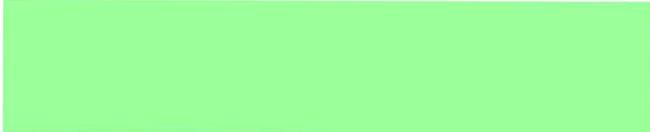


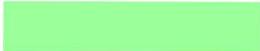


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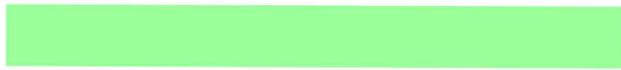


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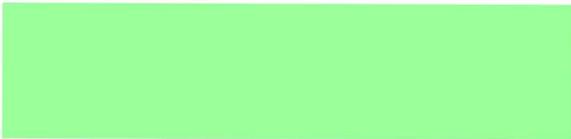
IN RE:

Petitioner:
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:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 25-employee education company¹ established in 1997. In order to employ the beneficiary in what it designates as a mathematics teacher position,² the petitioner seeks to classify him 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, concluding that the petitioner failed to demonstrate: (1) that the beneficiary is qualified to perform the duties of a specialty occupation; (2) that it would comply with the terms and conditions of employment; and (3) the existence of an authentic proffer of employment.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has overcome the first and third grounds of the director's decision denying the petition. Accordingly, those portions of the director's decision will be withdrawn. However, the petitioner has not overcome the second ground of the director's decision. Consequently, the appeal will be dismissed and the petition denied on that basis.

Beyond the decision of the director, the AAO finds three additional aspects which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely: (1) providing as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the occupational category (Secondary School Teachers, Except Special and Career/Technical Education) for which the LCA was certified does not correspond to the proffered position and its constituent duties as described in the record of proceeding; (2) the failure of the petitioner to sign and date the LCA; and (3) the petitioner's failure to demonstrate that the

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 611110, "Elementary and Secondary Schools." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "611110 Elementary and Secondary Schools," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Jul. 25, 2013).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 25-2031.00, the associated Occupational Classification of "Secondary School Teachers, Except Special and Career/Technical Education," and a Level I (entry-level) prevailing wage rate.

proffered position qualifies for classification as a specialty occupation.³ The petition must also be denied for these three additional reasons.

I. The Petitioner and its Proffered Position

In its December 29, 2009 letter of support, the petitioner described itself as a nonprofit educational organization, and claimed to offer affordable math and science tutoring, ACT and SAT preparation, computer training, summer school, and language classes. The petitioner explained that it realized most students in Chicago lack basic math and science skills, and it recognized an opportunity to open its own private school, which led to the creation of the [REDACTED]

In an undated attachment to its letter of support, the petitioner described the [REDACTED] as “the culmination of the expectations and beliefs of parents of Chicago school children and educators at [the petitioning entity].” The petitioner further described the [REDACTED] as “a small, structured school having grades K-8th [with] an enrollment of 12 students per grade.” The AAO notes that information from [REDACTED] website submitted in response to the director’s RFE confirms that the [REDACTED] is not a secondary school, as its instructional services do not extend beyond the eighth grade.

In this letter the petitioner also claimed that, as a mathematics teacher, the beneficiary would perform “duties customarily associated with teaching” including teaching classes; organizing and supervising field trips; attending weekly meetings; writing and aligning curriculum; preparing tests; mentoring other teachers; visiting with families; providing tutoring; advising students; attending parent-teacher conferences; and fulfilling other supervisory and organizational responsibilities.

In the March 9, 2010 letter it submitted in response to the director’s RFE, the petitioner expanded the list of duties to include the following:

- Designing and implementing appropriate curricula for the seventh and eighth grades;
- Assessing students’ performance levels, learning styles, strengths and weaknesses, and developing appropriate goals and objectives;
- Measuring and evaluating student progress;
- Participating in the Individualized Education Program (IEP) process as required;
- Preparing weekly lesson plans;
- Preparing substitute lesson plans;

³ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these three additional grounds for denial.

- Completing all paperwork including assessment reports, quarterlies, year-end reports, report cards, and IEP goals and objectives as required, and on time;
- Maintaining an organized, neat, and stimulating classroom space;
- Serving as a role model for students at all times;
- Setting and maintaining consistent and constructive limits and providing corrective learning and processing experiences for students;
- Preparing students for different mathematics competitions and coaching them;
- Providing extra tutoring for needy students;
- Communicating job-related information to team members effectively;
- Participating actively in department meetings, treatment teams, quarterly conferences, IEP meetings, etc.;
- Attending all required orientations and trainings, participating actively, and bringing agenda items and setting goals; and
- Performing other duties and responsibilities as requested by supervisory or administrative staff.

