

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  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



D2

Date: **JUN 02 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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 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,

*Michael T. Kelly*  
Perry Rhew  
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 for-profit preschool and kindergarten. It seeks to continue to employ the beneficiary as a kindergarten teacher by extending her H-1B 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 because the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the notice of decision; and (3) Form I-290B and counsel's brief with supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner stated that it has four employees and a gross annual income of \$136,438. The petitioner indicated that it wished to continue to employ the beneficiary as a kindergarten teacher from August 8, 2009 through August 8, 2012 at an annual salary of \$35,820.

The petitioner failed to demonstrate that it obtained a certified Labor Condition Application (LCA) in the occupational specialty in which the H-1B worker will be employed from the U.S. Department of Labor (DOL), which is required under 8 C.F.R. § 214.2(h)(4)(i)(B).

The AAO takes administrative notice of the H-1B petition the petitioner previously filed on behalf of the beneficiary [REDACTED] in which the petitioner stated that the beneficiary's proffered wage would be \$35,820 per year, with validity dates of October 11, 2006 to August 8, 2009. The beneficiary's Forms W-2 submitted with the present petition indicate that the beneficiary was paid \$25,056 in 2008 and \$23,152 in 2007. The petitioner also submitted two of the beneficiary's paystubs for April and one paystub for May 2009. These paystubs indicate that by May 29, 2009, the beneficiary had earned \$10,368, including sick pay and holiday pay. Further, the paystubs for April 2009 indicate the beneficiary's base salary was \$1056 every two weeks for that month, but the paystub for the last two weeks of May 2009 indicate that her base salary was only \$960. The petitioner failed to demonstrate that it paid the beneficiary \$35,820 per year. Even if the beneficiary is paid year-round by the petitioner and earns \$1056 every two weeks (which was not established by the petitioner), annualized this amount only comes to \$27,456 per year, which is substantially lower than the \$35,820 proffered wage.

The director denied the petition on September 18, 2009, finding that the beneficiary's wages were substantially lower than what was proffered by the petitioner.

On appeal, counsel asserts that USCIS did not take into account additional funds that the beneficiary received as part of her payment. Counsel argues that in 2008 the beneficiary received the difference between the \$25,056 listed in her Form W-2 and the \$35,820 proffered wage in cash and other benefits. In support of this argument, counsel has submitted deposit slips

for the beneficiary. The first deposit slip, which is for \$50, has the petitioner's name on it. The other three deposit slips submitted, which total \$1826, have only the beneficiary's name on them and therefore do not demonstrate that the funds listed on these slips came from the petitioner. No other evidence was submitted that the petitioner paid the beneficiary in cash and benefits making up the difference between the wages stated on the Forms W-2 and the proffered H-1B salary. The AAO notes that even if all four of the deposit slips submitted on appeal (for \$50, \$50, \$888, and \$888) are taken into consideration, the amounts on the deposit slips plus the \$25,056 amount listed in the beneficiary's 2008 Form W-2 total only \$26,932, which is still well below the proffered wage of \$35, 820. Counsel does not address the beneficiary's wages for 2007 on appeal. 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).

Upon review of the information submitted by counsel, the AAO finds that the wage inconsistencies have not been resolved. Pursuant to the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner attests in the H-1B petition that it will comply with the terms and conditions of the corresponding labor condition application (LCA), including payment of the required wage specified in the LCA, for the duration of the beneficiary's stay, and the petitioner made such a statement by its owner's signature to the following statement at Section 1 of the Form I-129 Supplement H: "I agree to the terms of the [LCA] for the duration of the alien's period of stay for H-1B employment." Further, the AAO notes that, by the owner's signature at Part 6 of the Form I-129, the petitioner certified that "this petition and the evidence submitted with it is all true and correct" and that "the proposed employment is under the same terms and conditions as stated in the prior approved petition." The evidence in the record of proceeding, however, does not establish that the petitioner paid the beneficiary the proffered wage for the prior approval period and has not established with consistent evidence that there exists a reasonable and credible offer of employment.

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, the AAO also finds that the beneficiary is ineligible for extended classification as an alien employed in a specialty occupation because the petitioner failed to demonstrate that, prior to the filing of the Form I-129 in this matter, it had obtained a certified LCA in support of the present petition.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby

incorporated into the particular section of the regulations requiring its submission  
....

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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. . . .*

(Italics added.)

In the instant matter, the petitioner requested an extension of H-1B employment, but appears to have not submitted a timely-certified LCA in support of this request.

As referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified-LCA from the DOL and the LCA must include the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing.

In this matter, there is no evidence that the petitioner complied with the LCA requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this reason also, the beneficiary is ineligible for classification as an alien employed in a specialty occupation.

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.