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

U.S. Citizenship and Immigration Services

[redacted]

D2

Date: MAR 0 2 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner described itself as a preschool education center with two employees. It seeks to employ the beneficiary as an English as a Second Language (ESL) teacher and 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 the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meets its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty

occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner submitted, *inter alia*, the following documents with the Form I-129: (1) petitioner's support letter, dated September 4, 2009; (2) a copy of the beneficiary's foreign degree and transcript; (3) a copy of the beneficiary's Master of Science degree in teaching ESL and transcript from Southern New Hampshire University, (4) a print-out of the Online Wage Library's wage survey page for "Teachers and Instructors, All Other," (5) copies of lesson plans on "Creativity" and "Imagination," and (6) a list of the company's students for whom English is a second language.

In the petitioner's support letter, the petitioner states that the beneficiary's job duties will be as follows:

- Instruct students individually and in groups, using various ESL teaching methods such as lectures, discussions, and demonstrations; [20% of time]
- Conduct classes, workshops, and demonstrations to teach ESL students; [20% of time]
- Prepare ESL materials for class and individual activities, adapting ESL teaching methods and instructional materials to meet students' varying needs and abilities; [15% of time]
- Observe and evaluate students' work to determine progress and make suggestions for improvement; [15% of time]
- Plan and conduct activities for a balanced program of instruction, demonstration, and work time that provides students with opportunities to observe, question, and investigate; [10% of time]
- Maintain accurate and complete student records as required by laws or administrative policies; [10% of time]
- Establish clear objectives for all lessons, units, and projects, and communicate those objectives to students. [10% of time]

The petitioner's support letter claims that the proffered position falls under the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) category for "Adult Literacy, Remedial Education, and GED Teachers and Instructors"[1] which states the following: "Those programs run by private religious, community, or volunteer organizations generally develop standards based on their own needs and organizational goals, but generally also require paid teachers to have at least a bachelor's degree." Petitioner also asserts that it requires a bachelor's degree or its equivalent, at a minimum, for the proffered position and that

[1] The AAO's references to the *Handbook* are to the 2010-2011 edition available online. The AAO notes that the job category title in the 2010-2011 edition of the *Handbook* is "Teachers—Adult Literacy and Remedial Education." The *Handbook*, which is available in printed form, may also be accessed on the Internet at http: www.stats.bls.gov/oco/.

this degree requirement is standard for the industry. In addition, the petitioner contends that the job duties for the proffered position are "so complex or unique that it can be performed only by an individual with a degree or [its] equivalent and the nature of the specific duties are so specialized and complex that the knowledge that is required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree."

The petitioner also submitted an evaluation by [redacted] Associate Professor in the Math, Science, and Technology Department at Nova Southeastern University. In her evaluation, [redacted] opines that an ESL teacher position "requires at least a relevant Bachelor's degree, or equivalent and a person having such a background as [the beneficiary] is fully qualified to teach English." [redacted] also concludes that the beneficiary possesses the required specialized knowledge for an ESL teaching position.

On November 2, 2009, the director issued an RFE requesting the petitioner to submit, inter alia, (1) evidence showing that a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered, (2) documentation highlighting the nature and scope of the petitioner's organization, and the number of students enrolled and their age group, (3) the petitioner's business license, (4) evidence to establish a degree requirement is common to the industry in parallel positions, and (5) job descriptions for the majority of positions within the petitioner's employ.

On December 17, 2009, in response to the director's RFE, petitioner's counsel explained that the beneficiary is not required to be licensed in the state of New York as the petitioner's organization is considered a "supplemental enrichment program rather than a school." In addition, the petitioner submitted (1) an advertisement for the petitioner's services printed from the website of NYMetroParents, and (2) a copy of an excerpt from the 2008-2009 edition of the *Handbook* indicating that licensure is not required for teachers in most private schools. Petitioner's counsel also stated the following:

> [Petitioner] is the only center offering [redacted] program in the entire United States. The [redacted] program focuses on two groups of students: English-speaking Americans whose parents want them to learn Chinese, and Chinese-speaking children who have recently come to the United States and whose English proficiency is low.

The director denied the petition on February 12, 2010, finding that the proffered position is not a specialty occupation.

On appeal, counsel for the petitioner contends that the director "grossly mischaracterized" the proffered position as a preschool teacher and claims that the duties of the position are that of an ESL teacher. In contrast to the description provided in the Form I-129 in which petitioner's business is described as a "pre-school education" center, counsel describes the petitioner as a provider of "early childhood education . . . [u]sing programs designed for children aged 6 months to 8 years old . . . ."[2] Counsel also asserts that the position qualifies as a specialty occupation by

[2] Counsel also describes the petitioner's business as an "early childhood education" provider in the

satisfying two of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), specifically:

> A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position,
>
> and
>
> The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In addressing whether the proffered position is a specialty occupation, the record is devoid of substantial documentary evidence as to whether the beneficiary's services would be that of an ESL teacher. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Despite the director's request for additional information from the petitioner highlighting the nature and scope of the petitioner's organization to establish that the beneficiary will be employed as an ESL teacher, the petitioner did not submit any such evidence demonstrating that it currently provides, or, intends to provide, ESL instruction to its students.

