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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]

DATE: AUG 0 6 2013 OFFICE: CALIFORNIA 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.

Thank you,

for
Ron Rosenberg
Acting 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 The director's decision will be withdrawn. The matter will be remanded to the director for action consistent with this decision.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on September 24, 2010. In the Form I-129 visa petition, the petitioner describes itself as a public charter school established in 2008. In order to employ the beneficiary in what it designates as a Turkish language teacher position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 24, 2010, finding that the petitioner failed to establish that there is a reasonable and credible offer of employment and the petitioner failed to submit the employer information solicited by the Request for Evidence (RFE). On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision. The issue before the AAO is whether the petitioner established that there is a reasonable and credible offer of employment and whether the petitioner complied with the RFE.

Based on the evidence presented, the AAO finds the petitioner has demonstrated that there is a reasonable and credible offer of employment and the petitioner is likely to comply with the terms and conditions of employment. Further, the AAO finds that the petitioner has reasonably complied with the RFE. Therefore, those bases for the director's decision will be withdrawn.

However, the AAO notes that the record has four additional, independent grounds that also preclude approval of this petition. Specifically, it is noted that the petitioner (1) failed to submit a completed Labor Condition Application (LCA); (2) failed to establish that it would pay the beneficiary an adequate salary for her work if the petition were granted; (3) failed to submit an LCA that corresponds to the petition; and (4) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The matter will be remanded to the director to consider these additional grounds.[1]

As mentioned above, the AAO finds that the petitioner failed to submit a completed LCA application. Specifically, the LCA in the record of proceeding contains only up to Page 4 of Page 5, and is missing Page 5 of Page 5.

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[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The DOL regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

> (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(l)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

Based on DOL and DHS filing requirements, the LCA that is filed with USCIS in support of an H-1B petition must be certified by DOL, signed by the beneficiary's employer, and submitted to USCIS on the date the Form I-129 is filed. Here, the petitioner s failed to submit a completed LCA with the petition. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 655.730(c)(1).

Further, the submitted LCA designates the proffered position under the occupational title of "Secondary School Teachers, Except Special and Vocational"-SOC (ONET/OES) code 25-2031. The petitioner stated in the LCA that the wage level for the proffered position was Level I (entry) and claimed that the prevailing wage in [redacted] Arizona) for the proffered position was $27,630 per year.[2] The petitioner offered $29,000 per year plus standard benefits.

In a support letter dated July 30, 2010, the petitioner states that the proffered position as a Turkish Language Teacher involves "teaching the Turkish language to English-speaking charter school students in the *4th through 9th grade*"(emphasis added). Thus, it appears that the proffered position involves teaching elementary, middle and high school students, and is a combination of several O*NET occupations.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

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[2] For additional information regarding prevailing wage for secondary school teachers in Pima County, *see* the All Industries Database for 7/2010 - 6/2011 for Secondary School Teachers, Except Special and Vocational Education at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-2031&area=46060&year=11&source=1 (last visited July 31, 2013).

> 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.

See DOL, 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.

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the petitioner's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the petitioner's job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Elementary School Teachers, Except Special Education" as $30,660 per year, at the time the petition was filed in this matter, for a Level I position in the area of intended employment.[3] The prevailing wage for "Middle School Teachers, Except Special and Vocational Education," is $31,350 per year for a Level I position.[4]

The wage level for both elementary and middle school teachers are higher than the prevailing wage for "Secondary Teachers, Except Special and Vocational Education." Thus, according to DOL guidance, if the proffered position involves teaching elementary, middle, and secondary students as claimed, the petitioner should have chosen the relevant occupational code for the highest paying occupation-in this case "Middle School Teachers, Except Special and Vocational Education." However, the petitioner selected the occupational category for the lowest paying occupational

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[3] For more information on prevailing wage for elementary school teachers in [redacted], *see* the All Industries Database for 7/2010 - 6/2011 for Elementary School Teachers, Except Special Education at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-2021&area=46060&year=11&source=1 (last visited July 31, 2013).

[4] For more information on prevailing wage for middle school teachers in [redacted], *see* the All Industries Database for 7/2010 - 6/2011 for Middle School Teachers, Except Special and Vocational Education at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-2022&area=46060&year=11&source=1 (last visited July 31, 2013).

category of "Secondary School Teachers, Except Special and Vocational Education" for the proffered position on the LCA.

Further, the job description provided with the RFE states "[n]o Turkish classes are scheduled for 9th grade for the 2010-2011 school year, but they are anticipated to be scheduled for 9th grade for the next academic year, 2011-2012." Moreover, the submitted copy of class schedule indicates that the beneficiary would be teaching 4th to 8th grade, as well as elementary and middle school Turkish clubs. Thus, at the time of filing the Form I-129, the proffered position only required teaching elementary and middle school students, but the petitioner filed the LCA for the least relevant and lowest paying occupational category, i.e., "Secondary School Teachers, Except Special and Vocational Education."

