on appeal, the petitioner provided a letter dated November 30, 2012 indicating that the Commission declined the petitioner's request to provide a letter supporting the petitioner's interpretation of the law.

The AAO notes that it is the petitioner's burden to provide sufficient evidence to establish eligibility for the benefit sought. Upon review of the record of proceeding, the AAO finds that the petitioner

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[4] The AAO observes that that the petitioner has additionally failed to submit sufficient evidence to establish that the beneficiary is teaching a "noncore, noncollege preparatory course." Notably, the petitioner has a technology-focused curriculum. In a support letter dated July 19, 2011, the petitioner stated its "vision" as "Inspiring students to choose career paths in science and technology." In the same letter, the petitioner indicated that the beneficiary will teach "computer skills and networking courses for grades 6th-12th." As previously noted, the petitioner indicated on the LCA that the beneficiary will teach at addresses corresponding to a middle school in San Diego and a high school in Los Angeles. On appeal, counsel indicates that "pursuant to the charter agreement between [the petitioner] and the , Computer Science IS NOT a core subject." However, counsel did not provide a copy of the charter agreement between the petitioner and the 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).

(1) has not demonstrated that the beneficiary is licensed to perform the duties of the job offered (or would be immediately eligible for a temporary license upon her admission to the United States); or (2) submitted sufficient evidence to demonstrate that a license is not required for the proffered position. Thus, the petitioner has failed to establish eligibility for the requested benefit under Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A).[5]

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[5] The director indicated that the petition was denied because the petitioner failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner had not established the beneficiary is exempt from the requirement.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, in this case the AAO will not examine additional issues or deficiencies in the record of proceeding, except to note that there are numerous discrepancies in the record which call into question the veracity of the petitioner's claims regarding the proffered position. Notably, the petitioner provided two work sites for the beneficiary on the LCA, one in Los Angeles and one in San Diego, but failed to provide an itinerary for beneficiary. The AAO again notes that the Form I-129 indicates that the beneficiary resides approximately 150 miles away from the San Diego worksite. The petitioner and counsel have made conflicting claims as to whether the beneficiary will be employed as a high school teacher, a middle school teacher, or both. The instant Form I-129 petition was filed as a request for H-1B classification based on "[c]ontinuation of previously approved employment *without change* with the same employer (emphasis added)."