While the petitioner submitted an advertisement of its program on the [redacted] and [redacted] lesson plans, those only serve to demonstrate that the petitioner's "Core program teaches preschool age children 3 – 8 years old to use creativity, communication and critical thinking skills through fun, interactive technology." Moreover, while the advertisement states that [redacted] teachers conduct lessons in subjects such as biology, astronomy, economics, art, speech, drama, goals/life lessons, and technology, it does not indicate that the petitioner offers ESL instruction. Moreover, although the petitioner submitted an "enrollment list" to USCIS of students that would likely be enrolled in the ESL courses taught by the

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response to the director's RFE.

beneficiary, without demonstrating that this list of students is a bona fide list of the petitioner's current students, or that these students would, in fact, be enrolled in such a class, the relevance of this list cannot be determined.

Furthermore, there must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will be in a specialty occupation. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). In this instance, such corroborating evidence might include, *inter alia*, (1) evidence that an ESL program is sanctioned by the FasTracKids franchisor, (2) evidence that the ESL program and/or Chinese program exists at the petitioner's place of business, and (3) invoices indicating payments by students for ESL instruction. The petitioner did not submit any corroborating evidence relevant to ESL instruction; therefore, it cannot be found that the proffered position falls within the *Handbook's* description of "Teachers–Adult Literacy and Remedial Education," as argued by the petitioner.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. While the petitioner claims that the proffered position is an ESL teacher position, for the reasons stated above, the AAO cannot conclude that the proffered position's duties are that of an ESL teacher. Instead, the AAO finds that the record evidence most closely reflects the duties of a preschool teacher. The *Handbook* section on "Teachers–Preschool, except Special Education," states the following:

> Preschool teachers nurture, teach, and care for children who have not yet entered kindergarten. They provide early childhood care and education through a variety of teaching strategies. They teach children, usually aged 3 to 5, both in groups and one on one. They do so by *planning and implementing a curriculum* that covers various areas of a child's development, such as motor skills, social and emotional development, and language development.
>
> Preschool teachers play a vital role in the development of children. They introduce children to reading and writing, expanded vocabulary, creative arts, science, and social studies. *They use games, music, artwork, films, books, computers, and other tools to teach concepts and skills.*
>
> Preschool children learn mainly through investigation, play, and formal teaching. Preschool teachers capitalize on children's play to further language and vocabulary development (using storytelling, rhyming games, and acting games), improve social skills (having the children work together to build a neighborhood in a sandbox), and introduce scientific and mathematical concepts (showing the children how to balance and count blocks when building a bridge or how to mix colors when painting). Thus, an approach that includes small and large group activities, one-on-one instruction, and learning through creative activities such as art, dance, and music, is adopted to teach preschool children. Letter recognition,

> phonics, numbers, and awareness of nature and science are introduced at the preschool level to prepare students for kindergarten.
>
> *Preschool teachers often work with students from varied ethnic, racial, and religious backgrounds.* With growing minority populations in most parts of the country, it is important for teachers to be able to work effectively with a diverse student population. Accordingly, some schools offer training to help teachers enhance their awareness and understanding of different cultures. *Teachers may also include multicultural programming in their lesson plans, to address the needs of all students, regardless of their cultural background.*
>
> Work environment. Seeing students develop new skills and gain an appreciation of knowledge and learning can be very rewarding. Preschool teachers in private programs and schools generally enjoy smaller class sizes and more control over establishing the curriculum and setting standards for performance and discipline.
>
> Part-time schedules are common among preschool teachers. Many teachers work the traditional 10-month school year with a 2-month vacation during the summer. During the vacation break, those on the 10-month schedule may teach in summer sessions, take other jobs, travel, or pursue personal interests. Many enroll in college courses or workshops to continue their education. Teachers in districts with a year-round schedule typically work 8 weeks, are on vacation for 1 week, and have a 5-week midwinter break. Preschool teachers working in day care settings often work year round.

See U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Ed., "Teachers-Preschool, Except Special Education," http://www.bls.gov/oco/ocos317.htm (last accessed Feb. 14, 2012) (emphasis added).

This section of the *Handbook* encompasses the proffered duties and teaching environment as described by the petitioner, which include teaching and preparing lesson plans for children usually aged 3-5 utilizing games, art, and computers. Moreover, as mentioned above, the petitioner identified itself as a provider of "pre-school education" on the Form I-129 and the NYMetroParents advertisement submitted by the petitioner states that the "Core program" of FasTracKids "teaches preschool age children 3-8 years old."

