U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B-6

[redacted]

FILE: LIN 03 110 55083 Office: NEBRASKA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed.[1]

The petitioner is a healthcare facility for severely handicapped children. It seeks to employ each beneficiary permanently in the United States as a "developmental disability specialist."[2] The instant petition was supported by a Form ETA 750 filed with the Department of Labor (DOL) on September 6, 2002. On August 14, 2003, the director issued a Notice of Intent to Deny (NOID), for this petition and the related petitions LIN 03 072 51157 and LIN 03 067 51563. The NOID explained that it appeared that the petitions could not be approved as a matter of law, so no additional evidence was being requested. Nonetheless, the petitioner was afforded an opportunity to submit any additional information or arguments, including any precedent decisions that should be considered. On September 15, 2003, the petitioner's counsel submitted a response to the NOID, submitting additional information and arguments. The petitioner's counsel argued that the beneficiaries qualified under the skilled worker classification, and in the alternative, requested that the petitions be considered under the "other worker" classification.

The director issued his decisions on September 30, 2003, denying the instant petition and certifying the decision to the AAO. The director denied the related petition, LIN 03 067 51563 and granted the related petition LIN 03 072 51157 and also certified those decisions to the AAO.

The Statutory and Regulatory Requirements Relating to Skilled Workers

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulations, at 8 C.F.R. § 204.5(l)(2) define skilled worker as follows:

> *Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

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[1] This preference visa petition is among numerous preference visa petitions submitted to the Nebraska Service Center by the petitioner. The decision in this case is one of three visa petitions decided by the director on September 30, 2003. The director denied two of the petitions and granted the third. All three have been certified by the director to the Administrative Appeals Office (AAO), for review pursuant to 8 C.F.R. § 103.4. The AAO upholds the director's two denials and denies the third on an issue not raised by the director. In all three decisions, the AAO raises the petitioner's failure to establish that it has the ability to pay the proffered wage. Although the AAO is issuing a decision in each case, the decisions will discuss the three cases certified to the AAO for purposes of comparing the evidence and outcomes in each appeal. The AAO believes this will assist the petitioner, the Service Center, and this office in evaluating the cases and any similar cases filed in the future.

[2] The ETA 750 reflects that the position's occupational title is "Teacher, Home Therapy" with occupational code 195-227-018.

Part 14 of the ETA 750, which specifies the minimum education, training and experience for the position, requires the individual filling the position to have at least a bachelor's degree in any field. At part 15, other special requirements, the petitioner stated "Bachelor's/Foreign Equivalent/Credential Evaluation which shows a combination of education, training and or work experience equivalency." The position has no separately specified training or experience requirements.

The issue in these petitions is whether the beneficiaries, by virtue of their education, qualify as skilled workers within the meaning of the regulations. Specifically, the question to be decided centers on the meaning of *relevant post-secondary education* and whether the bachelor's degrees possessed by the beneficiaries satisfy the regulatory requirements.

The Beneficiaries' Training, Experience and Education

Before discussing the findings of the director or the arguments raised by the petitioner's counsel, it is appropriate to examine what the record shows are the specific training, education and experience of the beneficiary.

The record reflects that the beneficiary is a twenty-seven year old alien who was born in, and is currently living in, the Philippines. Part 11 in Part B of the ETA 750 reflects that the beneficiary attended Benguet State University in the Philippines, from June 1994 through March 2001, receiving a Bachelor's degree in Agriculture. Parts 12 and 13 reflect that the beneficiary possesses no additional qualifications and skills or proficiencies, or licenses demonstrating any special qualifications or skills. With respect to the beneficiary's work experience, Part 15 of Part B of the ETA 750 reflects that the beneficiary was unemployed during the three years preceding the submission of the application for labor certification, and has held no jobs related to the position for which he seeks certification.[3]

At issue is whether the director properly determined that the beneficiaries did not qualify as skilled workers. A review of the reasons supporting the Service Center's decision is appropriate. Because the ETA 750 indicated that no particular training or experience was required, the Service Center focused its analysis on whether the beneficiaries possessed the appropriate education to qualify under the skilled worker classification. Examining the regulatory requirements at 8 C.F.R. § 204.5(l)(2), the director noted that the regulations specify that, "*relevant* post-secondary education" may be considered as training when assessing an alien's qualifications as a skilled worker. (Emphasis supplied.) The director noted that he was unable to identify any precedent decision, CIS policy or other guidance defining the term "relevant" in regard to post-

