



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 11 2015**

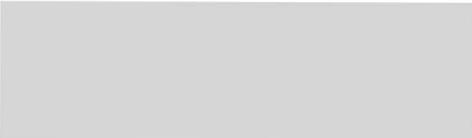
PETITION RECEIPT#: 

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

## I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 22-employee "Mandarin Chinese Language School" established in [REDACTED]. In order to employ the beneficiary in what it designates as a part-time Mandarin Chinese teacher position at a salary of \$400 per week,<sup>1</sup> 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, concluding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.

The record of proceeding before us 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) Forms I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's basis for denying this petition.<sup>2</sup> We will also address an additional, independent ground, not identified by the director's decision, that we find also precludes approval of this petition.<sup>3</sup> Specifically, beyond the decision of the director, we find that the evidence in the record of proceeding does not establish that the petitioner would have an employer-employee relationship with the beneficiary. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. SPECIALTY OCCUPATION

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Teachers and Instructors, All Other" occupational classification, SOC (O\*NET/OES) Code 25-3099, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

<sup>2</sup> In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies.

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

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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 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 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.

#### B. The Proffered Position

In the Form I-129, the petitioner stated that it wishes to employ the beneficiary in a Mandarin Chinese teacher position on a part-time basis. In its support letter, the petitioner provided the following information regarding the duties of the proffered position:

Beneficiary will be teaching students from toddler to adult level in Mandarin Chinese. She will act as a facilitator, using interactive discussions and 'hands-on' learning to help students learn and apply concepts. Beneficiary will help students understand abstract concepts, solve problems and develop critical thought process. Beneficiary will design classroom presentations to meet student needs and abilities. Beneficiary will plan, evaluate and assign lessons and homework. The position also

requires preparing, administering and grading tests; listening to oral preparations and maintaining classroom discipline.

Beneficiary will observe and evaluate a student's performance and potential. Beneficiary will provide additional assistance in area's [sic] where a student needs help. Beneficiary will be involved in grading papers, preparing report cards and meeting with parents and school staff to discuss student's academic progress or personal problems. Beneficiary will be keeping record[s], recording grades and performing other administrative and clerical duties. Beneficiary will continually update her skills in order to instruct and use the latest technology in the classroom.

Beneficiary will help students develop more deeply into subjects and expose them to information about the world. Beneficiary will use the latest technology in teaching such as films, slides, overhead projectors, and computers to enhance the students [sic] learning experiences. Beneficiary will prepare students by teaching students to interact with others, adapt to new concepts, and logically think through language instructions. Beneficiary will also be providing the tools and environment for the students to develop these skills.

Beneficiary will use effective, relevant and quality instructions. Beneficiary will engage in activities for continuous academic and professional development and improvement. Beneficiary will participate in Instructional Staff Development activities to promote instructional excellence and academic potential by contributing to the current state of knowledge in their discipline, by seeking new knowledge research and other scholarly and professional involvement.

Beneficiary will teach for the entire school year; and [p]rivate tutoring programs arranged by the Program Director. She will prepare a plan that will allow parents to teach students at home. She will send out weekly email updates to parents.

The petitioner states that a "bachelor's degree in education, or its equivalent and relevant work experience and appropriate certification for special language education" is required to perform the duties of the proffered position.

In the employment agreement entered into by the petitioner and the beneficiary on February 27, 2014, the petitioner stated that the beneficiary "further agrees to devote her time to the business of the [petitioner]."

The petitioner also submitted its job advertisement for a Chinese language lead classroom instructor position, in which the petitioner stated that the lead teacher is "responsible for teaching students (Toddler and Adult) in Mandarin Chinese at local schools," and provided the following duties:

- Plan, prepare and deliver developmentally appropriate instructional activities that teach students how to read, write, and understand Mandarin Chinese – spoken, character reading and writing.

