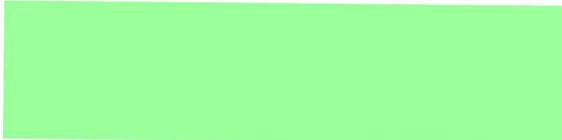


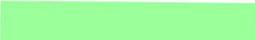
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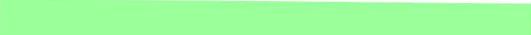
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

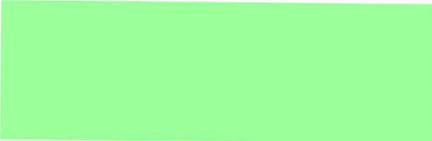


DATE: **JUN 06 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



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 in accordance with the instructions on 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting 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.

On the Form I-129 visa petition, the petitioner describes itself as an education / community school established in 2006. In order to employ the beneficiary in what it designates as a mathematics teacher position, the petitioner seeks to classify him 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, finding that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. On appeal, counsel for the petitioner asserts that the director's denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and 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's decision that the petitioner has not established by a preponderance of the evidence that it will comply with the terms and conditions of employment. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. By signing the Form I-129 petition and Labor Condition Application (LCA), the petitioner attests that it will comply with the wage requirements.

The primary rules governing an H-1B petitioner's wage obligations appear in the U.S. Department of Labor (DOL) regulations at 20 C.F.R. § 655.731. Based upon the excerpts below, the AAO finds that this regulation generally requires that the H-1B employer fully pay the LCA specified H-1B annual salary: (1) in prorated installments to be disbursed no less than once a month; (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly; and (3) within the work year to which the salary applies.

The pertinent part of 20 C.F.R. § 655.731(c) states the following:

*Satisfaction of required wage obligation.*

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section
- (2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:
  - (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
  - (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);
  - (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
  - (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
  - (v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).
- (3) *Benefits and eligibility for benefits* provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (e.g., full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (e.g., Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

\* \* \*

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (e.g., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .

(5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

In this case, the petitioner stated that it intends to employ the beneficiary on a full-time basis. On the Form I-129 petition (pages 5 and 17) and LCA, the petitioner reported that the salary for the proffered position would be \$42,000 per year. The instructions to Form I-129 state that "[t]he rate of

pay is the salary or wages paid to the beneficiary. Salary or wages must be expressed in annual full-time amount and **do not include non-cash compensation or benefits.** [Emphasis added]."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 1, 2012. With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The notice outlined the documentation to be submitted and included a request to "[s]ubmit copies of the petitioner's payroll summary, W-2's and W-3's evidencing wages paid to all employees for 2009 and 2010."

The petitioner responded with several documents, including its 2009 and 2010 Form W-2, Wage and Tax Statements, issued to its employees. In reviewing the documentation provided by the petitioner, the director found that there were discrepancies in the stated wages and the actual annual wages paid to H-1B employees. In the denial, the director provided as examples the names of three employees, the associated receipt numbers, the stated annual wages, and the wages that were actually paid to the employees according to the Form W-2, Wage and Tax Statements. The director noted that the Form W-2 wage data did not support a finding that the petitioner paid the H-1B employees the required wages under the statutory and regulatory provisions.

On appeal, counsel states, in part, the following:

There are a variety of lawful reasons for differences in payroll figures. For example, H-1B workers rarely start on the very first day of a calendar year. The Director would have to agree that most H-1B's are effective at the start of a fiscal year (Oct. 1<sup>st</sup>) which would reflect a rather low aggregate pay for that given calendar year when compared to the annual pay rate. The late start date would result in a lower annual pay on a W-2.

Another example would be H-1B workers taking requested time off for a myriad of reasons (health, pregnancy, travel back home for family reasons, or personal reasons like marriage). Those requested time off do not have to be compensated under DOL LCA guidelines. Those missed wages would reflect a lower annual pay on a W-2.

Yet another example would be that an H-1B worker simply quits the job during the year. Quitting early in the year would reflect a very low annual pay on a W-2.

The Director based its finding by taking the wage amount from Box 1 of the W-2 form. As indicated in the IRS regulations, only "taxable wages" should be reported on Box 1 of the W-2.

\* \* \*

In sum, Petitioner's contribution payments to employees' health/dental insurance plans and STRS [State Teacher Retirement Systems] funds do not have to be reported

in Box 1 of Forms W-2. This conclusion is supported by the LCA regulations at 20 CFR Section 655.731.

\* \* \*

The petitioner's contribution payments for teachers' retirement plan, as well as health and dental insurance premiums are among the authorized deductions from the H-1B required wage obligations as mandated by the LCA regulations.

By signing the Form I-129, the petitioner confirms "under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct" and it "agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment." The petitioner attests that it has read and agreed to the labor condition statements at Section H., which include confirming that it will "[p]ay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time." The required wage must be paid to the employee, cash in hand, free and clear, when due. *See* 20 C.F.R. § 655.731(c)(1).

Although counsel claims that the reason the Form W-2 wage numbers are lower than the wage amounts stated on the Form I-129 and LCA could be for a "variety" of reasons, including because the "[p]etitioner's contribution payments to employees' health/dental insurance plans and STRS funds do not have to be reported in Box 1 of Forms W-2," this claim is not persuasive. There is no evidence that the value of the benefits has been tabulated and reported and the record of proceeding lacks documentary evidence that establishes or corroborates counsel's assertion. Accordingly, counsel's uncorroborated assertions merit no evidentiary weight. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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, a simple assertion by counsel on appeal does not qualify as independent and objective evidence. 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).

Counsel further claims that "the issue of prior H-1B's was not even raised in the RFE. If so, the petitioner would have had the opportunity to explain the figures with appropriate documentation." It

must be noted that the petitioner did not submit the Form W-2, Wage and Tax Statements, with the initial petition. The documents were not received and, consequently reviewed by USCIS, until the petitioner sent the documents to USCIS *in response to the RFE*. Furthermore, with the RFE, the petitioner was put on notice of that additional evidence was required to determine its eligibility and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Counsel's assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. His attempt to shift the evidentiary burden in this proceeding is without merit. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972).

The regulations clearly indicate that the issuance of an RFE is discretionary and that the director may instead deny an application when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8). There is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) unambiguously permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director.

With regard to this perception by counsel of error in the service center's not having issued an additional RFE, or a Notice of Intent to Deny (NOID), based upon the concerns raised by the wage records submitted in response to the RFE, the AAO also notes, *arguendo*, that, even if the director had erred as a procedural matter in not issuing an additional RFE or a NOID – which, the AAO finds, the director did not err - it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner and counsel have in fact supplemented the record on appeal and, on appeal, had the opportunity to submit evidence to overcome the grounds of the director's decision, but did not use that opportunity to submit such evidence. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with evidence. In this regard, it should also be noted that the AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and that even after the petitioner was afforded the opportunity to submit evidence to effectively rebut and overcome the director's findings, it did not do so.

Based upon a complete review of the record, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. The AAO finds that the director was correct in the determination that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. Accordingly, the director's decision to deny the petition will not be disturbed.<sup>1</sup>

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<sup>1</sup> The director indicated that the petition was denied because the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. No other reasons were provided by the director for the denial. As noted above, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*,

As previously mentioned, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

**ORDER:** The appeal is dismissed. The petition is denied.