[3] LIN 03 110 55083, relating to [redacted], reflects that [redacted] a thirty-eight year old alien who was born in, and is currently living in, the Philippines. Part 11 of Part B of the ETA 750 reflects that [redacted] attended the University of St. Thomas in the Philippines from June 1981 through April 1989, receiving a Bachelor's degree in Zoology and a Doctor of Medicine. Parts 12 and 13 reflect that [redacted] possesses no additional qualifications, skills, proficiencies, or licenses demonstrating any special qualifications or skills. With respect to [redacted] work experience, part 15 of Part B of the ETA 750 reflects that he has been employed as a Resident Physician from November 1990 to the time that the ETA 750 was filed. LIN 03 067 51563, relating to [redacted] reflects that [redacted] is a thirty-one year old alien who was born in, and is currently living in, the Philippines. Part 11 in Part B of the ETA 750 reflects that [redacted] attended the Philippine Maritime Institute in the Philippines, from August 1989 through March 1992, receiving a Bachelor's degree in Maritime Transportation. Questions 12 and 13 reflect that Mr. Buquing possesses no additional qualifications, skills, proficiencies, or licenses demonstrating any special qualifications or skills. With respect to Mr. Buquing's work experience, Question 15 of Part B of the ETA 750 reflects that Mr. Buquing has been employed as a factory worker, crane operator, and most recently as a baker.

secondary education in the skilled worker context. Consequently, he turned to Merriam-Webster's Collegiate Dictionary, Tenth Edition for instruction as to the meaning of the term. That source defined the term as follows: "Having significant and demonstrable bearing on the matter at hand."

The director determined that the education must be relevant to the matter at hand, i.e., the duties of the position. The decision analyzed the petitions submitted on behalf of each beneficiary, and examined the education received by each beneficiary in comparison to the duties to be performed in the job. The director noted that the position of developmental disability specialist, according to the DOL's occupational code and Dictionary of Occupational Titles, falls within the sub-group of Occupations in Social and Welfare Work, which the DOL defines as occupations concerned with rendering assistance to individuals or groups with problems, such as illness and a variety of other conditions. The director then turned to the duties of the developmental disability specialist as described in the response to Question 13 of the ETA 750 and certified by DOL. It is worth repeating that description of the duties to be performed as described by the petitioner:

> To develop and implement a continuous active treatment program for each profoundly mentally and physically handicapped resident to enable each individual to function as independently as possible and prevent skill regression. Observe, instruct and play with resident and confer with professionals and parents to obtain information relating to child's mental and physical development. Develop individual teaching plan covering self-help, motor, social, cognitive and language skills development. Revises teaching plan to correspond with child's rate of development. Consults and coordinates plans with other professionals.

The director then thoroughly discussed the information in the record relating to the post-secondary education received by the beneficiaries in order to determine whether it should be considered education having "significant and demonstrable bearing" on the duties of the position.

In the case of the beneficiary, the director reviewed the transcripts and evaluation submitted in connection with the petition and found that the coursework related to his degree in Agriculture consisted of general coursework, as well as a number of identified agricultural courses relating, of course, to his major area of study.[4]

Petitioner's Position in Support of the Beneficiaries' Qualifications as Skilled Workers

The petitioner's counsel has submitted a brief and additional evidence in support of the petitioner's position that the beneficiaries qualify as skilled workers. Counsel's basic assertion is that possession of a bachelor's degree in any subject area necessarily qualifies the beneficiaries as skilled workers. Counsel explains that due to the petitioner's inability to attract qualified workers for the position of Developmental Disability Specialist, it has liberalized the requirements for the position. Counsel argues that requiring applicants to possess a bachelor's degree in any area is sufficient because positions to which DOL assigns a Specific Vocational

[4] In the case of [redacted] the director found that the beneficiary's post-secondary education was sufficiently related to the duties to be performed to conclude that [redacted] qualified as a skilled worker. In the case of [redacted], the director also reviewed the transcripts and evaluation to his degree in Maritime Transportation and found that the coursework consisted of general coursework and numerous courses in marine related subjects, his area of concentration. The director concluded that while the degrees were determined to be equivalent to an institution of higher learning in the United States, they could not be found to have a "significant and demonstrable bearing" on the duties of the position.