- Utilize formal academic curricula that consider the diverse educational, cultural, and linguistic backgrounds of the students and families to formulate a syllabus.
- Integrate learning objectives of curriculum into lesson plans.
- Establish and communicate clear objectives for all learning activities.
- Create projects designed to enhance lectures.
- Develop student understanding and appreciation of Chinese culture.
- Take into account individual learners' strengths, interests, and needs to enable each learner to accelerate his/her learning. Adapt to the needs of students.
- Leverage existing and create new instructional resources for classroom.
- Motivate participation in class activities. Create positive educational climate for students to learn in and manage classroom behaviors.
- Participate in the selection of materials (books, learning aids, etc.) available in the classroom and online.
- Leverage, as appropriate knowledge/content management assets provided by [REDACTED] to tailor the learning experience.
- Observe and evaluate student's performance, providing regular and timely feedback to students (and parents as needed).
- Grade student work and maintain grade books.
- Prepare and distribute required reports (attendance, participation, test and project grades, etc.).
- Read and stay abreast of current topics in education.
- Tutor students on an individual basis (as part of optional Tutoring program participation).
- Participate in [REDACTED] in house teaching development programs and continue to build professional skills related to areas of responsibility.
- Participate as needed in periodic Accreditation activities, and including direct observations of teaching by evaluators.
- Collaborate with families, [REDACTED] community, colleagues, and other professionals to promote learner growth and development.
- Work within Public School System and engage in classroom teaching[.]

### C. Analysis

As a preliminary matter, we note that although on the Form I-129 the petitioner stated that the beneficiary would not work off-site,<sup>4</sup> the evidence of record indicates that the beneficiary would also work off-site at local public and private schools and other locations within Connecticut for after-school programs. In response to the Director's RFE, as well as on appeal, the petitioner submitted an e-mail dated May 22, 2014, from [REDACTED] "Head of School" at [REDACTED] who stated that her organization has entered into an agreement with the petitioner for the provision of Mandarin Chinese instructors to teach at its facility. However, the petitioner did not submit the referenced agreement or any associated work orders or similar documentation. In addition, the "Work

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<sup>4</sup> On the Form I-129, the petitioner checked the box "No" to the question of whether the beneficiary would work off-site.

Conditions/Environment" section of the petitioner's job advertisement states that "[f]or after-school with participating districts, [the beneficiary will] travel as needed in [Connecticut]." The record contains another job advertisement by the petitioner for a Mandarin Chinese Teacher position, which states that a successful candidate would teach at the petitioner's location as well as at client schools for the entire school year. The record does not contain any agreements with public school districts or other participating institutions outlining in detail the duties of the job the beneficiary would perform at such end-clients' locations. Furthermore, the petitioner did not provide any explanation for the inconsistency regarding where the beneficiary would work. The petitioner did not provide specific information regarding for which end-client the beneficiary would provide services, nor does the record contain an itinerary indicating the percentages of time the beneficiary would spend teaching in-house and at the end-clients' locations. When a petition includes errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).<sup>5</sup>

In addition, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks listed. Thus, the petitioner did not specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, the record indicates that the proffered position includes significant clerical and administrative duties, as well as unspecified duties for "the business of the [petitioner]." To qualify as a specialty occupation, the petitioner must establish, among other things, that the duties of the proffered position require a bachelor's or higher degree in a specific specialty, or its equivalent. See section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Furthermore and as previously stated by the Service, "The H-1B classification is not intended . . . for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts." 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998); *but cf.* 8 C.F.R. § 214.2(l)(3)(v)(C) (permitting L-1A managers or executives that are coming to the United States to open a "new office" in the United States to perform some non-qualifying duties during the one year period it takes the new office to meet the "doing business" standard).<sup>6</sup> In other words and in contrast to the L-1A new office regulations, no provision in the law relevant to H-1B nonimmigrants provides an initial grace period during which non-qualifying duties may be performed.

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<sup>5</sup> In addition, the uncertainty regarding the beneficiary's actual employment location calls into question the validity of the LCA.

<sup>6</sup> This regulation recognizes that when a new office is first established and commences operations in the United States, the L-1A manager or executive responsible for setting up operations will be engaged in a variety of non-qualifying, day-to-day duties not normally performed by employees at the executive or managerial level and that often the full range of executive or managerial responsibility cannot be performed in that first year. See 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987).