The petitioner stated that the beneficiary would have five general goals for all of his students, as follows:

- Learning to value mathematics;
- Becoming confident in one's own abilities;
- Becoming a mathematical problem solver;
- Learning to communicate mathematically; and
- Learning to reason mathematically.

In adjudicating this petition, the AAO will first address the three additional grounds for denial it has identified on appeal, each of which independently mandates denial of this petition. The AAO will then address the three grounds upon which the director denied the petition.

II. The LCA Submitted in Support of the Petition Does Not Correspond to It

As noted, the petitioner claims that the beneficiary would teach mathematics to students enrolled in the seventh and eighth grades. In other words, he would not teach students in a secondary school setting. However, that assertion materially conflicts with the occupational category designated by the petitioner on the LCA it submitted in support of this petition. As noted above, the LCA submitted by the petitioner in support of the instant position was certified for the SOC (O*NET/OES) Code 25-2031.00 and the associated Occupational Classification of “Secondary School Teachers, Except Special and Career/Technical Education.”

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer’s responsibility to ensure that ETA [(the DOL’s Employment and Training Administration)] receives a complete and accurate LCA.”

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor 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.

The *Prevailing Wage Determination Policy Guidance*⁴ issued by DOL states that “[t]he O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification” for determining the prevailing wage for the LCA.

Moreover, 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

⁴ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last visited Jul. 25, 2013).

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

Thus, the regulation at 20 C.F.R. § 655.705(b) requires USCIS to ensure that an LCA actually supports the H-1B petition.

The O*NET Summary Report for the occupational category “Secondary School Teachers, Except Special and Career/Technical Education” summarizes that occupation as follows:

Teach students in one or more subjects, such as English, mathematics, or social studies at the secondary level in public or private schools. May be designated according to subject matter specialty.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Secondary School Teachers, Except Special and Career/Technical Education, available at <http://www.onetonline.org/link/summary/25-2031.00> (last visited Jul. 25, 2013).

Although the petitioner characterized the proffered position as that of a secondary school teacher on the LCA, the record makes clear that the beneficiary would not be a secondary school teacher, and that the [redacted] is not a secondary school. As noted, the petitioner claimed that the beneficiary would teach mathematics to children in the seventh and eighth grade, and the materials regarding the SAC submitted below make clear that the [redacted] is not a high school. The petitioner did not explain why it believes its proffered position falls under the occupational category of “Secondary School Teachers, Except Special and Career/Technical Education” rather than under the occupational category of “Middle School Teachers, Except Special and Career/Technical Education,” which is summarized by O*Net OnLine as follows:

Teach students in one or more subjects in public or private schools at the middle, intermediate, or junior high level, which falls between elementary and senior high school as defined by applicable laws and regulations.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Middle School Teachers, Except Special and Career/Technical Education, available at <http://www.onetonline.org/link/summary/25-2022.00> (last visited Jul. 25, 2013).⁵

⁵ The AAO notes that counsel cited to O*Net OnLine’s Summary Report for “Middle School Teachers, Except Special and Career/Technical Education” in his December 26, 2009 letter.

When determining the proper occupational classification, it is not sufficient for a position to simply have a similar title. The aforementioned *Prevailing Wage Determination Policy Guidance* specifies that a determination should be made by “consider[ing] the particulars of the employer’s job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected.” In this case, the petitioner has not provided any documentation to substantiate its apparently erroneous claim that the position’s primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of “Secondary School Teachers, Except Special and Career/Technical Education” as depicted by O*Net OnLine. As such, it has not established that this LCA actually corresponds to this petition, and the appeal will be dismissed and the petition denied on this basis alone. Thus, even if it were determined that the petitioner had overcome all of the director’s grounds for denying this petition (which it has not), the petition could still not be approved.

III. Failure to Properly Execute the LCA

Next, the AAO notes that an authorized official of the petitioner has not signed and dated the LCA’s Declaration of Employer (section K), as that section requires in order to obtain (1) the petitioner’s attestation that the statements in the LCA are true and correct, that the petitioner “agree[s] to comply with the [LCA] Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the Department of Labor regulations (20 CFR part 655, Subparts H and I),” and (2) the petitioner’s agreement to make the LCA, its supporting documentation, and other records available to DOL.