Preparation (SVP) score of 7, or higher, are generally considered to be skilled worker positions. Counsel asserts that fulfilling requirements for a bachelor's degree necessarily imbues such beneficiaries with the skills necessary for them to successfully perform the duties of the position. In support of the petitions, counsel has offered evidence in the form of letters from three individuals who back the petitioner's assertion that a bachelor's degree provides the necessary training and experience for the developmental disability specialist position.

Two letters are from current employees of [redacted]r. One is from [redacted] Director, Day Training Program, and was submitted in support of the original petitions. The second letter is from [redacted] Qualified Mental Retardation Professional, and was submitted following certification of the decision. The third letter, also submitted with the original petition, is from Rosa Milagros Santos, Ph.D., an Assistant Professor in the Department of Special Education at the University of Illinois, Urbana-Champaign.

All three letters are offered in support of the petitioner's contention that a bachelor's degree in any subject area qualifies the petitioners for the position of Developmental Disability Specialist.

Potter Letter

The letter from Cathy Potter describes the [redacted] as serving individuals who are "*severely and profoundly*" handicapped and unable to be cared for by their families. Ms. Potter, as the Director, serves as the supervisor of the nursing staff, and in an advisory capacity to the medical staff, department heads and administrators in matters related to patient care. In addition, the letter states that she is involved in "the establishment of personnel qualification requirements" among other duties, as well as performing various training, oversight, and personnel management functions. In addition to these multiple duties, she directly supervises the Developmental Disability Specialist positions at issue. She states that after reviewing the job description for the "developmental disability specialists" she has concluded that a generalized bachelor's degree adequately prepares an individual to perform those functions. She bases her conclusion on a description of the learning environment and type of academic training that bachelor's degree candidates receive. She also concludes that in addition to knowledge and skills, the bachelor's degree candidates also "demonstrate a higher degree of interest and curiosity" in helping the residents "actualize themselves."

Spaugh Letter

The letter from [redacted] asserts that she serves as a case manager a[redacted] and has reviewed the job description for the Developmental Disability Specialist positions. She attests that a generalized bachelor's degree adequately prepares an individual to perform those duties. Her letter goes on to state each of the elements contained in the description of duties for the developmental disability specialist as listed in the ETA 750 and describes elements of training for a bachelor's degree that fulfill the requirements.

Santos Letter

The letter from [redacted] discusses the existence of a shortage of highly qualified professionals in the field of Special Education and the difficulties in filling those positions. The letter asserts that individuals obtaining bachelor's degrees, aside from obtaining content knowledge, emerge with work skills such as the ability to comprehend new concepts, develop analytical skills, apply concepts and ideas, evaluate outcomes and develop organizational skills as well as various interpersonal and life skills.

What the Letters Do Not Address and How They Do Not Fully Support Petitioner's Position

None of the letters provide information on the number of persons currently in developmental disability specialist positions, whether the job description of those to be employed in the positions matches the job description of those currently performing the duties, what type of degrees the persons currently filling the positions possess, or any indicators of the success of those persons such as evaluations, retention rates, etc. In addition, the authors offer no evaluation of the educational background of any of the beneficiaries for the positions or their specific qualifications for the position. The absence of this information is particularly noteworthy for the two Swann employees who presumably have been involved in recruitment efforts at Swann, including those efforts that led to the decision to petition for the beneficiaries.

Counsel is basically asserting that post secondary training in the form of a bachelor's degree satisfies the training requirement set forth in the regulations. While the regulation does allow post secondary education to be used to satisfy the training requirement, the determinative issue is not post secondary education itself, but "relevant" post secondary education.

As noted earlier, the director, in the absence of any precedent interpreting the regulatory requirement, turned to a dictionary definition. The petitioner's counsel counters this with her own preferred dictionary definition. According to that definition, "relevant" means, "having a bearing on or connection with the matter at hand." The source of this definition is The American Heritage Dictionary of the English Language, Fourth Edition, Copyright 2000 by Houghton Mifflin Company. Counsel prefers this definition as she notes that unlike the definition used by the director, there is no reference to the education having "a significant and demonstrable bearing." Consequently, counsel's position is that any post secondary bachelor's degree is sufficient because there need not be a significant connection between the coursework taken and the job duties, just some connection.

