



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 22 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an 8-employee preschool¹ established in 1998. In order to employ the beneficiary in what it designates as a full-time "preschool teacher" at a salary of \$25,936.80 per year 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 does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding 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, a brief, and supporting documentation.

We find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Preschool Teacher" on a full-time basis. The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Preschool Teachers-Except Special Education" occupational classification, SOC (O*NET/OES) Code 25-2011.00, and a Level II prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Preschool Teacher" as the position's job title.

On the Form I-129, the petitioner provided the following nontechnical job description: "teach preschool pupils skills."

On the Form I-129 Supplement H, the petitioner described the proposed duties as follows:

Teach Preschool pupils social and manipulative skills. Instruct children in activities designed to promote intellectual growth.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and

¹The petitioner provided a North American Industry Classification System (NAICS) Code of 624410, "Child Day Care Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "624410 Child Day Care Services," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Aug. 18, 2014).

issued an RFE on April 5, 2011. The petitioner was asked to submit additional information about the company. Further, the petitioner was asked to submit evidence to establish that the proffered position requires an individual with a bachelor's degree in a specific field of study in order to perform the duties of the position. Finally, the petitioner was asked to submit documentation highlighting the nature, scope, and activity of the business enterprise. The director outlined some of the types of specific evidence that could be submitted.

In response to the director's RFE, the petitioner provided the following information regarding the business and the duties inherent in the proffered position:

[The petitioner] is a child development facility located in Washington, DC. It was established in 1998. It is duly licensed by the DC office of the State Superintendent for Education as a childcare facility for children 2 months to 5 years of age. Currently, [REDACTED] has a total enrolment (sic) of 48. It employs a total of 8 teachers and support personnel. The annual revenue is [REDACTED]

[The beneficiary] is being offered the position of Preschool Teacher. Her duties, with the percentage time allotted for each, shall include:

1. Supervise teacher assistants and childcare workers to ensure that proper care, instruction and supervision is provided to all children at all times[.] -30%
2. Confer with teacher aides to develop curriculum and to monitor each child's intellectual, physical, social and emotional growth.-15%
3. Instruct, supervise, encourage and train teacher assistants and aides on what activities are appropriate for children.-15%
4. Discuss pupil's academic and behavioral problems with parents and suggest remedial action.-10%
5. Teach preschool pupils academic, social and manipulative skills in private educational system.-15%
6. Prepare lesson plan and teaching outline for course of study.-10%
7. Assigns lessons, correct papers and hear oral presentations.-5%

The petitioner further noted that "[t]he usual minimum educational requirement for this position is a Bachelor's Degree in Early Child or Elementary Education."

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 4, 2011.

II. SPECIALTY OCCUPATION

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we find that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

A. Law

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, 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 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 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 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. Analysis

As a preliminary matter, in support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a May 24, 2010 letter from [REDACTED] Ed.D, Professor, Department of Educational Theory and Practice, [REDACTED] Professor [REDACTED] made the following assertions:

I have been asked to evaluate the academic degree requirements expected for the professional position of Preschool Teacher for [the Petitioner].

* * *

[The petitioner] is a licensed child development and care facility located in Washington D.C. Established in 1998, [the petitioner] provides care for children aged two months to five years. Currently, [the petitioner] requires the services of a Preschool Teacher to perform various specialized duties that will help ensure the organization's continued success. It is apparent that a Preschool Teacher with the specific duties listed below² would be considered a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Early Childhood Education or a related area, or the equivalent. Such a requirement is necessary in that a college graduate obtains specific knowledge for the complex responsibilities of this position during a college program leading to such a degree.

We reviewed the letter in its entirety. However, as discussed below, the letter from Professor [REDACTED] is not persuasive in establishing that the proffered position qualifies as a specialty occupation position.

Upon review of the opinion letter, there is no indication that Professor [REDACTED] possesses any particular knowledge of the petitioner's proffered position and its business operations. Professor [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific center or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. There is no evidence that Professor [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Professor [REDACTED] has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

Further, it must be noted that there is no indication that the petitioner advised Professor [REDACTED] that the petitioner characterized the proffered position as one for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. (as indicated by the Level II wage-level on the LCA). The wage levels are defined

² The duties listed in Professor [REDACTED] letters are virtually identical to the duties listed by the petitioner in her April 7, 2011 letter, quoted above.

in DOL's "Prevailing Wage Determination Policy Guidance."³ A Level II wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

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.