The record contains an unsigned LCA bearing a certification date of December 15, 2009. The “Declaration of Employer” (Section K.5., page 4) of the LCA does not contain the petitioner’s signature. It is noted that on the first page of the LCA, the petitioner affirmatively checked the box confirming that that it “understood and agreed” to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

In addition, in the section “Signature Notification and Complaints” (Section N, page 5), the following notice is provided:

The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

[Emphasis in original.] DOL and DHS regulations require that the beneficiary's employer or a representative of the employer submit a copy of the signed, certified Form ETA 9035/ETA 9035E to USCIS in support of the Form I-129 petition.

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)(1)); 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.

* * *

- (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c) states, in pertinent part, the following:

- (1) Undertaking of the Employer. In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP. . . .
- (2) Signed Originals, Public Access, and Use of Certified LCAs. . . . For H-1B visas only, the employer must submit a copy of the signed, certified

Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the DOL regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Based on DOL and DHS regulations, the LCA that is filed with USCIS in support of an H-1B petition must be certified by DOL and signed by the beneficiary's employer or a representative of the employer. Here, the petitioner filed a copy of the certified, but unsigned, Form ETA 9035/9035E with USCIS in support of the Form I-129 petition. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 8 C.F.R. § 655.730(c)(2) and (3). Thus, even if it were determined that the petitioner had overcome all of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

IV. Specialty Occupation

The AAO will now explore the matter of whether the evidence of record establishes that the proffered position constitutes a specialty occupation. Based upon a complete review of that evidence, the AAO finds that it does not.

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)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁶ As discussed above, the AAO finds that the duties of the proffered position do not align with those of secondary school teachers as claimed on the LCA. Instead, the AAO finds that the duties of the proffered position more closely align with those of

⁶ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are from the 2012-13 edition available online.

middle school teachers, as such duties are described in the *Handbook*. The *Handbook's* discussion of the duties typically performed by middle school teachers states, in pertinent part, the following:

Middle school teachers educate students, most of whom are in sixth through eighth grade. They help students build on the fundamentals they learned in elementary school and prepare them for the more difficult lessons they will learn in high school. . . .

Middle school teachers typically do the following:

- Plan lessons that teach students subjects such as biology and history
- Assess students to evaluate their abilities, strengths, and weaknesses
- Teach students as an entire class or in small groups the lessons they have planned
- Grade students' assignments to monitor their progress
- Communicate with parents about their child's progress
- Work with individual students to challenge them and overcome their weaknesses
- Prepare students for standardized tests required by the state
- Develop and enforce classroom rules
- Supervise students outside of the classroom—for example, at lunchtime or during detention

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Middle School Teachers," <http://www.bls.gov/ooh/education-training-and-library/middle-school-teachers.htm#tab-2> (last visited Jul. 25, 2013).

The *Handbook* reports the following educational requirements for middle school teachers:

All states require public middle school teachers to have at least a bachelor's degree. . . .

* * *

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.

* * *

All states require teachers in public schools to be licensed, or certified, as it is frequently referred to. Those who teach in private schools are not usually required to be licensed.

Id. at <http://www.bls.gov/ooh/education-training-and-library/middle-school-teachers.htm#tab-4> (last visited Jul. 25, 2013).

As noted, the *Handbook* indicates that all states require middle school teachers working for public schools to possess both licensure (or certification) and a bachelor's degree in either elementary education or a content area (for example, mathematics in the instant case). However, the petitioner is not a public school, and the *Handbook* specifically states that those who teach in private schools are not required to meet state requirements. The *Handbook* does not specify a normal minimum hiring requirement by private schools for a bachelor's degree or the equivalent in a specific specialty.

The September 26, 2002 letter that counsel submitted from the Illinois State Board of Education supports the AAO's analysis. In pertinent part, that letter states the following:

Please be advised that there is no requirement that teachers in private or nonpublic school[s] be certified by the State Board of Education. Teacher qualifications and competencies are established by each private, nonpublic school. . . .

A school may employ teachers or other professional staff on the basis of demonstrated competence in lieu of a baccalaureate degree or its equivalent.

The information from O*NET OnLine submitted by counsel does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. First and foremost, as noted above, because the proffered position is not that of a secondary school teacher, the information regarding normal minimum educational requirements for "Secondary School Teachers, Except Special and Career/Technical Education" contained in O*NET OnLine has little relevance here. However, even if that were not the case, the O*NET OnLine excerpt submitted by counsel would still not establish the proffered position as a specialty occupation, as O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as its Job Zone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational

preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine excerpt is of little evidentiary value to this issue.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

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 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 for 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. Nor does the record of proceeding contain any other evidence establishing that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not 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.”

