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

U.S. Citizenship
and Immigration
Services

DATE: **OCT 20 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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)

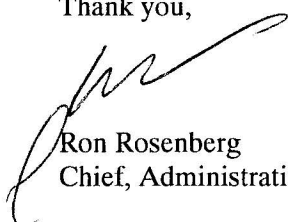
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner claims to be a "Mental/Behavioral Health and Substance Abuse Agency." It seeks to extend the employment of the beneficiary as an English and Literacy Teacher 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 revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after an administrative site visit to the petitioner's offices demonstrated that the beneficiary was not employed in the capacity specified in the petition.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on February 19, 2014.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR, dated February 21, 2013; (3) the petitioner's response to the NOIR dated March 22, 2013; (4) the director's February 19, 2014 notice of revocation (NOR); and (5) the Form I-290B, appeal brief, and supporting documentation. We reviewed the record in its entirety before issuing our decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

A brief summary of the factual and procedural history between the approval and the decision revoking it follows below.

The director revoked the petition's approval based on her determination that the petitioner had failed to establish that the beneficiary was employed in the capacity claimed in the initial petition. Specifically, the director found that the petitioner had failed to comply with the requirements governing Labor Condition Applications (LCAs) and that the proposed position did not qualify as a specialty occupation.

The Form I-129 petition was filed by the petitioner on July 27, 2011. In its letter of support dated July 14, 2011, the petitioner claimed that it is "a nonprofit multi-cultural community Mental Health and Outpatient Clinic." The petitioner further claimed that its mission is "to provide educational and vocational counseling programs to minority and non-minority youths" and that it offered a variety of educational programs including GED, Adult Basic Education (ABE) classes, and individual tutoring. It also claimed that its teachers its programs are taught by qualified teachers who have extensive experience in the education field.

Regarding the proffered position, the petitioner claimed to require the continued services of the beneficiary in the full-time position of English and Literacy Teacher. According to the petitioner, her specific duties included the following:

Instructional Strategies:

- Develop and implement plans for the ESL program and show written evidence of preparation.
- Prepare lessons for the ESL areas that reflect accommodation for individual student differences.
- Present the ESL classes to students according to the guidelines established by [the petitioner's] board policies, and administrative regulations.
- Employ a variety of instructional techniques and media for the ESL areas for students consistent with the needs and capabilities of the students groups involved.

Student Growth and Development

- Assist students in analyzing and improving methods and habits of study.
- Assess the accomplishments of students on a regular basis and provide progress reports as requires for the ESL areas.

Classroom Management and Organization

- Establish control in the classroom and administer discipline in accordance with board policies and administrative regulations.
- Assist in the selection of books, equipment and other instructional materials for the ESL areas.

Communication

- Establish and maintain open lines of communication with students and their parents.

Professional growth and Development

- Participate in the district staff development program[.]
- Stay up on current trends.

The petitioner concluded by stating that a bachelor's degree in English was required to perform the duties of the position, and further claimed that the position required (1) knowledge of the subject assigned; (2) general knowledge of curriculum and instruction; (3) ability to instruct students and manage their behavior; and (4) strong organizational, communication, and interpersonal skills. Finally, the petitioner noted that the beneficiary's fluency in the Vietnamese language was a critical requirement for the position.

The petitioner also submitted an LCA the job prospect of English and Literacy Teacher, which was certified for the occupational title of "Adult Literacy, Remedial Education, and GED Teachers and Instructors," SOC (ONET/OES) Code 25-3011; (2) a letter from [redacted] Executive Director of Adult and Community Education for the [redacted]; and (3) copies of the beneficiary's diplomas, transcripts, and an evaluation of the beneficiary's foreign academic credentials.

The director initially approved the petition on September 22, 2011.

Upon further review, however, the director determined that the approval involved gross error in that the beneficiary was not employed in the capacity claimed in the petition. Specifically, the director noted that an administrative site visit revealed that the beneficiary was not performing teaching duties as claimed in the petition, but rather was undertaking translating duties as well as administrative and clerical tasks for the petitioner. The director issued the NOIR on February 21, 2013 and afforded the petitioner the opportunity to respond.