Thus, in designating the proffered position at a Level II wage, the petitioner has indicated that the proffered position is a comparatively low level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment." It appears that Professor [REDACTED] would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities. Professor [REDACTED] has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Professor [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusion reached by Professor [REDACTED] lacks the requisite specificity and detail and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. The professor does not present an adequate factual foundation to support the opinion and we find that the opinion is not in accord with other information in the record. Therefore, we find that Professor [REDACTED] submission is not probative evidence towards satisfying any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

³ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

We, in our discretion, may 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. 791 (Comm'r 1988). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

Having made the above preliminary findings, we turn now to 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.

We 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.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁴ The duties of the proffered position as described by the petitioner appear to be encompassed by the typical duties of preschool teachers as stated in the *Handbook*. The *Handbook's* discussion of the duties of preschool teachers states, in pertinent part, the following:

Preschool teachers educate and care for children, usually ages 3 to 5, who have not yet entered kindergarten. They teach reading, writing, science, and other subjects in a way that young children can understand.

Preschool teachers typically do the following:

- Prepare children for kindergarten by introducing concepts they will explore further in kindergarten and elementary school
- Work with children in groups or one on one, depending on the needs of children and the subject matter
- Plan and carry out a curriculum that targets different areas of child development, such as language, motor, and social skills
- Organize activities so children can learn about the world, explore interests, and develop talents

⁴ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

- Develop schedules and routines to ensure children have enough physical activity, rest, and playtime
- Watch for signs of emotional or developmental problems in children and bring problems to the attention of parents
- Keep records of the students' progress, routines, and interests, and keep parents informed about their child's development

Young children learn from playing, problem solving, questioning, and experimenting. Preschool teachers use play and other instructional techniques to teach children about the world. For example, they use storytelling and rhyming games to teach language and vocabulary. They may help improve children's social skills by having them work together to build a neighborhood in a sandbox or teach math by having children count when building with blocks.

Preschool teachers work with children from different ethnic, racial, and religious backgrounds. Teachers include topics in their lessons to teach children to respect people of different backgrounds and cultures.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Preschool Teachers," <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-2> (last visited Aug. 18, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Education and training requirements vary based on settings and state regulations. They range from a high school diploma and certification to a college degree.

Education

In childcare centers, preschool teachers generally are required to have at least a high school diploma and a certification in early childhood education. However, employers may prefer to hire workers with at least some postsecondary education in early childhood education.

Preschool teachers in [REDACTED] programs are required to have at least an associate's degree. However, at least 50 percent of all preschool teachers in [REDACTED] programs nationwide must have a bachelor's degree in early childhood education or a related field. Those with a degree in a related field must have experience teaching preschool-age children.

In public schools, preschool teachers are generally required to have at least a bachelor's degree in early childhood education or a related field. Bachelor's degree programs teach students about children's development, strategies to teach young children, and how to observe and document children's progress.

Id. at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4> (last visited Aug. 18, 2014).

These statements from the *Handbook* do not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into the Preschool Teacher occupational category. Rather, the *Handbook* states that although there is a range of acceptable credentials, most preschool teachers are required to have a high school diploma. The *Handbook* further indicates that some employers *prefer* to hire workers with some postsecondary education in early childhood education. Obviously, a *preference* for a particular level of education does not indicate a requirement.

The *Handbook* discusses the requirements for preschool teachers in [REDACTED] programs and in public schools. The petitioner does not claim, and has not provided any documentation to support a finding, that it has a [REDACTED] program or is a public school. Thus, these paragraphs of the *Handbook* are not relevant to the instant matter.

Accordingly, as the *Handbook* indicates that entry into the Preschool Teachers occupational category does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the Preschool Teachers occupational category, a particular position's inclusion within this classification is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, 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 authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

We refer back to our earlier comments and findings with regard to Professor [REDACTED] letter. As noted above, we find that the letter from Professor [REDACTED] does not establish that the proffered position is a specialty occupation.

Further, it is asserted that the petitioner has been accredited by the [REDACTED] and thus, "it proves that the petitioner's educational requirement for the proffered position is in compliance with the demands of an accredited body. This also establishes the fact that the bachelor's degree requirement is common to the industry."

