



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **OCT 24 2014** 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:

[Redacted]

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for action consistent with this decision.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center. In the Form I-129, the petitioner describes itself as an enterprise engaged in education established in 2005. The petitioner seeks to classify the beneficiary 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).

In a letter dated August 26, 2010, the petitioner claimed that the beneficiary is exempt from the six-year limitation on the authorized period of stay in H-1B classification. Specifically, the petitioner asserted that the beneficiary was exempt under section 106(a) of the "American Competitiveness in the Twenty-First Century Act," which authorizes extensions in one-year increments if a labor certification or employment-based petition under 203(b) of the Act has been pending for 365 days or more.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary was exempt from the six-year limit in H-1B classification as the application for labor certification filed on his behalf had been denied. On appeal, the petitioner submitted documentation indicating that it had requested reconsideration of the denial of the labor certification.

Upon receipt of the appeal, we conducted a preliminary review of the record of proceeding and found numerous discrepancies regarding the nature of the proffered position and the duties to be performed by the beneficiary.¹ We issued a Notice of Derogatory Information (NDI). Thereafter, counsel for the petitioner submitted a response to the NDI.

II. THE DIRECTOR'S DECISION

The director denied the petition finding that the petitioner failed to establish that the beneficiary was exempt from the six-year limit in H-1B classification. Upon review, we find that the application for labor certification was denied; however, thereafter, the petitioner submitted a request for reconsideration. Thus, a final decision had not been made to deny the application for labor certification.² Accordingly, we hereby withdraw the director's decision to deny the H-1B petition on this basis.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² On September 20, 2013, the Board of Alien Labor Certification Appeals affirmed the denial of the labor certification. The judge found that the certifying officer properly denied certification.

Upon review, however, we note that there are additional issues beyond the decision of the director that preclude the approval of the petition. Accordingly, the matter will be remanded to the director for review and issuance of a new decision.

III. ADDITIONAL ISSUES

A. Specialty Occupation

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Here, the petitioner has provided inconsistent information about the nature of the proffered position, which undermines its credibility with regard to the services the beneficiary will perform, as well as the actual nature of the proffered position.³ When there are numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For example, the following inconsistencies were noted in our NDI:

- The petitioner indicated that the beneficiary will be employed as a **middle school math teacher**:
 - In the Form I-129 petition, the proffered position is described as "Mathematics Teacher";

³ Although the petitioner bears the burden to establish eligibility for the benefit sought, USCIS may verify information submitted to meet that burden. Agency verification methods may include but are not limited to: review of other filings; review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. *See generally* sections 103, 204, 205, 214, 291 of the Act; 8 U.S.C. §§ 1103, 1154, 1155, 1184, 1361 (2012); 8 C.F.R. § 103.2(b)(7), 8 C.F.R. § 103.8(d)(2011).

The term record of proceeding is the official history of any examination or proceeding before USCIS, and in addition to the petition includes any other evidence relied upon in the adjudication. 8 C.F.R. § 103.8(d)(2011). In accordance with 8 C.F.R. § 103.2(b)(16)(i), USCIS will notify a petitioner of derogatory information of which it is unaware. In the filings described here, the petitioner submitted information regarding the nature of the position to USCIS. Thus, the petitioner was aware of the information contained in those filings. Accordingly, USCIS was not required to provide notice to the petitioner of the inconsistencies and discrepancies. Nevertheless, with the NDI, we advised the petitioner of the material and offered it an opportunity to rebut the information and present information on its behalf.

It is incumbent upon the petitioner to resolve the inconsistencies 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).

- In the Form I-129 petition, the beneficiary's present occupation is described as "Teacher & Mathematics Department Head";
 - In response to the director's request for evidence (RFE), the petitioner submitted its mathematics curriculum for grades 6, 7, and 8;
 - In the letter dated August 26, 2010 filed in support of the Form I-129, the petitioner describes itself as a "community middle school";
 - Also in the letter, the petitioner described the duties of the proffered position as those of a classroom mathematics instructor, and described the beneficiary's experience as a mathematics teacher and head of the mathematics department;
 - In response to the RFE, the petitioner provided a description of the proffered position, which indicates that the beneficiary will "teach 30 hours of mathematics classes including the preparation time" per week, and occupy the rest of his time with duties such as classroom preparation, coordination of extracurricular activities, and overseeing the assigned teacher aide; and
 - The petitioner's tax returns describe the petitioner as a "middle school" and as an "[redacted] School that serves children for grades 5-8";
 - The petitioner submitted a sample weekly schedule for the 2009-2010 academic year indicating that the beneficiary would teach six academic periods four days a week and 4 academic periods one day a week.
- The petitioner indicated that the beneficiary will be employed as a **secondary school teacher**:
 - The petitioner provided an Labor Certification Application (LCA) in support of the Form I-129 petition, classifying the proffered position as pertaining to the occupational category, "Secondary School Teachers, Except Special and Vocational" SOC (ONET/OES Code) 25-2031. The Online Wage Library database includes the occupational category "Middle School Teachers, Except Special and Vocational" SOC (ONET/OES Code) 25-2022; however, this occupational category was not selected by the petitioner.
 - The petitioner indicated that the beneficiary will be employed as an **educational administrator**:
 - The Form I-129 petition was filed on September 9, 2010 for "[c]ontinuation of previously approved employment without change with the same employer."
 - The Labor Condition Application (LCA) indicates that the petitioner seeks "[c]ontinuation of previously approved employment without change with the same employer."
 - With the Form I-129, the petitioner submitted an ETA Form 9089 on behalf of the beneficiary for the position of "Dean of Academics," which is classified under the occupational category "Educational Administrators,

