



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: SEP 05 2013

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 14, 2011. In the Form I-129 visa petition, the petitioner describes itself as a non-profit educational institution/charter school established in 2006. In order to employ the beneficiary in what it designates as a mathematics teacher position, the petitioner seeks to classify her 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 on April 24, 2012, finding that the petitioner failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner had not established the beneficiary to be exempt from the requirement. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that all evidentiary requirements were satisfied.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the 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 that the petitioner has failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner has not established the beneficiary is exempt from the requirement. Accordingly, the appeal will be dismissed, and the petition will be denied.

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a mathematics teacher in St. Louis, Missouri from January 16, 2012 to January 15, 2015. In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Middle School Teachers, Except Special and Career/Technical Education" - SOC (ONET/OES) code 25-2022, at a Level I (entry level) wage.

The director reviewed the initial evidence and found it insufficient to establish eligibility for the benefit sought. The director issued an RFE on February 16, 2012. The petitioner was put on notice that additional evidence was required and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO notes that, among other evidence, the director specifically requested that the petitioner provide evidence of the beneficiary's Missouri teacher's license or evidence that the beneficiary is exempt from the licensing requirements. The director further stated, "If the state where the beneficiary will work allows an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation, provide evidence of such and a copy of the senior or supervisor's license to practice as a member of

the profession." The director requested that the petitioner provide an organizational chart "indicat[ing] who will direct the beneficiary, by name and job title (emphasis in original)."

On April 12, 2012, the petitioner and counsel responded to the RFE by submitting a letter and additional evidence. Among the evidence submitted was (1) a block-and-line organizational chart for the petitioner; (2) a listing of the petitioner's staff; (3) a copy of section 160.420 of the Missouri Revised Statutes; and (4) copies of State of Missouri educator's certificates and teacher certificates for several individuals.

The director reviewed the information provided by the petitioner and determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary either possesses the requisite license or is exempt from the licensure requirements. The director denied the petition on April 24, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted copies of previously submitted documents.

The issue before the AAO is whether the petitioner has established eligibility for the benefit sought. More specifically, whether the petitioner has demonstrated that the beneficiary either possesses the requisite license or is exempt from the licensure requirements.

The AAO first notes that in adjudicating petitions pursuant to the "preponderance of the evidence" standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). The preponderance of the evidence standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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.

Section 214(i)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." The regulations on the licensure requirements for H-1B and other H nonimmigrant classifications are at 8 C.F.R. §§ 214.2(h)(4)(v)(A) to (E).

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), where, as here, a state or local license, registration, or certification is required for an individual to fully perform the duties of an occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that credential prior to approval of the petition. The regulation states:

*General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C 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.

There are regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license. The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) addresses situations where the beneficiary has been issued temporary licensure. It states:

*Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

As the petitioner has not indicated, or provided any evidence, to suggest that a temporary license is available to the beneficiary, this provision is not relevant to the appeal.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(C) addresses situations where an unlicensed beneficiary is permitted to fully practice an occupation under the supervision of a licensed senior or supervisory personnel. This provision states:

*Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

In response to the RFE, counsel asserted that the "State of Missouri allows charter schools to employ non-certified instructional personnel provided that uncertified teachers do not fill more than 20% of the full time instructional staff positions." Counsel indicated that the petitioner currently has three noncertified teachers. In support of this assertion, counsel and the petitioner provided a staff list indicating that it has 32 certified teachers and three noncertified teachers. The petitioner also provided copies of 32 teacher/educator certificates that it claims correspond to its certified teachers.

The AAO observes that the State of Missouri allows charter schools to employ some noncertified instructional staff members, provided that certain conditions are met. Specifically, section 160.420(2) of the Missouri Revised Statutes states the following regarding unlicensed instructional personnel:

A charter school may employ noncertificated instructional personnel; provided that no more than twenty percent of the full-time equivalent instructional staff positions at the school are filled by noncertificated personnel. All noncertificated

instructional personnel shall be supervised by certificated instructional personnel. . . . The charter school shall ensure that all instructional employees of the charter school have experience, training and skills appropriate to the instructional duties of the employee . . . . Appropriate experience, training and skills of noncertificated instructional personnel shall be determined considering:

- (1) Teaching certificates issued by another state or states;
- (2) Certification by the National Board for Professional Teaching Standards;
- (3) College degrees in the appropriate field;
- (4) Evidence of technical training and competence when such is appropriate; and
- (5) The level of supervision and coordination with certificated instructional staff.

In response to the RFE, the petitioner submitted a block-and-line organizational chart. In this chart, there is a direct line from a block with the name [REDACTED] School Principal, to a block bearing the beneficiary's name, one level below Mr. [REDACTED]. The chart indicates that the beneficiary will be directly supervised by Mr. [REDACTED] the school principal. The AAO observes that in the staff list provided by the petitioner, Mr. [REDACTED] is described as "Non-Instructional." Under the column titled "Certified/Uncertified," the petitioner listed "NA" for Mr. [REDACTED]. Of the thirty-two teacher/educator certificates provided by the petitioner, none bear the name [REDACTED]. Thus, by means of the organizational chart the petitioner has represented that the beneficiary will be supervised by an individual who is neither "instructional" nor "certificated."