As evident in the following excerpt, the *Handbook* indicates that a bachelor's degree or higher in a specific specialty is not a normal minimum requirement for entry into a preschool teaching position:

> The training and qualifications required of preschool teachers vary widely. Each State has its own licensing requirements that regulate caregiver training. These requirements range from a high school diploma and a national Child Development Associate (CDA) credential to community college courses or a college degree in child development or early childhood education.

* * *

> Some employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, the petitioner did not submit documentation regarding the hiring practices of similar schools for its preschool teachers. As a result, the petitioner has not established that preschools routinely require at least a bachelor's degree in a specific specialty for parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that there is a wide spectrum of degrees acceptable for preschool teacher positions, including degrees not in a specific specialty. Moreover, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).[3]

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Here, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been established as being more specialized and complex than preschool teacher, or even ESL teacher, positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

It is noted that, even if the proffered position was established as being that of an ESL teacher, a review of the *Handbook* does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of ESL teacher. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Edition, "Teachers—Adult Literacy and Remedial Education," <http://www.bls.gov/oco/ocos289.htm> (accessed Feb. 14, 2012). As such, absent evidence that the position of ESL teacher satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

In addition, the AAO finds no probative value in the opinion rendered by [redacted]. First, [redacted]'s letter discusses ESL teachers and not preschool teachers, the position found to have been proffered in this matter. Second, [redacted] claims that her expertise to render this opinion is based on her educational, research, and professional background teaching in Nova Southeastern University's Math, Science, and Technology Department. Absent sufficient, corroborating evidence to the contrary, the evidence of record does not establish that [redacted] is an expert in the area in which she is opining. Third, the opinion is not based upon sufficient information about the ESL teaching position proposed here. USCIS may, in its discretion, use as advisory

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[3] While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Despite her self-endorsement, neither the professor's letter, her resume, nor any other evidence of record substantiates that she is qualified as an expert on the educational requirements or industry-wide recruiting and hiring practices of preschools or early childhood education centers in the area of ESL instruction. The record does not provide a factual foundation for the professor's claim that she has expertise in the subject matter of the proffered position. Further, there is no extrinsic evidence of expertise in the area, such as scholarly research conducted by the professor on the specific area upon which she is opining; books, articles, or treatises authored by her in the area of claimed expertise; or recognition by professional organizations as an authority on ESL instruction in preschools or early childhood education centers or the employment practices of such institutions with respect to ESL teachers. As the professor has not established her credentials as an expert on ESL instruction in preschools or early childhood education centers and the industry's hiring standards, her opinion in this area merits no special weight and is not persuasive.

Further, the content of the professor's letter does not demonstrate that the professor's opinion is based upon sufficient information about the particular position at issue. First, the letter reveals that the professor's knowledge of the position is limited to the duties listed in the petitioner's September 4, 2009 Form I-129 support letter. Second, the professor does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does she state that that she has reviewed any projects or work products related to the proffered position. Third, the professor's opinion does not relate her conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for her conclusions about the educational requirements for the particular position here at issue.

The AAO will also address an additional, independent ground for denial of the petition, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. On the LCA, the petitioner specified that the occupational classification for the proffered position falls under "Teachers and Instructors, All Other" and listed the SOC (O*NET/OES) Code as 25-3099.00. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

In the petitioner's Form I-129 support letter, the petitioner asserted that the duties of the proffered position fall under the O*NET code for "Adult Literacy, Remedial Education, and GED Teachers and Instructors" for which the code is 25-3011.00. The assertion of the petitioner that the occupational category for the proffered position is "Adult Literacy, Remedial Education, and GED Teachers and Instructors" is contradicted by the occupational classification selected by the petitioner for the LCA.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.[4] 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 SWA 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 SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The AAO notes that the petitioner stated on the LCA that the wage level for the proffered position is Level 1 (entry). The petitioner provided the prevailing wage that corresponds to the occupation "Teachers and Instructors, All Other," which is $24,700 per year.

The AAO observes that the prevailing wage for the position "Adult Literacy, Remedial Education, and GED Teachers and Instructors" at a Level 1 wage is significantly higher at $38,938 per year than the prevailing wage for "Teachers and Instructors, All Other." Thus, according to DOL guidance, if the petitioner believed its position was appropriately described in "Adult Literacy, Remedial Education, and GED Teachers and Instructors" or was a combination of "Adult Literacy, Remedial Education, and GED Teachers and Instructors" and "Teachers and Instructors, All Other," it should have chosen the relevant occupational code for the highest paying occupation, in this case "Adult Literacy, Remedial Education, and GED Teachers and Instructors." However, the petitioner chose the occupational category for the lower paying occupation "Teachers and Instructors, All Other" for the proffered position on the LCA.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (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 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the

[4] DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at *http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.*

qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a certified LCA that corresponds to the claimed duties of the proffered position, and the appeal must be dismissed and the petition denied for this additional reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

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 (9th 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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Here, that burden has not been met.

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