

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 01 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhee

Chief, Administrative Appeals Office

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

The petitioner claims to be a non-profit charter school with approximately 24 employees that seeks to employ the beneficiary as a Computer Teacher from October 1, 2010 to September 8, 2013. 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).

The director denied the petition because she found that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment. Specifically, the director found the documentation submitted by the petitioner contained discrepancies with respect to the petitioner's number of employees, the petitioner's net annual income, and the number of the petitioner's students. Additionally, the director found that there were discrepancies between the wages of some of the petitioner's employees as listed on the petitioner's income tax return when compared to the employees' Forms W-2.

Counsel timely filed an appeal on July 12, 2010. On appeal, counsel for the petitioner asserts that USCIS did not give the petitioner an opportunity to respond to the director's findings regarding the discrepancies in the documentation submitted by the petitioner. Counsel includes a letter from the petitioner explaining the discrepancies along with supporting documentation. The petitioner explains the discrepancies found by the director as follows:

- The petitioner listed the gross income on the Form I-129 as \$1,285,846.55, which is the estimated gross income for the fiscal year of July 1, 2009 to June 30, 2010. The amount of \$596,839 listed on the 2008 tax return is the actual gross income for the fiscal year period of July 1, 2007 to June 30, 2008. The amount of \$368,489 listed on the 2007 tax return is the actual gross income for the fiscal year of July 1, 2006 to June 30, 2007. The AAO notes that the petitioner did not list a net income on the Form I-129.
- The number of employees listed on the Form I-129 was the number of full-time employees at the time the petition was filed while the Forms W-2 are for all employees, both part-time and full-time, who had worked anytime during the calendar year and received at least one paycheck.
- Any discrepancies with respect to the number of the petitioner's students are due to clerical errors and the petitioner submitted sufficient other documentation to establish that it has been doing business since 2006.
- The copies of the Forms W-2 submitted for the petitioner's H-1B workers include only taxable wages, and not tax deferred deductions for retirement plans, and health and dental insurance to which the employee may contribute. Additionally, the Forms W-2 do not include days the employees did not report to work, such as when the start date of employment is later than the first day of a calendar year, requested unpaid leave, or when an employee quits before the end of the calendar year.

The petitioner also submitted copies of its employees' 2009 pay records as well as an organizational chart.

Although the AAO agrees with the petitioner that it has submitted sufficient evidence to demonstrate that it has been doing business as a school, the AAO finds that the petitioner has failed to demonstrate that there exists a reasonable and credible offer of employment to the beneficiary as a full-time computer teacher due to a number of discrepancies as follows:

1. The occupational title used for the prevailing wage basis in the Form ETA-9035 Labor Condition Application (LCA) submitted with the petition is "MIDDLE SCHOOL TEACHERS, EXCEPT SPECIAL AND," however the petitioner's support letter and 2008-2009 Annual Report both state that the petitioner is an elementary school. Therefore, the LCA does not correspond to the proffered position of a computer teacher at an elementary school.
2. The petitioner provided names of its H-1B workers in an organizational chart. One of these employees, [REDACTED] is listed in the chart as being a computer teacher. However, the copies of this worker's 2009 pay stubs provided on appeal state that this employee is a network administrator, which is a different occupation. Therefore, it does not appear that the petitioner has met the terms and conditions of employment for this H-1B worker. Moreover, if [REDACTED] is working as a full-time computer teacher as claimed in the chart, it is unclear how the petitioner, which appears to be a small elementary school with 24 employees and, according to the Annual Report, has under 100 students, would require two full-time computer teachers.
3. Another worker, [REDACTED] is, according to the petitioner's organizational chart, working as a Turkish teacher. However, according to USCIS records, [REDACTED] has a degree in physics. Therefore, the petitioner misrepresented the subject [REDACTED] would teach in the H-1B petition it filed on her behalf. Assuming that [REDACTED] is working as a Turkish teacher as stated in the organizational chart, the petitioner would also have to demonstrate that [REDACTED] is qualified to perform the duties of a specialty occupation requiring a degree relevant to teaching a foreign language.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, simply asserting on appeal that information regarding the number of students was a clerical error does not qualify as independent and objective evidence. 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).

The petitioner has not established with consistent evidence that it has made a bona fide offer to the beneficiary as a full-time computer teacher in an elementary school. For this reason, the petition

may not be approved.

In view of the foregoing, the petitioner has not overcome the director's objections. For this reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director and as indicated above, the AAO also finds that the petitioner failed to establish that the submitted LCA corresponds to the petition. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

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:

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.*

[Emphasis added].

The LCA in this matter, which indicates the proffered position as being for a middle school teacher, does not correspond with the petitioner's support letter or the Annual Report, which state that the petitioner is an elementary school. Therefore, USCIS cannot ascertain that this LCA actually supports and corresponds to the H-1B petition. *See id.*

Additionally, the AAO finds that the petitioner has not established with consistent evidence that it will comply with the terms and conditions of employment as a full-time, elementary school computer teacher. Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. For this reason also, the petition may not be approved.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied 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.