Additionally, in response to the RFE, in a letter dated April 3, 2012, the petitioner stated that the beneficiary will be supervised by "math teacher [REDACTED] who has a teaching certificate from the Missouri Department of Education." Notably, in the organizational chart provided by the petitioner, Ms. [REDACTED] appears in a different column than the beneficiary, and several rows below the beneficiary. No other evidence regarding the petitioner's supervisory structure was provided. Thus, the petitioner's statement regarding who will supervise the beneficiary is inconsistent with the only evidence in the record of proceeding submitted by the petitioner depicting the beneficiary's chain of supervision.

In addition, the AAO observes that none of the Missouri Department of educator/teacher certificates provided by the petitioner bears the name [REDACTED]. On the petitioner's staff list, the petitioner has marked [REDACTED] name with an asterisk and written [REDACTED]. Later, in the document the petitioner states "Last Name stated on the teaching certificate." The AAO notes that the petitioner has provided a copy of an educator's certificate bearing the name [REDACTED] which expires in 2015. However, the petitioner has furnished no evidence to establish that the certificate bearing the name [REDACTED] was issued to "Elizabeth Thureau," who the petitioner claims will supervise the beneficiary. The petitioner failed to provide any documentation to establish that Ms. [REDACTED] and Ms. [REDACTED] are the same person. Thus, even if the petitioner had established that the beneficiary will be supervised by Ms. [REDACTED]

(which it has not), the AAO could not find that the petitioner has established that the beneficiary would be supervised by a "certificated" instructional staff member, as required by Missouri law.

The AAO notes that it is the petitioner's burden to provide sufficient evidence to establish eligibility for the benefit sought. In the instant case, the petitioner has provided conflicting information regarding the beneficiary's chain of supervision. Further, the petitioner has failed to provide sufficient evidence to establish that either of the individuals that it claims will supervise the beneficiary meets the requirements set forth by section 160.420(2) of the Missouri Revised Statutes, which states that "[a]ll noncertificated instructional personnel shall be supervised by certificated instructional personnel."<sup>1</sup>

Upon review of the record of proceeding, the AAO finds that the petitioner (1) has not demonstrated that the beneficiary is licensed to perform the duties of the job offered (or would be immediately eligible for a temporary license upon her admission to the United States); or (2) submitted sufficient evidence to demonstrate that a license is not required for the proffered position. Thus, the petitioner has failed to establish eligibility for the requested benefit under Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A).<sup>2</sup>

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<sup>1</sup> The AAO notes that the petitioner has furnished no explanation as to its determination that the beneficiary has "experience, training and skills appropriate to the instructional duties of the employee," as required by Missouri statute. The petitioner provided an evaluation of the beneficiary's credentials indicating that she holds the U.S. equivalent of a Bachelor of Science degree in mathematics. Upon review of the record, however, the petitioner does not assert that the beneficiary has a teaching certificate issued by another state. Furthermore, the petitioner does not claim that the beneficiary has been granted certification by the National Board for Professional Teaching Standards. Additionally, the petitioner has not submitted probative evidence of technical training and competence. Moreover, the petitioner makes a general claim that the beneficiary will be supervised, but has not demonstrated any particular level of supervision and coordination with certificated instructional staff. Furthermore, the petitioner has not demonstrated that the beneficiary has any teaching experience or has taken any classes in the field of education.

While obtaining her degree, the beneficiary failed thirteen mathematics courses and received grades of "D" in nine courses. The petitioner submitted an evaluation of the beneficiary's credentials in which the evaluator acknowledges "that while [the beneficiary] failed and received low grades in some of the courses in her Bachelor's Degree program in Mathematics at [REDACTED] including courses in Abstract Mathematics, Analytical Geometry, Geometry, Abstract Algebra, and Differential Geometry, she retook and subsequently passed every course that she failed." While the beneficiary's transcript indicates that the beneficiary retook the courses she failed, it must be noted that for some of the classes (such as Analytical Geometry II and Analysis IV) she retook the courses and received grades of D's. For courses such as Abstract Mathematics II and Differential Geometry, the beneficiary failed the courses, retook the courses and failed them again, and then finally passed the courses on the third attempt. Notably, the petitioner claims that the beneficiary will serve as a mathematics teacher and classified the proffered position as falling under the occupational category "Middle School Teachers, Except Special and Career/Technical Education" in the LCA.

<sup>2</sup> The director indicated that the petition was denied because the petitioner failed to establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner had not established the beneficiary is exempt from the requirement.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal will be dismissed.

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The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, in this case the AAO will not examine additional issues or deficiencies in the record of proceeding, except to note that the petitioner classified the proffered position under the occupational category "Middle School Teachers, Except Special and Career/Technical Education" – SOC (ONET/OES Code) 25-2022. The AAO observes that the petitioner has described itself as a "school [with] an enrolling capacity of 350 students from kindergarten to the 8<sup>th</sup> grade." The petitioner, however, has not provided sufficient information with respect to the beneficiary's schedule, the grade level she will be teaching, the specific subject matter, and number of students that she will be teaching. The petitioner has failed to adequately describe the proffered position.