Elementary & Secondary" SOC (ONET/OES Code) 11-9032 at a Level II. This form contains the following relevant attestations:

- On page 3 the petitioner indicated that the position requires two years of administrative experience and an Ohio Administrator's license;
 - On page 6 the petitioner indicated that the beneficiary has been employed with the petitioner since September 1, 2004 as "Dean of Academics";
 - On page 7 the petitioner indicated that the beneficiary was employed since 2007 as "Dean of Academics and Mathematics Teacher," and from 2006 to 2007 as "Dean of Academics, Teacher and Mathematics Department Head";
 - On page 11 the petitioner described the responsibilities of the position of "Dean of Academics." These duties are administrative in nature. They are not instructional.
- In the beneficiary's resume, submitted in support of the Form I-129, he describes his position as "Dean of Academics and a Mathematics Teacher," and lists numerous duties of an academic administrator.
 - U.S. Citizenship and Immigration Services (USCIS) records reflect that the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on July 21, 2010. This petition was filed in conjunction with a National Interest Waiver. In support of the Form I-140 petition, the petitioner provided the following documents, which include relevant attestations:
 - An ETA Form 9089 (signed by the beneficiary and the petitioner on July 14, 2010), which states on page 6 that the beneficiary has been employed by the petitioner since September 1, 2004 as "Dean of Academics/Math Teacher";
 - A support letter dated July 12, 2010, in which the petitioner indicated that the beneficiary was employed by the petitioner as the Dean of Academics and as a Mathematics Teacher from 2007 until the date of the letter (2010);
 - A support letter prepared by [REDACTED] Dean of Students at [REDACTED] dated September 27, 2010, which states: "At [the petitioner's school], [the beneficiary] is the Dean of Academics-overseeing student grades, school testing and teacher supervision."
 - USCIS records indicate that another Form I-140, Immigrant Petition for Alien Worker, was filed on behalf of the beneficiary on November 19, 2012. In support of this Form I-140, the petitioner in that matter provided various documents, which include the following relevant attestations:
 - A certified ETA Form 9089 (signed by the beneficiary on November 9, 2012), which states on page 7 that the beneficiary was employed by the instant petitioner between December 1, 2005 and April 1, 2011 as "Dean of Academics/ Math Te[acher]."

- USCIS records reflect that the beneficiary provided a Form I-485, Application to Register Permanent Residence or Adjust Status, on November 19, 2012. In support of this application, the beneficiary filed a Form G-325A, Biographic Information.
 - On the Form G-325A, signed by the beneficiary on November 2, 2012, the beneficiary attests that he was employed by the petitioner in the occupation of "Dean of Acad/Math Teac" from December 2005 until April 2011.
- **Additional Information:**
 - An organizational chart, also submitted in response to the RFE for the Form I-129, indicates that the petitioner employs four individuals other than the beneficiary in positions entitled "Math Teacher." The individuals are [REDACTED]. However, the quarterly wage reports provided by the petitioner indicate that the beneficiary's salary differs significantly from other individuals employed as math teachers by the petitioner. The wage reports reflect that the beneficiary is the petitioner's second highest paid employee.
 - According the petitioner's organizational chart, the petitioner employs 29 individuals, including the beneficiary. Of these individuals, 17 are identified as teachers or instructors and 5 of the 17 teachers are identified as Math Teachers.

The petition contains inconsistent and conflicting statements regarding the proffered position. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position qualifies as a specialty occupation. The tasks as described fail to communicate (1) the substantive nature and scope of the beneficiary's employment within the petitioner's business operations; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty.

Further, it is noted that the petitioner did not state that there are any particular academic requirements for the proffered position. Instead, the petitioner indicated that the beneficiary's academic credentials and experience qualify him to serve in the proffered position. However, the test to establish a position as a specialty occupation is not the credentials and skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent).

Therefore, we are precluded from finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position,

which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has not satisfied any of the criteria under the applicable provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A).

B. Labor Condition Application

The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment. Petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

As noted previously, the petitioner has characterized the duties of the proffered position as pertaining to multiple occupational categories. When the duties of a proffered position involve more than one occupational category, the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, if the petitioner believed its position is a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. However, the LCA submitted in support of the instant petition is for the occupation

with the *lowest prevailing wage* of the three occupational categories with which the petitioner has associated the proffered position.⁴

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).⁵ USCIS is responsible for determining whether the LCA filed in support of the Form I-129 actually supports that petition. That is, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that DHS (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 supports that petition. 20 C.F.R. § 655.705(b).

Here, the petitioner has failed to submit a certified LCA that corresponds to the claimed duties of the proffered position. Thus, for this reason also the petition cannot be approved.

IV. CONCLUSION

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). For the reasons discussed, the matter will be remanded to the director for further review and issuance of a new decision.

ORDER: The director's April 12, 2011 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.

⁴ The prevailing wage for "Middle School Teachers" SOC (ONET/OES Code) 25-2022 for the relevant time period in [REDACTED] OH was \$43,703 per year, and the prevailing wage for "Education Administrator" SOC (ONET/OES Code) 11-9032 was \$70,940 per year.

⁵ Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).