



U.S. Citizenship  
and Immigration  
Services

Non-Precedent Decision of the  
Administrative Appeals Office

MATTER OF N-D-O-E-

DATE: DEC. 19, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a public school system, seeks to classify the Beneficiary as a science teacher of exceptional ability. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that the position requires someone of exceptional ability.

The matter is currently before us on appeal. The Petitioner now submits additional documentation and maintains that the Director erred in his analysis of the evidence.

Upon *de novo* review, we will dismiss the appeal.

## I. LAW

Section 203(b)(2) of the Act provides classification, *inter alia*, to individuals of exceptional ability in the sciences, arts, or business whose services are sought by an employer in the United States. Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). To demonstrate an individual's exceptional ability, a petitioner must provide documentation that satisfies at least three of six evidentiary criteria. 8 C.F.R. § 204.5(k)(3)(ii). The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").<sup>1</sup>

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<sup>1</sup> *Cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

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In addition to demonstrating that the individual possesses exceptional ability, the petitioner must demonstrate that the position requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i).

## II. ANALYSIS

The Director denied the instant petition after finding that the stated position does not require an individual of exceptional ability. On appeal, the Petitioner submits a brief and additional documentation about the [REDACTED]. Upon review, we agree with the Director that the Petitioner did not demonstrate that the position requires an individual of exceptional ability, and additionally find that the Petitioner has not demonstrated that the Beneficiary possesses exceptional ability. We explain both of these findings below.

### A. Exceptional Ability of the Beneficiary

The Director found that the Petitioner satisfied three of the six evidentiary criteria listed at 8 C.F.R. § 204.5(k)(3)(ii). He did not, however, proceed to the second step of the exceptional ability analysis and consider whether the totality of the evidence demonstrates that the Beneficiary has a degree of expertise significantly above that ordinarily encountered. 8 C.F.R. § 204.5(k)(2).

On appeal, the Petitioner indicates: “The regulation at 8 CFR § 204.5(k) states plainly that requiring at least three of these factors, without more, ‘demonstrates exceptional ability.’ 8 CFR § 204.5(k)(3)(ii).” The Petitioner errs in its interpretation of the regulatory language. The regulation cited by the Petitioner states, “To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following . . . .” This regulation makes the submission of initial evidence meeting at least three of these criteria necessary, but not sufficient, for establishing exceptional ability.

Relevant statute, case law, a precedent decision, and USCIS policy all support a two-step analysis for determining whether an individual has exceptional ability. The statute expressly advises that “the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.” Section 203(b)(2)(C) of the Act. Thus, the statute contemplates that USCIS will consider on a case-by-case basis whether an individual’s credentials are, in fact, indicative of the necessary level of expertise. A federal circuit court considered first preference regulations that similarly list criteria.<sup>2</sup> That court found that, while USCIS is limited to the plain language of the criteria when considering whether a criterion is satisfied, USCIS may then perform a final merits determination that analyzes the filings in the aggregate.<sup>3</sup> A USCIS precedent clarifies that we look not simply at the quantity, but also at

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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the quality of the evidence provided.<sup>4</sup> Finally, it is established USCIS policy that we perform a two-step analysis in exceptional ability cases.<sup>5</sup>

### 1. Evidentiary Criteria

The Director found that the Petitioner submitted evidence meeting at least three of the evidentiary criteria. The Beneficiary has a two-year bachelor of science degree, a one-year bachelor of education degree, and a two-year master of arts degree. An evaluation of this education from [REDACTED] concludes that this education "is equivalent to undergraduate course work in Education, a Bachelor of Arts in Public Administration awarded by a regionally accredited university in the U.S." This meets the academic degree criterion. 8 C.F.R. § 204.5(k)(3)(ii)(A). Next, the Beneficiary is certified by the [REDACTED] to teach biology and general science in grades 5-9. Thus, the record supports the conclusion that the Beneficiary meets the certification criterion. 8 C.F.R. § 204.5(k)(3)(ii)(C). Finally, the Petitioner demonstrated that the Beneficiary belongs to the [REDACTED] and the [REDACTED] thereby meeting the professional membership criterion. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner stated that the Beneficiary satisfied a fourth criterion by showing that she has commanded a salary or other remuneration for services which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D). The Director did not address this criterion. The Petitioner provided evidence that the Beneficiary's annual salary became \$82,900 as of May, 2015. The Petitioner compared this to the offered wage range of \$44,849 to \$69,838 listed on the ETA Form 9089, Application for Permanent Employment Certification (labor certification). It also noted that the entry level wage for teachers according to the ACWIA database, one that is reserved for institutions of higher education and certain research entities, is \$20,470. The Petitioner indicates that the ACWIA<sup>6</sup> schedule is appropriate for it to use due to its affiliation with the New York state higher education system. Regardless of the ACWIA schedule, we note that the Petitioner determines the salaries for its teachers according to its own chart, which is based on years of teaching and education.<sup>7</sup> The Petitioner did not provide information regarding average experience or education levels in its schools or for teacher's in general. As a result, the Petitioner has not shown that the Beneficiary's salary demonstrates exceptional ability.

<sup>4</sup> *Chawathe*, 25 I&N Dec. at 376.

<sup>5</sup> USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14 4, 20-23* (Dec. 22, 2010), <https://www.uscis.gov/laws/policy-memoranda>.

