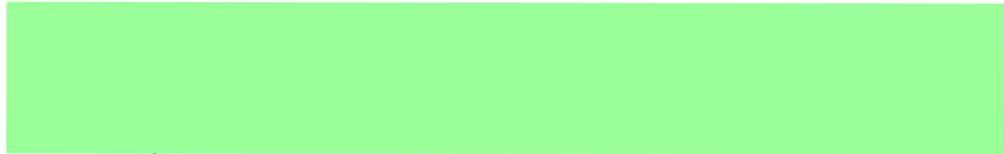




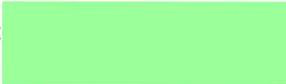
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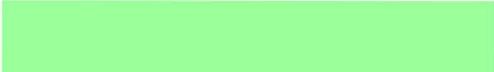
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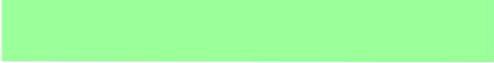


Date: JUN 20 2013

Office: CALIFORNIA SERVICE CENTER

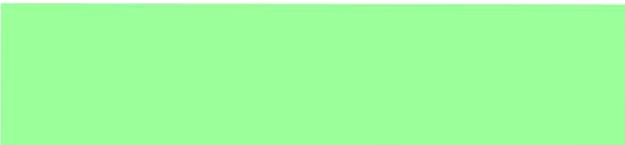
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IN RE: Petitioner: 

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center acting 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 submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center, reporting that it is a public charter school with 135 employees and a gross annual income of approximately \$8 million.

Seeking to employ the beneficiary in what it designates as a math instructional coordinator position, the petitioner filed this H-1B petition in an endeavor 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 a reasonable and credible offer of employment existed for the beneficiary. Specifically, the director found that the petitioner had failed to establish that it was authorized to operate as an educational institution and that it had failed to demonstrate it would continue to 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 acting director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

A review of the evidence submitted by the petitioner demonstrates that the petitioner engaged in a Charter Contract with the Arizona State Board of Education on August 30, 2001. It is further noted that the petitioner's contract was for the operation of a charter school identified as [REDACTED]. A review of Paragraph 6, entitled "Term of Contract," demonstrates that the charter agreement is good for fifteen years from the date of August 30, 2001. Moreover, the record contains a Notification of Change Request signed by the Arizona State Board of Education of May 22, 2002, which changes the name of the charter school under this contract from [REDACTED] to [REDACTED] the school for which this petition is filed.

The record also contains copies of the petitioner's tax returns for 2007, 2008, and 2009, and a review of public records demonstrates that the petitioner is a corporation in good standing. Further review of the petitioner's website, and the website for the location at which the beneficiary's services are requested in this petition, demonstrate that the petitioner is operational. For these reasons, the AAO will withdraw the director's finding that the petitioner is not operating in the capacity claimed in the petition.

However, for the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established with consistent evidence that it will comply with the terms and conditions of employment.

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) of the Act, 8 U.S.C. 1182(n). 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 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).

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 3 and 17) and LCA, the petitioner reported that the salary for the proffered position would be approximately \$36,000 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."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 9, 2011. 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 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 six employees, the associated receipt numbers, the stated annual wages, and the wages that were actually paid 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. The director further noted that numerous employees identified on the petitioner's line-and-block organizational chart were not included in the W-2 wage statements, thereby raising questions regarding the legitimacy of the petitioner's organizational and employment structure.

On appeal, counsel stated, in part, that the findings of the director were erroneous and argued that the director provided no opportunity for the petitioner to respond to these new allegations raised for the first time in the denial notice.

The AAO is not persuaded by counsel's assertion. Neither section 212(n) of the Act, the regulations at 20 C.F.R. § 655.731(c), nor any other statutory or regulatory provision permits an employer to pay wages below the required wage specified on the LCA. Further, the AAO finds discrepancies in the stated wages and the actual annual wages paid to at least 6 H-1B employees, as well as a lack of evidence that additional employees identified on the petitioner's organizational chart were actually compensated. The AAO further notes that, upon review of the examples cited by the director, the majority of these reveal discrepancies of between \$10,000 and \$20,000 per employee.

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).

Furthermore, counsel asserts that U.S. Citizenship and Immigration Services' (USCIS) calculation of the wages paid was erroneous, since it focused on Box 1 of the W-2 forms and thus failed to account

for authorized deductions permitted under 20 C.F.R. § 655.731(c)(9). Counsel further asserts that the inconsistencies involved could have been easily explained had USCIS issued a second, targeted request for additional evidence, such as travel and personal leave records for the employees in question, which counsel claims would have explained the inconsistencies. Counsel's statements, however, are not persuasive since 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).<sup>1</sup>

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).