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor’s degree in a specific specialty, or the equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor’s or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from typical private-school middle school teaching positions which, as indicated in the *Handbook*, do not necessarily require a person with at least a bachelor’s degree in a specific specialty, or the equivalent.

The petitioner therefore failed to establish how the beneficiary’s responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor’s degree in a specific specialty, or the equivalent.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor’s degree in a specific specialty, or the equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor’s degree, or the equivalent, in a specific specialty for the position.

The AAO’s review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree in a specific specialty, or its equivalent, in its prior recruiting and hiring for the position. The record must establish that a petitioner’s imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor’s degree in a specific specialty, or the equivalent.

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 assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record contains no evidence regarding any previous mathematics teachers employed by the petitioner. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entry for the middle school teacher occupational category and the letter from the Illinois State Board of Education. Again, neither resource indicates that a bachelor's degree in a specific specialty, or the equivalent, is normally required to perform the duties of a

general private-school middle school teaching position (to the contrary, both resources indicate precisely the opposite). With regard to the specific duties of the private-school middle school teaching position proffered here, the AAO finds no evidence establishing that these duties differ from those performed by general private-school middle school teachers such that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO acknowledges the information contained in the record regarding a previous nonimmigrant petition filed on behalf of the beneficiary by another petitioner. The director's decision does not indicate whether she reviewed this prior petition. However, if the previous nonimmigrant petition was approved based upon the same evidence contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis alone. Thus, even if it were determined that the petitioner had overcome all of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

V. Beneficiary Qualifications

The AAO will now address the director's first ground for denial of the petition: her determination that the petitioner had failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The statements made by DOL in the *Handbook* and by the Illinois State Board of Education in its previously-discussed September 26, 2002 letter demonstrate that licensure is not required to perform the duties of the proffered position. With regard to education, the record contains three evaluations which collectively serve as ample evidence of the beneficiary's qualifications to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). Accordingly, while the proffered position is not a specialty occupation, the director's finding that the beneficiary is unqualified to perform its duties is nonetheless hereby withdrawn.

VI. Terms and Conditions of Employment

The director's second ground for denial of the petition was her determination that the petitioner had failed to demonstrate that it would comply with the terms and conditions of employment. As will be discussed, the AAO finds that the petitioner has failed to overcome this ground of the director's decision.

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) of the Act, 8 U.S.C. § 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. By signing the Form I-129 and LCA, the petitioner attests that it will comply with the wage requirements.

The primary rules governing an H-1B petitioner's wage obligations appear in the DOL regulations at 20 C.F.R. § 655.731. Based upon the excerpts below, the AAO finds that this regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary: (1) in prorated installments to be disbursed no less than once a month; (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly; and (3) within the work year to which the salary applies.

The regulation at 20 C.F.R. § 655.731(c) states, in pertinent part, the following:

Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.
- (2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:
 - (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
 - (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. [§] 1, et seq.);

- (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. [§] 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. [§] 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
 - (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
 - (v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).
- (3) *Benefits and eligibility for benefits* provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.
- (i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (e.g., full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the

H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. [§§] 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

* * *

- (iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.*, recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

The petitioner states its intent to employ the beneficiary on a full-time basis. On the Form I-129 (at pages 3 and 13) and the LCA, the petitioner reported that the salary for the proffered position would be \$40,650 per year. The *Instructions* to the Form I-129 state that "[t]he rate of pay is the salary or wages paid to the beneficiary. Salary or wages must be expressed in annual full-time amount and do not include non-cash compensation or benefits."⁷

The director found the initial evidence submitted by the petitioner insufficient to establish eligibility for the benefit sought, and issued an RFE on February 5, 2010. With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The notice outlined the documentation to be submitted and included a request that the petitioner "[s]ubmit copies of the petitioner's payroll summary, W-2's and W-3's evidencing wages paid to all employees for 2006, 2007, and 2008."

The petitioner submitted the requested evidence and, in reviewing the petitioner's response, the director found discrepancies between the stated wages and the actual annual wages paid to four of the petitioner's H-1B employees. In her decision denying the petition, the director provided as examples the names of four employees and their associated H-1B receipt numbers, the wages the petitioner had stated in their petitions, and the wages that were actually paid, according to the Forms W-2. The director noted that the wage data from the Forms W-2 did not support a finding that the petitioner had paid the H-1B employees the required wages under the relevant statutory and regulatory provisions.