Because this matter turns on the legal interpretation of the regulation, we believe it to be appropriate to examine the definition of the term "relevant" as found in Black's Law Dictionary. That definition states:

> Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value -- that is, rationally tending to persuade people of the probability or possibility of some alleged fact. Cf. MATERIAL. "The word "relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other." James Fitzjames Stephen, *A Digest of the Law of Evidence* 2 (4th ed. 1881).

Black's Law Dictionary 1293 (7th ed. 1999).

We find, in keeping with both the legal definitions of the term, and the policy reasons underlying the regulatory scheme, that relevant post secondary education, which can serve to satisfy training or experience, is education which bears more than a casual relationship to the matter at hand, i.e., the duties to be performed. For this reason, we interpret the term relevant to mean that for a beneficiary's post secondary education to be considered, it must be logically related and have appreciable probative value as to the capacity of the beneficiary to perform the job duties on the basis of the educational qualifications alone.

The difficulty with the position advanced by counsel is that it has the practical effect of modifying the regulation to state simply, "post secondary education may be considered as training for the purposes of this provision." Were the regulation to be modified in this way, then certainly situations involving applicants with post-secondary degrees would qualify without a need to examine the connection of that post secondary education to the duties performed. We do not dispute the petitioner's contention that a bachelor's degree is desirable because it provides a number of experiences that may facilitate the performance of the job duties. As the letters in support of the petitions provide, post-secondary education in general is desirable because it consists of generic first-year courses and opportunities to develop life skills that provide an advantage to anyone entering the working world. While this facilitates the performance of the duties sought to be fulfilled by the petitioner--or any employer--it does not satisfy the regulatory requirements as they currently exist. Because the attributes noted by the petitioner as being acquired in a post-secondary environment are inherent in that experience, it renders the regulation's requirement of relevancy to be a redundant requirement. Because we believe that meaning must be given to all components of the regulatory definition, we decline to accept the position advanced by counsel. The AAO believes that the regulation attempts to provide an appropriate requirement that the educational experience be directly connected to duties of the job being performed beyond generic experiences which any post-secondary experience provides.

Having determined that the regulation requires a more substantial connection between the post-secondary education and the job duties to be performed, the AAO will examine the post-secondary education of each beneficiary. This review will evaluate whether the post secondary education demonstrates the necessary probative value and logical connection between the qualifications of the beneficiary and the job duties of a developmental disability specialist.

As noted previously in this decision, the beneficiaries obtained their degrees from institutions of higher learning in the Philippines. Petitioner's counsel has submitted an evaluation of each beneficiary's degree by Morningside Evaluations and Consulting. That evaluation demonstrates that each had attained the equivalent of a bachelor's degree in his respective field from an accredited institution of higher learning in the United States. The evaluation relating to the beneficiary provides additional details as follows:

> The beneficiary completed coursework in general studies and his area of concentration, Agriculture, which leads to a degree from the University. A general studies curriculum included coursework in English, the social sciences, mathematics and the sciences which are a requisite component of a university degree from an institution of higher learning in the United States. Additionally, the beneficiary completed specialized courses in his area of concentration, Agriculture, including Plant Disease Control, General Plant Pathology, Principles of Ecology, Research Technique in Plant Pathology, Fundamentals of Entomology, and related areas.

The director determined that of the beneficiary's degree did not satisfy the regulatory requirements. The AAO agrees with the director's conclusion.

In contrast with the medical degree involved in one of the other petitions certified to this office,[5] the educational background of the beneficiary - upon which the petitioner exclusively relies - offers no similar

[5] We are not suggesting that a medical degree is required to fulfill the duties of a developmental disability specialist and we acknowledge that Mr. Sarol is over-qualified for the position. We find, however, that Mr. Sarol's medical education and training has exposed him to patient diagnosis, treatment and therapy. He also has specific training with respect to medical conditions relating to children. While the position of developmental disability specialist does not involve

connection to demonstrate their relevance to the duties to be performed. The AAO is not suggesting that a post secondary education other than a medical degree is not relevant as a number of other fields would have a substantial connection to the duties of a Developmental Disability Specialist as set forth in the ETA 750. Among the post secondary education likely to have such a connection would be areas of study involving teaching, various fields of health care, occupational training, or therapy. The post-secondary education possessed by the beneficiary is not sufficiently connected to the types of duties to be performed by a Developmental Disability Specialist to be considered relevant to those duties.