In a response dated March 22, 2013, counsel for the petitioner addressed the issues raised in the NOIR. Counsel submitted the following documentation: (1) a second letter from [REDACTED] Executive Director of Adult and Community Education for the [REDACTED] (2) a letter from Dr. [REDACTED] Executive Director for the petitioner; (3) copy of advertisements for the petitioner's ESL classes, including one targeted toward Vietnamese speakers; (4) copies of sign-in sheets from an ESL class for the period from March 2012 to July 2012; (5) a copy of a letter from [REDACTED] claiming that she was a student in the beneficiary's class; and (6) a copy of the beneficiary's W-2, Wage and Tax Statement, for 2012.

The director reviewed the submitted evidence but ultimately revoked the petition's approval. The director found that despite the petitioner's newly-submitted documentation, the evidence of record did not establish that the beneficiary was employed in the teaching capacity claimed in the petition. Moreover, the director found that, since the beneficiary was primarily performing administrative and clerical duties, the LCA in the record did not correspond to the petition. The director revoked the petition's approval on February 19, 2014.

On appeal, counsel for the petitioner asserts that the explanation provided in response to the NOIR was sufficient to establish that the beneficiary was performing teaching duties as initially claimed in the petition. Counsel compares the original duties of the position to the updated statement of duties submitted in response to the NOIR, noting that they are virtually identical and thus establish that the beneficiary is employed in the capacity claimed in the petition. No additional documentary evidence, other than counsel's three page brief, is submitted in support of the appeal.

II. LAW AND ANALYSIS

A. Grounds for Revocation

We will turn first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds to revoke the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

B. Basis for Revocation

The director revoked the petition's approval, finding that the beneficiary was no longer employed by the petitioner in the capacity specified in the petition. Specifically, the director found that material changes to the initial statement of duties were made subsequent to approval, thereby rendering the petition, and the LCA that accompanied the petition, invalid.

Upon review of the record, we agree with the director's determination that the record contains insufficient, credible documentary evidence demonstrating that the beneficiary is in fact be employed in the position of English and Literacy teacher.

As noted above, after a post adjudicative site visit was conducted on November 14, 2011, it was determined that the beneficiary was not actually employed in the capacity claimed in the petition. Specifically, when questioned by the USCIS officer, the beneficiary claimed that she performed filing duties, performed data entry, translated the ABE and GED books and forms from English to Vietnamese, and translated the petitioner's forms from English to Vietnamese. She also indicated that on Tuesday and Thursday evenings she served as an interpreter in the adult ABE of Dr. [REDACTED]. We also note that, according to Dr. [REDACTED] July 1, 2011, submitted with the petition, the beneficiary worked as a translator and liaison between the Asian populations served between the petitioner and Dr. [REDACTED] Adult Learning Center.

After articulating these findings in the NOIR, the director afforded the petitioner the opportunity to respond. In a letter dated March 20, 2013, the petitioner's executive director claimed that the beneficiary misunderstood the questions asked about her employment due to nervousness, and provided the following additional list of duties of the proffered position:

1. Using the entry assessment information, determine the most suitable academic plan for each student.
2. Provide a variety of instructional methods that meet the various learning styles of the student.
3. Adapt the instructional materials and methods to meet the needs and goals of the student.
4. Administer a post-assessment to each student.
5. Maintain a class report.
6. Maintain sign-in sheets with class reports and class registration forms.
7. Maintain all other required forms that are required by the director.
8. Attend all required professional development sessions throughout the state.
9. Maintain professional conduct and provide a positive learning atmosphere.

The petitioner, however, submitted no independent evidence to corroborate these claimed duties.

The petitioner also submitted a second letter from Dr. [REDACTED], Executive Director of Adult and Community Education for the [REDACTED]. Dr. [REDACTED] stated that her letter is an "official recommendation" for the beneficiary, who she claims was her choice to assist with the Vietnamese population at the Adult Learning Center. She claims that the beneficiary initially served as a volunteer and that she currently "work[s] with Vietnamese students on site" at the petitioner's office. There is no indication in this letter that the beneficiary is serving in the capacity of ESL teacher or English and Literacy Teacher as claimed in the petition; rather, at best, Dr. [REDACTED] letter confirms that the beneficiary serves as her assistant and performs translation services, which is akin to the statements provided by the beneficiary herself during the administrative site visit.

Finally, it is noted that the petitioner submitted copies of sign-in sheets for one of its "Individual ESL" classes from March 2012 to July 2012. The sheets indicate that the course was taught by [REDACTED] one day per week at 1pm, and that it had only one student, [REDACTED]. The sheets are accompanied by a handwritten letter from Ms. [REDACTED] stating that the beneficiary was known as [REDACTED] and was a "very good teacher."