Nevertheless, while there is no provision in the law for specialty occupations to include non-qualifying duties, we will view the performance of duties that are incidental<sup>7</sup> to the primary duties of the proffered position as acceptable when they are unpredictable, intermittent, and of a minor nature. Anything beyond such incidental duties, however, e.g., predictable, recurring, and substantive job responsibilities, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. Here, the record of proceeding does not provide information regarding the percentages of time the beneficiary would spend on clerical, administrative, and other non-specified duties for the petitioner's business.

Despite these deficiencies in the description of the duties, we will nevertheless analyze them as described by the petitioner and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position*

USCIS 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 that it addresses.<sup>8</sup> As noted above, the LCA corresponds to the occupational classification "Teachers and Instructors, All Other"-SOC(ONET/OES) code 25-3099, at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

We reviewed the *Handbook* regarding the occupational category "Teachers and Instructors, All Other." However, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for this occupational category. More specifically, the *Handbook* does not provide the typical duties and responsibilities for "Teachers and Instructors, All Other." It also does not provide any information regarding the academic and/or professional requirements for these positions. Thus, the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

There are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

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<sup>7</sup> The two definitions of "incidental" in *Webster's New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are "1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . ."

<sup>8</sup> All of the references are to the 2014-2015 edition of the *Handbook*, which is available at <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," available at <http://www.bls.gov/oooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited August 5, 2015).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented and that detailed occupational profiles for these occupations are not developed.<sup>9</sup> The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies the statutory and regulatory provisions, including this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

In addition, we note that the Occupational Information Network (O\*NET) Summary Reports, referenced by counsel, are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. On August 5, 2015, we accessed the pertinent section of the O\*NET OnLine Internet site relevant to 25-2031.00 – Secondary School Teachers. Contrary to the assertions of counsel, O\*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O\*NET OnLine does not indicate that four-year bachelor's degrees required by some Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, the O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

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<sup>9</sup> We note that occupational categories for which the *Handbook* only provides summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

With regard to the expert opinion evaluation submitted by the petitioner, we note that the evaluator, [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. Nor does he discuss the duties of the position in any meaningful detail. Thus, it appears that [REDACTED] did not base his opinion on any objective evidence, but instead restates the proffered position description as provided by the petitioner. [REDACTED] does not indicate whether he visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that these workers apply on the job. His level of familiarity with the actual job duties as they would be performed in the context of the petitioner's business has therefore not been substantiated.

Furthermore, [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, he nowhere discusses this aspect of the proffered position. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for his ultimate conclusion as to the educational requirements of the position upon which he opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Teachers and Instructors, All Other" occupational category, SOC (O\*NET/OES) Code 25-3099, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by the DOL states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.<sup>10</sup>

Thus, the proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level

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<sup>10</sup> U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited August 5, 2015).

indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. The author's omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of her assertions. The petitioner's LCA wage-level designation does not support [REDACTED] conclusion that the proffered position involves "complex job duties." [REDACTED] omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

Finally, while the assertions of [REDACTED] with regard to an industry-wide recruiting and hiring standard are acknowledged, the record contains insufficient evidence to support these assertions. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). For all of those reasons, [REDACTED] opinion letter does not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our discretion, use advisory opinion statements submitted by the petitioner as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

Upon review, we find that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner did not satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,  
or its equivalent, is common to the industry in parallel  
positions among similar organizations*

Next, we will review the record regarding 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

The petitioner submitted copies of nine job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, the petitioner's reliance on the job advertisements is misplaced.

In the Form I-129, the petitioner stated that it is a Mandarin Chinese language school with 22 employees established in [REDACTED]. The petitioner reported a gross annual income \$292,824 and \$17,008 as its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 611630,<sup>11</sup> which is designated for "Language Schools."

For the petitioner to establish that an organization in its industry is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

We will briefly note that, without more, the job advertisements do not appear to involve organizations that both operate in the petitioner's industry and that are also similar to the petitioner. For example, three of the advertisements are from public school systems, one of the advertisements is from a community college, and [REDACTED] Academy is a college preparatory school. The record contains no information regarding the remaining organizations. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it. Consequently, the record does not contain sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few

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<sup>11</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited August 5, 2015).

elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. 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. at 165.