Petitioner's Argument that the Service Center is Imposing "Specialized Knowledge" Requirements

Counsel for the petitioner asserts that the director seeks to equate the term "relevant" which appears in regard to the post secondary education that may be substituted for experience or training in the context of skilled workers, to the term "specialty" or more accurately, "specialized knowledge" which relates to the requirements for intra-company transferees to qualify as temporary workers under Section 101(a)(15)(L) of the Act. Counsel for the petitioner takes issue with the director's interpretation of the term "relevant." Counsel asserts that Congress chose the term "relevant" and not "specialty" to describe the type of post secondary education that could satisfy the requirements for a skilled worker. Counsel would assert that by imposing a closer relationship between the post secondary education and the job duties, the director is imposing a requirement that the post secondary education in essence make the applicant an individual who possesses "specialized knowledge."

The AAO disagrees. First, counsel's reference to a statutory basis for the term "relevant" is erroneous. As noted previously, the requirement that the post secondary education be relevant is a regulatory requirement. If anything, the statute makes no specific allowance for post secondary education to satisfy the requirements of a skilled worker, referencing simply training or experience. It is the former Immigration and Naturalization Service (currently CIS), which interpreted, through the rulemaking process, the training or experience requirement to also permit relevant post secondary education. If anything, Congress' preference for actual experience and training pertaining to a job deemed to be skilled, supports an interpretation of "relevant" as close to the skilled job to be performed.

Counsel references several BIA decisions in support of the assertion that skilled workers are not persons of specialized knowledge. (See counsel's brief in support of reversing NSC decision at 3.) We do not disagree with that contention, although it must be noted that the cases cited are not ones in which the BIA rejected an agency interpretation seeking to impose specialized knowledge requirements in assessing the qualification of a skilled worker. Instead, the cases involved the BIA rejecting an attempt to equate a skilled worker to an intra-company transferee with specialized knowledge, or instances in which particular workers were found to

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conducting a medical diagnosis and treatment of the residents, the special circumstances of the residents involve complicated medical conditions. A background in the health sciences can necessarily aid any therapeutic efforts undertaken for the residents. [redacted] background would likely be of demonstrable benefit to him in carrying out his duties with the patients and would facilitate his interaction with others involved in the care of residents at the facility. As reflected in the petitioner's description of the job duties of the Developmental Disability Specialist, it involves various elements in which [redacted] educational background may be of substantial relevance such as developing and implementing active treatment programs for mentally and physically handicapped individuals, to observing and instructing residents and conferring with professionals and parents regarding the child's mental and physical development. In addition, a medical background will provide training regarding motor, social, cognitive, and language skills possessed by individuals with the medical conditions a DDS is likely to encounter. Furthermore, inherent in a medical training program is a need to consult and coordinate patient care plans with other professionals. All of these elements are ones that demonstrate a logical connection between a medical education and the duties of a Developmental Disability Specialist.

possess specialized knowledge. Counsel's reliance on these cases falls short, however, as the director was not seeking to require that in order to qualify as skilled workers individuals must be persons who possessed knowledge related to the petitioner's processes and procedures. There is a vast difference between possessing specialized knowledge and having the necessary training, experience or education to carry out the duties of a skilled worker and there is nothing in the director's decision to indicate that it was imposing higher standards on these petitions.

Assuming the petitioner's situation regarding its difficulties in recruiting qualified individuals is factual, we do not believe that the regulatory requirements should be rendered meaningless in order to accommodate those needs. For that reason, petitioner may need to pursue other avenues to enable it to attract qualified workers, such as increasing the wages offered[6], or modifying its recruiting efforts. It seems difficult to believe that the petitioner's foreign recruiting efforts have not attracted a sufficient number of individuals with teaching, healthcare, or other education or experience more relevant to the duties of a Developmental Disability Specialist than persons with post-secondary education in areas such as maritime transportation and agriculture.