In reviewing the document entitled [REDACTED] (Criterion 6.A.05), we note that for the period of 2010-2014, which covers the period when the instant H-1B petition was filed and when this appeal is before this office, as a condition for accreditation, [REDACTED] has set the requirement that for 4 or more teachers, "at least 50 percent of teachers have a minimum of an associate's degree or equivalent" and "at least 25 percent of teachers have a minimum of a baccalaureate." These statements from [REDACTED] do not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into the Preschool Teacher occupational category.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, 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 described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In this case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is the minimum requirement 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 this particular position 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 failed to satisfy 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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, the record contains no letters or affidavits from firms or persons in the industry attesting to such a requirement. Further, there is no evidence of a professional association

having made a bachelor's degree in a specific specialty, or the equivalent, a minimum requirement for entry.

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not 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.

Next, we find that the evidence of record does 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."

The statements on record with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, as reflected in our earlier comments and findings regarding the record's description of the duties comprising the proffered position, the petitioner has not provided sufficient evidence to establish why it is more likely than not that the proffered position can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner's statements with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are further undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment.

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 at least a bachelor's degree in a specific specialty or its equivalent.

As the evidence of record therefore fails 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 at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn 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 or higher degree in a specific specialty or its equivalent for the position.

Our 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 or degree equivalency, in a specific specialty, in its prior

recruiting and hiring for the position. Additionally, the record must establish that the 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.

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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In support of this criterion, a list of 7 employees, their position, and the highest educational attainment was submitted. The three positions referenced in the list were Teacher, Teacher/Quality Control Program Manager and Teacher/Director. However, we note that the petitioner's list represents a claim regarding the individuals' educational credentials, rather than evidence to support that claim. Notably, the petitioner did not submit probative evidence establishing the teachers are employed by the petitioner (e.g., pay records, wage reports) and documentation regarding their academic credentials (e.g., transcripts). Moreover, the petitioner has not provided any evidence to substantiate that the teachers possess degrees in fields of study or disciplines directly related to the duties and responsibilities of the position.

Moreover, the petitioner failed to provide the job duties and day-to-day responsibilities of the positions that it claims are the same or similar as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. It is unclear whether the duties and responsibilities of these individuals are the same or related to the proffered position. We observe that the petitioner did not submit any documentation regarding its recruiting practices. Thus, the submission is not probative in establishing this criterion of the regulations.

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).

Next, we find that the evidence of record does not satisfy 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 specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Preschool Teachers" occupational category. Again, the *Handbook* does not indicate that a bachelor's or higher degree in a specific specialty, or

the equivalent, is a standard, minimum requirement to perform the duties of such position; and the record indicates no factors that would elevate the duties proposed for the beneficiary above those of other entry-level positions generally discussed in the *Handbook*.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA at a Level II wage. That is, the Level II wage designation is indicative of a lower level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, petitioner has not demonstrated that its proffered position is one with specialized and complex duties. For instance, 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 significantly higher prevailing wage. For instance, as previously mentioned, 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."

Finally, we note that on appeal the petitioner has submitted a February 17, 2010 email from [REDACTED]

[REDACTED] MS, RD, LD, [REDACTED]

[REDACTED] Washington, DC. In her email, Ms. [REDACTED] confirms that the duties of the proffered position outlined by counsel's colleague in a February 17, 2010 email⁵ reflect some of the common responsibilities for teachers. We do not find that this evidence establishes 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. In this regard, we incorporate into this analysis this decision's earlier comments and findings regarding the generalized level of the information and evidence provided with regard to the proposed duties.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. We therefore conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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).

III. BENEFICIARY'S QUALIFICATIONS

The petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications

⁵ The duties noted by the petitioner in his email to Ms. [REDACTED] are identical to the duties listed by the petitioner in her April 7, 2011 letter submitted with the H-1B petition.

further, except to note that the [REDACTED] credential evaluation submitted establishes that the beneficiary has the equivalent of a U.S. "[b]achelor's degree in chemistry from, and two years of graduate study, at a regionally accredited institution." This documentation does not establish that the beneficiary meets the petitioner's requirements of the position, as stated in the petitioner's April 7, 2011 letter, specifically "a Bachelor's Degree in Early Child or Elementary Education." The petitioner thus did not submit sufficient evidence to establish that her degree is the equivalent of a U.S. bachelor's degree in a specific specialty. This would be an issue that the petitioner would have to resolve if the evidence of record had established the proffered position as a specialty occupation.

IV. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

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.