<sup>6</sup> The American Competitiveness and Workforce Improvement Act (ACWIA) was passed in 1998 and made several structural changes, particularly related to the H-1B program. American Competitiveness and Workforce Improvement Act of 1998, PL 105-277, 112 Stat 2681, 2681-640.

<sup>7</sup> See Certified Teachers Schedule,

[REDACTED] (last visited Dec. 19, 2016). A copy of the schedule has been printed and incorporated into the record of proceeding.

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## 2. Evidence in the Aggregate

The Director found that the Petitioner satisfied three of the regulatory criteria, but he did not consider the totality of the record to determine if it demonstrated that the Beneficiary is an individual with a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.<sup>8</sup> As noted above, this second step of the analysis is necessary when evaluating whether the Petitioner has met the requisite burden of proof and established eligibility for the Beneficiary as an individual of exceptional ability.<sup>9</sup>

The regulation defines exceptional ability as “a degree of expertise significantly above that ordinarily encountered.” 8 C.F.R. § 204.5(k)(2). After evaluating the evidence provided, we conclude that it does not show that the Petitioner has such ability. The Petitioner does not indicate that a bachelor’s degree is indicative of expertise in the teaching profession. In addition, the Petitioner explained that all teachers in New York must obtain state certification. According to the Petitioner, memberships in the [redacted] and the [redacted] are automatic upon a teacher’s hiring. It therefore appears that at least two of these criteria are shared by every teacher in the state. Lastly, as noted above, the Petitioner has not shown that the Beneficiary’s salary is indicative of expertise as a teacher significantly above that ordinarily encountered in the sciences, arts, or business. As a result, the record does not demonstrate that the Beneficiary has exceptional ability as a science teacher.

### B. Exceptional Ability Required for the Position

The Director denied the underlying petition after finding that the job offer portion of the individual labor certification did not demonstrate that the position requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). The Petitioner provided a labor certification for a Level I, Secondary School Teacher, SOC Code 25-2031.00, with a prevailing wage of \$44,849. It listed a job title of “General Science Teacher” and indicated the position requires a bachelor’s degree in education or an alternate field of study. It requires no experience in teaching, but does require eligibility for a New York state teaching certificate. The Petitioner listed the proposed wage range as \$44,849 to \$69,838 annually.

The Petitioner stated that the degree and licensure requirements listed on the job certification correspond to two of the evidentiary criteria for exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A), (C). In this case, however, as noted above, these requirements are prerequisites for becoming a teacher in New York public schools. As a result, even though they correspond to evidentiary criteria, they do not show in this case that the job requires “a degree of expertise significantly above

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<sup>8</sup> 8 C.F.R. § 204.5(k)(2) (definition of exceptional ability). Eligibility is to be determined not by the quantity of the filings alone but by their quality. *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm’r 1989)). We “examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence.” *Id.*

<sup>9</sup> See section 203(b)(2)(A), (C) of the Act; 8 C.F.R. § 204.5(k)(2), (3)(ii); cf. *Kazarian*, 596 F.3d at 1119-20.

that ordinarily encountered.” 8 C.F.R. § 204.5(k)(2). Instead, they indicate that the position has requirements consistent with the minimum conditions for employment as dictated by law.

The Petitioner also indicates that the wage range offered on the labor certification of \$44,849 to \$69,838 annually indicates exceptional ability. We first note that the lower end of this range, \$44,849, is consistent with the prevailing wage for a Level I teacher. The four levels for prevailing wage rates are Level I (entry), Level II (qualified), Level III (experienced), and Level IV (fully competent).<sup>10</sup> The use of a Level I wage for comparison is problematic in that, by definition, it reflects the rate paid to individuals with the lowest skill set in the profession. As a result, we do not find that the wage range listed demonstrates exceptional ability is required for the position. The Petitioner also notes that the ACWIA database, one that is reserved for institutions of higher education and certain research entities, lists a significantly lower salary for entry level of “Teachers and Instructors, All Other.” Regardless of whether the Petitioner uses ACWIA because it is affiliated with a university system, it has not demonstrated that the entry level salary it provides is a meaningful comparison to the offered wage. As noted above, the bottom range of the offered wage matches the prevailing wage on the submitted labor certification. The Petitioner has not shown that tendering the prevailing wage indicates that the job requires an individual of exceptional ability. See 8 C.F.R. § 204.5(k)(3)(ii)(D).

All of these factors show that, although the position has some requirements that correspond to evidentiary criteria, the requirements generally reflect the basic legal conditions for teaching in New York. The Petitioner has not stated or documented that a bachelor’s degree is above that ordinarily encountered among teachers. It indicated that certification is a requirement for all teachers in the state. Finally, it has not explained how offering a salary consistent with the prevailing wage, is indicative of requiring exceptional ability. As a result, these factors in the aggregate do not demonstrate that the job requires an individual with “a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.” 8 C.F.R. § 204.5(k)(2).

### III. CONCLUSION

The Petitioner has not demonstrated that the job requires an individual of exceptional ability or that the Beneficiary has such expertise. Accordingly, the Petitioner has not met its burden to establish eligibility for the immigration benefit sought. See Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

**ORDER:** The appeal is dismissed.

Cite as *Matter of N-D-O-E-*, ID# 12278 (AAO Dec. 19, 2016)

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<sup>10</sup> Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Program, Foreign Labor Certification Data Center – Skills Levels, Nov. 2009, [http://www.flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Dec. 14, 2016).