In addition to giving meaning to the regulation's requirement that the post secondary education be relevant to the duties performed, there are sound public policy reasons supporting the director's determination in this case. The underlying basis of the employment-based immigrant petition process is to allow petitioners to offer U.S. jobs to foreign workers, and authorize those workers to receive permanent resident status in the U.S., but to do so through a process that offers the job opportunity in the first instance to qualified U.S. workers, and to fill a job in which a need exists for labor with an individual who is fully qualified to perform that job. It is CIS' responsibility to ensure that the foreign workers are qualified to perform that work. We are particularly sensitive to this responsibility for a job that involves individuals with such critical needs as the patients who will be served by the Developmental Disability Specialists, that is, severely handicapped children. It is also likely that individuals with experience that is more substantially related to the type of duties to be performed are also individuals more likely to remain in those positions, rather than move on to seek employment in a field not related to that for which they were accorded immigrant status. Furthermore, a review of the ETA 750 reflects that the position may require the beneficiaries to supervise up to 5 additional employees. (See ETA 750 Question 17). Because the position may entail supervising other individuals involved in health care and educational activities related to severely handicapped individuals, and because of the significance of the consequences should such work be deficient, we believe that maintaining a strong relationship between the post secondary education and the job duties is sound from both a legal and policy perspective.[7]

Counsel's Request to Consider the Denied Cases as Unskilled Workers

In counsel's response to the Service Center's Notice of Intent to Deny, counsel indicated that in the alternative, counsel would change the classification of the denied cases to that of unskilled workers in order to

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[6] The wage offered is $7.88 an hour. This wage, although approved by the DOL for the position offered, will make it difficult for the petitioner to attract college graduates with bachelor's degrees.

[7] We note that an Internet search for information maintained by the Illinois Department of Public Health disclosed that since the August/September 2002 priority date associated with these petitions, [redacted] has been the subject of 13 surveys of the facility conducted by the Illinois Department of Public Health. While many of the surveys are related to routine annual certification requirements and follow-up, several surveys, including several within the last year and a half, relate to investigations stemming from complaints. We do not suggest that Swann Special Care is unique in this regard or receives more investigations or complaints than do other nursing facilities. Nevertheless, it does reinforce to us the importance of ensuring that individuals employed in sensitive positions such as working with the disabled, need to fully meet the training and experience requirements. See, www.idph.state.il.us.

facilitate a grant of the petitions. (See Response to NOID at p.11) In the interest of resolving the cases more expeditiously, the AAO will consider counsel's request at this time rather than remand the cases for that purpose.

The difficulty with accepting counsel's argument that beneficiary should be considered as an "other worker" arises from the evidence already in the record with respect to the job duties and DOL's reliance upon that information in issuing the labor certifications.

As noted previously, the petitioner is seeking to employ the beneficiary in the position of Developmental Disability Specialists (aka Teacher-Home Therapy). The Department of Labor, in the course of reviewing the offered position including the description of duties to be performed and the education, training, and experience required, classifies the position under the applicable Industry and Occupational Codes., and designates the appropriate Occupational Title. (See DOL endorsement on Part A of the ETA 750.

As counsel has noted in the response submitted to the Service Center's Notice of Intent to Deny (NOID), the requirements specified for the position of DDS were certified by the DOL indicating that those requirements were consistent with "those defined for the job in the Dictionary of Occupational Titles (DOT) including those for sub-classes of jobs" citing 20 C.F.R. § 656.21(b)(2). Counsel further noted in her response that "[g]enerally positions in the Labor Department's Dictionary of Occupational Titles with a Specific Vocational Preparation (SVP) code of seven or greater will be qualified as skilled" noting that the position of DDS has an SVP code of 7.

As an attachment to her response, counsel submitted Appendix C of the Dictionary of Occupational Titles in support of the argument that the DDS's assignment of SVP Code of 7, meant that the position fit the requirements of a skilled worker. An examination of that document is appropriate. The discussion in Appendix C regarding the SVP and its meaning provides as follows:

> Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.
>
> The training may be acquired in a school, work, military, institutional, or vocational requirement. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

The appendix goes on to note that a position which has been assigned an SVP code of 7 is one which requires "over 2 years up to and including 4 years." Counsel also attached the Dictionary of Occupational Titles description corresponding to the DDT position which clearly provides an SVP code of 7.