There is insufficient evidence in the record to establish that these sign-in sheets actually represent a class instructed by the beneficiary. Despite the explanation provided by Ms. [REDACTED] the name of the instructor and the name of the beneficiary in the instant petition differ substantially. More importantly, however, is the fact that these sign-in sheets are from 2012. The petition was filed in July of 2011, and the administrative site visit was performed in November of 2011. The fact that the beneficiary may ultimately have assumed teaching responsibilities after approval is not relevant here. Rather, the capacity that she was employed in at the time of filing and at the time of the administrative site visit is the focus of this examination. There is no evidence in the record to demonstrate that the beneficiary was actually performing the duties of a teacher at the time the petition was approved or shortly thereafter.

Finally, we return to the new statement of duties submitted in response to the NOIR and again on appeal. While counsel asserts that the newly-submitted list of duties from the petitioner, which was provided in response to the NOIR, outlines the same duties originally claimed in the petition and confirms that the beneficiary was employed as an English and Literacy teacher, there is insufficient evidence to establish that the beneficiary was performing such duties at the time of approval and at the time of the administrative site visit. The beneficiary acknowledged that she was performing translating and administrative duties, and no evidence to refute these statements has been submitted. In fact, the July 1, 2011 letter from Dr. [REDACTED] confirms that the beneficiary was acting as a translator. Merely providing a generic list of duties that corresponds to the general duties of the occupational category claimed here will not suffice.¹ 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

As such, we agree with the director's decision to revoke the approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A).²

¹ We further note that the petitioner's website states, "Our GED and tutoring programs are taught by State Certified Teachers who have extensive experience in the education field." See [REDACTED] (last visited October 6, 2014). There is no evidence in the record establishing that the beneficiary holds certification from the State of Oklahoma, thereby suggesting that the findings regarding her administrative employment as a result of the administrative site visit are accurate.

² Moreover, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, simply by virtue of its occupational classification, the proffered position as

The director also found that the LCA contained in the record does not correspond to the petition. Specifically, the director found that the beneficiary was not employed in the capacity of English and Literacy Teacher, the job prospect for which the LCA was certified. We note that neither counsel nor the petitioner address this basis for revocation on appeal.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Although the LCA, when filed, corresponded to the petition as prepared, in that the claimed occupational classification of the proffered position was the same occupational classification set forth in the LCA, it is now evident that the proffered position is not that of an English and Literacy Teacher as originally claimed. The LCA, therefore, does not correspond to the petition, nor is the occupation named in the LCA a specialty occupation as previously noted by us in this decision.³

described qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation. On the LCA, the petitioner classified the proffered position in the occupational category of "Adult Literacy, Remedial Education, and GED Teachers and Instructors." According to the *Handbook*, the occupation of "Adult Literacy and High School Equivalency Diploma Teachers" (the category most akin to the occupational category described in this petition) does not require a degree in a specific specialty for entry into the occupation. Specifically, the *Handbook* states that although most states require adult literacy and high school equivalency diploma teachers to have at least a bachelor's degree, it also indicates that a bachelor's degree in any field is acceptable. *See* DOL, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Adult Literacy and High School Equivalency Diploma Teachers" <http://www.bls.gov/ooh/education-training-and-library/adult-literacy-and-ged-teachers.htm#tab-4> (last visited October 6, 2014). Absent evidence that the proffered position of English and Literacy Teacher satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. As such, even if the proffered position here were established as being that of an English and Literacy Teacher, which it has not, the instant petition would be revoked for this additional reason.

³ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Finally, we further note that the LCA is certified for the prevailing Level 1 Wage of \$21,299 for the period from 7/2010 to 6/2011. As the LCA was certified on July 11, 2011, the petitioner should have listed the prevailing Level 1 Wage for the corresponding period, which would be 7/2011 to 6/2012.⁴ For all of these reasons, the LCA contained in the record does not correspond to the petition, and therefore the director's decision to revoke the petition's approval on this additional basis was proper.

Finally, we note that USCIS approved a prior petition on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. USCIS is not required to approve applications or 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'r 1988). It would be absurd to suggest that USCIS or any 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).

The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

III. CONCLUSION

The appeal will be dismissed and the approval of the petition revoked 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 approval of the petition remains revoked.

⁴ It is noted that the prevailing Level 1 Wage for the corresponding period was \$19,989, an amount less than the prevailing wage for the previous time period. Nevertheless, the LCA is not certified for the prevailing wage in effect at the time of certification.