The AAO notes that under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A),

The petitioner's offered wage to the beneficiary of $29,000 per year is below the prevailing wage for the occupational classification of "Middle School Teachers, Except Special and Vocational Education" in the area of intended employment. The Level I prevailing wage for the occupational category of "Middle School Teachers, Except Special and Vocational Education" for a full-time position in the area of intended employment was $31,350 per year at the time the petition was filed in this matter, a difference of over $2,350 per year. The AAO notes that the petitioner indicated that the beneficiary would be paid "an annual salary of at least $29,000 plus standard benefits." However, the petitioner has not provided any evidence to support that the beneficiary would be paid more than $29,000 including standard benefits. Thus, the AAO finds that the petitioner has not established that the beneficiary would be paid the prevailing wage of $31,350.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, for this reason as well, the petition should be denied.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if

> the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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 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 valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations.

In addition, the AAO will now address whether the petitioner established that it would employ the beneficiary in a specialty occupation position.

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 following statutory and regulatory requirements.

Section 214(i)(l) of 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 which [(2)] 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a Turkish language teacher to work on a full-time basis at an annual salary of $29,000 plus standard benefits. With the Form I-129 petition, the petitioner provided a letter of support dated July 30, 2010, which stated:

> Tasks and duties for the position of Turkish Language Teacher include: teaching the Turkish language to English-speaking charter school students in the 4th through 9th grades.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[5] The petitioner asserts in the LCA that the proffered position falls under the occupational category "Secondary School Teachers, Except Special and Vocational Education."

[5] All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

However, as previously noted, the petitioner should have filed the LCA for the occupational category of "Middle School Teachers, Except Special and Vocational Education."

The AAO reviewed the chapter of the *Handbook* entitled "Middle School Teachers" including the sections regarding the typical duties and requirements for this occupational category.[6]

The subchapter of the *Handbook* entitled "How to Become a Middle School Teacher" states the following, in part, about this occupational category:

> **Education**
> All states require public high school teachers to have at least a bachelor's degree.
> All states require public middle school teachers to have at least a bachelor's degree. Many states require middle school teachers to major in a content area, such as math or science. Other states require middle school teachers to major in elementary education. Those who major in a content area typically enroll in their university's teacher preparation program and take classes in education and child psychology.
>
> Teacher education programs teach prospective middle school teachers how to present information to students and how to work with students of varying abilities and backgrounds. Programs typically include fieldwork, such as student teaching.
>
> Some states require middle school teachers to earn a master's degree after receiving their teaching certification.
>
> Teachers in private schools do not need to meet state requirements. However, private schools typically seek middle school teachers who have a bachelor's degree and a major in elementary education or a content area.
>
> **Licenses and Certification**
> All states require teachers in public schools to be licensed, which is frequently referred to as a certification. Those who teach in private schools are not required to be licensed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Middle School Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/middle-school-teachers.htm#tab-4 (last visited July 31, 2013).

While the *Handbook* states that "all states require public middle school teachers to have at least a bachelor's degree," it also states "[t]eachers in private schools do not need to meet state requirements." Similarly, the AAO notes that the petitioner is a charter school and it is exempt from state requirements. While Arizona requires its teachers to be certified and a bachelor's degree

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[6] U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Middle School Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/middle-school-teachers.htm#tab-4 (last visited July 31, 2013).

is a requirement for a certificate of teaching, charter schools are exempt from the certification requirement under the Arizona State Statute A.R.S. §15-183(E).[7]

The evidence of record contains a letter from the Director of Certification Rules and Procedures at the Arizona Department of Education, which states that "charter school teachers in Arizona are exempt from Arizona Statute §15-502.B (requiring all public school teachers to be certified)." In the appeal, counsel also points to this fact by stating "[p]er the letter from the Arizona Department of Education, this means that, since charter school teachers were never specifically mentioned in A.R.S § 15-502, the state statute regulating teacher certification, they are thereby exempt from the requirement of certification."

Therefore, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus the petitioner failed to establish that proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). The petitioner also has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty, or its equivalent, or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Further, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered 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. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, in the evaluation of the beneficiary's foreign degree stating that her degree is the equivalent of a U.S. bachelor's degree in secondary education with a teaching major in Turkish, the grades are different

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[7] For more information about requirements for a teaching certificate in Arizona, *see* http://www.azed.gov/educator-certification/files/2011/09/secondary-certificate.pdf?20120709 (last visited July 31, 2013).

than the grades indicated on the original transcript. For example, the original transcript indicates that the beneficiary received grade "C" in "Turkish Grammar I: Phonetics." However, in the course by course evaluation report, it is indicated that the beneficiary received "B" in the same course. The AAO notes that the evaluation suggests that the beneficiary's Turkish grades were "converted."

As stated above, the decision of the director finding that there is no reasonable and credible offer of employment and that the petitioner failed to submit the employer information solicited by the RFE will be withdrawn. The matter will be remanded to the director for issuance of a new decision to consider the additional grounds identified in this decision.

ORDER: The director's November 24, 2010 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.