On appeal, counsel argues that the director provided no evidence regarding the wage figures cited by the petitioner in the earlier petitions and, further, that "[t]here are a variety of lawful reasons for differences in payroll figures," and provides as examples H-1B workers commencing employment

⁷ The *Instructions* to the Form I-129 may be found online at the USCIS website at <http://www.uscis.gov/files/form/i-129instr.pdf> (last visited Jul. 25, 2013).

several months into the year, employees taking leave for health reasons, and employees who leave the employer in the middle of a year.

However, the AAO finds neither argument persuasive. As a preliminary matter, the AAO notes that by signing the Form I-129, the petitioner confirms “under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct” and that it “agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment.” The petitioner attests that it has read and agreed to the labor condition statements at Section H, which include confirming that it will “[p]ay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time.” The required wage must be paid to the employee, cash in hand, free and clear, when due. *See* 20 C.F.R. § 655.731(c)(1).

With regard to counsel's first argument, the AAO notes that the director provided the petitioner with the names of the four employees and their associated H-1B receipt numbers, which provided the petitioner with sufficient information to enable it to locate those petitions within its files. Counsel's argument, therefore, is not persuasive.

Regarding counsel's second argument, the AAO notes that although counsel raises several *potential* reasons why an actual wage could be lower than a stated wage, he does not explain whether any of these potential reasons actually caused the discrepancies identified by the director, let alone submit evidence establishing that such was the case. His argument is not persuasive because it represents a claim by counsel rather than evidence to support a claim. Uncorroborated assertions made by counsel merit no evidentiary weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, a simple assertion by counsel on appeal does not qualify as independent and objective evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel argues further that the director should have raised this issue in the RFE, stating the following:

Further, the issue of prior H-1B's was not even raised in the RFE. If so, the petitioner would have had the opportunity to explain the figures with appropriate

documentation . . . Denying the petition on a basis not even raised in an RFE defeats the purpose of raising potential bases for denial in an RFE . . . The petitioner has not even had the opportunity to explain or submit evidence on the “discrepancies” for the simple reason that there was no discrepancy offered in the RFE to explain or otherwise respond to.

However, it must be noted that the petitioner did not submit the Forms W-2 when it filed the petition initially. The documents were not received and, consequently reviewed by USCIS, until the petitioner sent the documents to USCIS *in response to the RFE*. Furthermore, with the RFE, the petitioner was put on notice that additional evidence was required to determine its eligibility and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Counsel’s assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. His attempt to shift the evidentiary burden in this proceeding is without merit. When any person makes an application for a “visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible” for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm’r 1972).

The regulations indicate clearly that issuance of an RFE is discretionary and that the director may instead deny an application when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8). There is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. The regulation at C.F.R. § 103.2(b)(8) unambiguously permits the acting director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director.

With regard to this perception by counsel of error by the director in not issuing an additional RFE, or a Notice of Intent to Deny (NOID) the petition based upon the concerns raised by the wage records submitted in response to the RFE, the AAO also notes, hypothetically, that, even if the director had erred as a procedural matter in not issuing an additional RFE or a NOID – which, the AAO finds, she did not - it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and, on appeal, had the opportunity to submit evidence to overcome the grounds of the acting director’s decision, but did not use that opportunity to submit such evidence. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with evidence. In this regard, it should also be noted once again that the AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d at 145), and that even after the petitioner was afforded the opportunity on appeal to submit evidence to effectively rebut and overcome the director’s findings, it elected to not do so.

Based upon a complete review of the record, 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. The AAO finds that the director was correct in the determination that the petitioner failed

to credibly establish that it would comply with the terms and conditions of employment. Accordingly, the appeal will be dismissed and the petition denied on this basis.

VII. Authentic Proffer of Employment

The director's third ground for denial of the petition was her determination that the petitioner had failed to demonstrate the authenticity of its proffer of employment to the beneficiary. The AAO finds that the questions raised by the director regarding the petitioner's "central purpose," its "chronological development," and its total number of employees have been resolved. Accordingly, this portion of the director's decision is hereby withdrawn.

VIII. Conclusion

As discussed above, the AAO finds that the petitioner has overcome the director's concerns regarding: (1) the qualifications of the beneficiary to perform the duties of a specialty occupation; and (2) the authenticity of its proffer of employment. Consequently, those portions of the director's decision will be withdrawn.

The petitioner has not overcome the director's concerns with regard to its compliance with the terms and conditions of employment. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

Beyond the decision of the director, the petitioner has also failed to: (1) submit an LCA that corresponds to the petition; (2) submit a signed and dated LCA; and (3) demonstrate that the proffered position qualifies for classification as a specialty occupation. The petition must therefore also be denied for each of these three additional reasons.

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 at 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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