The question then becomes one of reviewing the information in the record to determine how the prospective employee fulfills the requirements for the DDT position. This information is contained in the ETA 750 which specifies the experience, education and training requirements of the position which it is reasonable to conclude, taken together, fulfill the SVP code specifications corresponding to the occupation. As noted previously, the petitioner has not required that the position requirements be fulfilled through past experience or specific training. Rather, the petitioner has chosen to require that the qualifications for the position be satisfied through education in the form of a bachelor's degree in any field. As this office has explained, for purposes of the skilled worker

classification, we have concluded that the degree must be relevant to the duties to be performed. Because the degrees are deemed to not be relevant to the duties to be performed, the beneficiaries are unable to satisfy the requirements for the skilled worker category. The fact that the position, as contemplated by DOL through its classification process, is one that requires a certain amount of vocational preparation, leads us to conclude that it cannot at one time be a position for which there are requirements that lead DOL to assign it a fairly high SVP code of 7, yet can simultaneously be considered ones requiring no skills or training.—and presumably a low SVP rating. Counsel herself acknowledges this when she states in response to the NOID, "we assert that the position of Developmental Disability Specialist is most appropriately classified as a 203(A)(b)(3)(i) skilled worker." Counsel's desire to have the petition considered under the unskilled worker category results not from an assessment that this is the correct petition category, but out of an understandable desire to address the client's needs. However, having made certain representations regarding the type of position and its requirements, counsel cannot now modify those representations. Furthermore, CIS has the obligation to ensure that the position is filled with a qualified worker. Because we conclude that the position's requirements corresponds to a skilled worker, and the beneficiaries do not have the necessary qualifications, the unskilled worker category cannot be used to accomplish the outcome that is otherwise unavailable.

Additional Issue Regarding the Petitioner's Ability to Pay the Proffered Wage

Beyond the director's decision,[8] the AAO notes an additional issue affecting CIS' ability to approve the petitions. The issue relates to the evidence in support of the petitioner's ability to pay the beneficiary's wages. The ETA 750 reflects that the proffered wage is $7.66 per hour, which equals a yearly salary of $15, 932.80. The petitioner has submitted evidence on the issue of its ability to pay the proffered salary in the form of a letter dated August 6, 2002, from the director of [redacted] The letter states that Swann Special Care Center is an Illinois corporation that employs over 140 people at its Champaign, Illinois facility. The letter further provides that for the fiscal year ending June 30, 2002, Swann Special Care Center had revenue in excess of $20,319,622 and net income in excess of $889,974.24. While the letter asserts that the petitioner "is now and will be for the expected future able to pay the wages proffered to our employee" we note that the letter is a photocopy and does not mention the beneficiary by name.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept [redacted] letter. The three petitions discussed in this decision reflect only a small portion of the petitioner's recent filings. CIS records indicate that the petitioner has filed over 250 Form I-140 petitions with the Nebraska Service Center since May 2000. In addition, the petitioner has also filed forty-one Form I-129 nonimmigrant petitions since November 1999. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of

[8] 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the 250 I-140 petitions, the petitioner would need to establish that it has the ability to pay combined salaries of $3,983,200. Given that the number of immigrant and nonimmigrant petitions reflects a tripling of the petitioner's workforce, we cannot rely on a photocopied letter from [redacted] referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on [redacted]'s letter, we will examine the other financial documentation submitted. These documents do not clearly support [redacted] contention. First, although [redacted] letter indicates that the petitioner's 2001 financial statements were audited by Price Waterhouse, the attached financial statements do not contain any indication of being audited financial statements. Second, the attached financial statements indicate that they relate to [redacted] and not to [redacted], Inc. Although [redacted] Inc. may be an affiliated with Hoosier Care, Inc., the record does not contain evidence of the relationship, or any indication that all of the assets of Hoosier Care, Inc., are available to pay the wages of the beneficiaries for whom the petitioner has filed petitions. Third, even assuming that the director's contention that the petitioner's net income in 2001 exceeded $889,974.24, this figure cannot account for the ability to pay the proffered wage of 250 new employees.

After reviewing the case the AAO has determined that the director correctly decided the issue of the petitioner's qualifications as the evidence does not demonstrate that he possesses relevant post-secondary education. In addition, the petition will also be denied for the additional reason that the petitioner failed to establish that it had the ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The petition is denied.