In addition, although the advertised positions are for Chinese language teachers, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

Further, some of the advertisements do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.<sup>12</sup> For instance, the advertisements from the [REDACTED], Indianapolis, and [REDACTED] public school systems require a bachelor's degree, and the advertisements from [REDACTED] Academy and [REDACTED] Academy prefer a master's degree but do not state their minimum educational requirement in a specific specialty.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job advertisements is not necessary.<sup>13</sup> That is, not every deficit of every job advertisement has been addressed.<sup>14</sup>

The petitioner's reliance on [REDACTED] e-mail is also misplaced as the record of proceeding contains insufficient evidence to demonstrate that The [REDACTED] is an organization that is similar to the petitioner. Simply 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. at 165.

The evidence of record has not established 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 (1) in

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<sup>12</sup> As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a degree in a specific specialty that is directly related to the duties of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

<sup>13</sup> The petitioner did not provide any independent evidence of how representative the job advertisements are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

<sup>14</sup> Even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

*The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent*

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the evidence of record shows that the petitioner's particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

Here, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the Mandarin Chinese language teacher position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. The petitioner did not demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a continuous quality improvement supervisor position, the evidence of record does not demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.<sup>15</sup> Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.<sup>16</sup> For example, a Level IV (fully

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<sup>15</sup> The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

<sup>16</sup> The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations

competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>17</sup>

The petitioner claims that the beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The evidence of the record has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

*The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position*

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, 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 performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner 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 388.

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

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(doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

<sup>17</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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 384. 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 the specific specialty as the minimum for entry into the occupation as required by the Act.

The record contains copies of several individuals' degrees and paystubs. The petitioner also submitted a list of its employees, the degrees they possess, and their employment dates. The petitioner claims that these documents demonstrate its hiring history. However, the record does not contain sufficient evidence demonstrating that the duties of these individuals are the same as those of the proffered position that it offers to the beneficiary. Furthermore, the internet page the petitioner submitted lists three individuals on its teaching staff who do not have a degree in education or in a related field. For example, [REDACTED] has a degree in social work, [REDACTED] has a degree in computer science, and [REDACTED] has a bachelor's degree in economics and a law degree. The petitioner did not provide any explanation as to how these degrees are related to the education degree it requires. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

*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 in a specific specialty, or its equivalent*

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to demonstrate that the nature of the specific 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 a specific specialty, or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. The record of proceeding lacks sufficient, credible evidence establishing that the duties of the proffered position 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.

Here, we incorporate by reference our earlier discussion regarding [REDACTED] opinion letter. For the reasons discussed earlier, we find that the letter from [REDACTED] is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Again, we may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 791.

We reiterate our earlier discussion regarding the petitioner's designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within

the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.<sup>18</sup>

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has not satisfied the criterion of the regulations described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, as the evidence of record does not satisfied any 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. The appeal will be dismissed and the petition denied for this reason.

### III. EMPLOYER-EMPLOYEE RELATIONSHIP

Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the petitioner seeks again to employ the beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

Beyond the Director's decision, we also concluded that the record of proceeding does not establish that the petitioner meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

More specifically, section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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<sup>18</sup> For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows (emphasis added):

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As discussed above, although the petitioner claims that the beneficiary will be employed as an in-house employee, the evidence of record suggests that the beneficiary would also teach at other public and private institutions in addition to teaching at the petitioner's location. The record, however, contains insufficient information identifying any specific end-client to which the

beneficiary would be assigned or specific information outlining in detail the nature and scope of the beneficiary's employment at end-clients' locations. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated. While the record contains multiple assertions regarding the petitioner's right to control the work of the beneficiary, simply 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. at 165. The record contains insufficient evidence to demonstrate that the requisite employer-employee relationship would exist between the petitioner and the beneficiary while working at the sites of these unspecified end-clients.

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without further evidence of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship exists between the petitioner and the beneficiary. Consequently, the petition may not be approved for this additional reason.

#### IV. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons.<sup>19</sup> 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.

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<sup>19</sup> As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.

(b)(6)



*NON-PRECEDENT DECISION*

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