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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**

b2

Date: **JUN 25 2012**

Office: VERMONT SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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. The petition will be denied.

The petitioner claims to be an educational services company with 120 employees. It seeks to employ the beneficiary as a special education teacher 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).

On October 21, 2009, the director denied the petition, finding that the record did not contain evidence that the beneficiary is a licensed Special Education Teacher in the state of Georgia, or other evidence that he is immediately eligible to practice his profession in Georgia. On appeal, counsel for the petitioner submitted for the first time a letter dated October 29, 2009 from Georgia Professional Standards Commission (PSC) in support of his claim that the beneficiary is qualified for the proffered position.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on May 1, 2009 and supporting documentation, requesting new employment of the beneficiary from October 1, 2009 to September 30, 2012; (2) the U.S. Department of Labor (DOL) Form 9035 & 9035E Labor Condition Application for Nonimmigrant Workers (LCA) certified on April 8, 2009, valid from October 1, 2009 to September 30, 2012; (3) the director's July 1, 2009 request for evidence (RFE); (4) the petitioner's response to the director's RFE received on August 14, 2009; (4) the director's October 21, 2009 denial decision; and (5) the Form I-290B and supporting documentation. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner provided sufficient evidence to establish the beneficiary's qualifications for the proffered position.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v) states in pertinent part that “[i]f an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1A 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.”

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires.

In this matter, the petitioner seeks to employ the beneficiary as a special education teacher in the State of Georgia. According to the Official Code of Georgia Annotated (OCGA) section 20-2-200, *all teachers, service personnel, administrators, and paraprofessionals must hold a certificate issued by the Georgia PSC. Specifically, OCGA § 20-2-200(a) provides:*

The Professional Standards Commission shall provide, by regulation, for certifying and classifying all certificated professional personnel employed in the public schools of this state. No such personnel shall be employed in the public schools of this state unless they hold certificates issued by the commission certifying their qualifications and classification in accordance with such regulations.

In addition, Georgia PSC Rule 505-2-01(9) stipulates that it is the responsibility of the individual educator to meet all requirements and to maintain a valid certificate.

The record of proceeding shows that the petitioner filed the instant petition on May 1, 2009. On July 1, 2009, the director issued an RFE requesting the petitioner submit the beneficiary's license/certificate to teach in the State of Georgia, or evidence from the appropriate authority demonstrating that no license is required. The petitioner responded to the director's request on August 14, 2009 but failed to submit the beneficiary's license or evidence demonstrating that a license was not required.

On appeal, counsel submits a letter dated October 29, 2009 from the Georgia PSC stating that the beneficiary is currently eligible for a Level 5 Non-Renewable teaching certificate in certain areas upon employment in a Georgia school system.

The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner failed to establish that the beneficiary held the required certification to teach in the State of Georgia at the time the petition was filed or prior to the adjudication of the petition by the Director of the Vermont Service Center. For this reason, the petition must be denied.

Beyond the decision of the director, the AAO will enter the following additional ground upon which to dismiss the appeal and deny the petition.

The petition must be denied due to the petitioner's failure to establish that it qualifies as a United States employer or agent. The record of proceeding lacks sufficient documentation demonstrating exactly for whom the beneficiary would be providing services. Moreover, according to the submitted teaching services agreements between the petitioner and various school districts in the State of Georgia, teacher salaries will be determined by the particular school district and the school district will also determine the services provided by the beneficiary.

The record contains a letter from Clayton County Public Schools confirming that the beneficiary was selected for a teaching position within that district. While the instant petition was filed on May 1, 2009, the letter from Clayton County Public Schools is dated August 10, 2009, four months after the petition's filing. The petitioner, therefore, has failed to establish whether it has made a bona fide

offer of employment to the beneficiary at the time of filing. Additionally, given the lack of specific evidence regarding who would exercise ultimate control over the beneficiary's work and duties at the time of filing, the petitioner has also failed to establish that it is a qualifying U.S. employer with standing to file the petition. *See* 8 C.F.R. § 214.2(h)(1)(i) and (4)(ii). The petition must be denied for this additional reason.

U.S. Citizenship and Immigration Services (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).

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed 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.