As briefly discussed above, counsel repeatedly claims that that the "proper course of action" for USCIS after noting the wage discrepancies should have been to issue a second, targeted request for leave and travel requests for the employees in question. Counsel's assertions are not persuasive. The regulations clearly indicate that the issuance of an RFE is discretionary and that the director may instead deny a petition when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8). Furthermore, with the RFE, the petitioner was put on notice that additional evidence was required and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. 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. 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).

On appeal, the petitioner supplemented the record, and could have submitted evidence to overcome the grounds of the acting director's decision, but failed to submit such evidence. Therefore, it would

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<sup>1</sup> If, as counsel asserts, personal leave and travel records for the employees in question would have explained the discrepancies in the 2009 wages cited by the director, counsel should have submitted such evidence on appeal. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

serve no useful purpose to remand the case simply to afford the petitioner another opportunity to supplement the record with evidence.

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 approved. The director was correct in determining that the petitioner failed to credibly establish that it would comply with the terms and conditions of employment. Accordingly, the acting director's decision to deny the petition will not be disturbed.

Beyond the decision of the director, the record suggests an additional issue that was not addressed in the decision of denial. Specifically, it does not appear that the beneficiary is qualified to perform the duties of the proffered position.<sup>2</sup>

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:

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<sup>2</sup> 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 (9<sup>th</sup> 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).

- (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.

The petitioner is seeking to employ the beneficiary as a math instructional coordinator. Regarding the requirements for entry into this occupational category, the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* states:

School districts generally require instructional coordinators to have at least a master's degree in curriculum and instruction or in a related field. Some instructional coordinators have a master's degree in the content field they plan to specialize in, such as math or history.

Master's programs in curriculum and instruction teach students about curriculum design, instructional theory, and collecting and analyzing data. To enter these master's programs, students usually need a bachelor's degree from a teacher education program or in a related field.

#### Licenses

Instructional coordinators in public schools are generally required to be licensed. Most school districts require a teaching license; some require an education administrator license. For information about teaching licenses, see the profile on high school teachers. For information about education administrator licenses, see the profile on elementary, middle, and high school principals.

#### Work Experience

Most school districts require instructional coordinators to have experience working as a teacher or as a principal or other school administrator. For some positions, they may require experience teaching a specific subject or grade level.

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. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

According to the *Handbook*, an instructional coordinator working in a public school is typically required to have a master's degree in either curriculum or instruction, or in the content field he or she plans to specialize in. Additionally, in the petitioner's letter of support dated January 6, 2011, the petitioner stated that the minimum requirement for the proffered position is at least a master's degree in mathematics or mathematics education field, or an equivalent in education and experience. The record, however, does not establish that the beneficiary possesses the requisite education for entry into the position.

The record contains an educational evaluation from [REDACTED] which states that the beneficiary has the U.S. equivalent to a bachelor's degree in mathematics. Although the petitioner claims that the beneficiary taught mathematics in various high schools, there is no additional evidence to support this claim, and no independent credentials evaluation equating this combination of education and experience to that of a master's degree in mathematics.

Moreover, the *Handbook* indicates that instructional coordinators are generally required to be licensed in public schools. While the AAO acknowledges that the petitioner is a private charter school, there is insufficient evidence to demonstrate that the beneficiary is exempt from this requirement. Although the record contains a statement from the State of Arizona's Department of Education, which states that charter school *teachers* are exempt from Arizona State Statute § 15-502.B, which requires all public school teachers to be certified, the proffered position in this matter is that of an instructional coordinator, not a teacher.

Absent evidence establishing that the beneficiary is qualified and immediately eligible to perform the duties of a math instructional coordinator for the petitioner, the petition cannot be approved. There is no evidence that the beneficiary holds (1) a U.S. master's degree in mathematics from an accredited college or university, (2) a foreign degree determined to be equivalent to such a degree, or (3) a pertinent license or certification or is exempt from said requirement. Moreover, since the record lacks any documentary evidence to support the petitioner's claim that the beneficiary worked as a math teacher in various schools both in the United States and abroad over the past twelve years, the AAO is precluded from making a Service determination that the beneficiary's combination of education and experience qualifies him for the proffered position. As previously stated, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

(b)(6)

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The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

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