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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **SEP 04 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a Montessori center with kindergarten program<sup>1</sup> established in 1964. In order to employ the beneficiary in what it designates as a part-time teacher position at a salary of \$20.38 per hour<sup>2</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 demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

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) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the proffered position is not a specialty occupation. The director's ground for denying this petition was therefore premature, and it will be withdrawn. The appeal will be dismissed, and the petition will be denied.

## II. SPECIALTY OCCUPATION

We will first consider the question of whether the proffered position is a specialty occupation. To meet the petitioner's burden of proof in this regard, the evidence of record must establish that the job the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

### A. Law

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 61111, "Elementary and Secondary Schools." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "61111 Elementary and Secondary Schools," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Aug. 27, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 25-2012, the associated Occupational Classification of "Kindergarten Teachers, Except Special Education," and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

- (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. The Proffered Position

The petitioner states in its March 26, 2013 support letter that the beneficiary's job duties will be as follows:

- Focusing on enhancing the child's development in all domains-physical, social, language and literacy, cognitive, sensory and adaptive.
- Implementing a set curriculum and adapting it to suit each child's individual developmental needs.
- Tracking each child's learning process by regular documentation, collecting of work samples and assessments.



- Creating age appropriate assignments and classroom lesson plans.
- Creating [sic] new teaching materials and projects (while adhering to Montessori principles) that tweak the interest of the young mind.
- Engage in hands-on teaching, using manipulatives and worksheets.
- Engage in one-on-one and group teaching.
- Modeling and encouraging positive interactions with peers and adults.
- Key subject areas include Math, Language, Science, Geography, Sensorial, Practical Life Activities, Music and Art.
- Math- Introducing quantity and then symbols, beginning with the numbers from 1-10, introducing the concept of "zero", introducing the "teens" (11-19) and then introducing counting from 1 through 100. Counting in the 2's, 3's, 4's and so on is introduced next, as a preparation for multiplication. Children are introduced to the four basic mathematical functions of addition, subtraction, multiplication and division. Both the static and dynamic versions of each function are introduced. First the children work with concrete materials (specific teaching aids) to understand the mathematical functions. Gradually the children progress to working with mathematical functions in abstract form, using work sheets without the aid of the Montessori mathematical materials. Children are also taught [sic] fractions, reading time, reading temperature and geometry. Two dimensional and three dimensional geometric figures, and their names are taught [sic]. (Polygons from the four sided shapes to the decagon, different types of triangles, circles, curvilinear shapes, etc.)
- Language- First the children are introduced to the concept of sounds. Once they are able to recognize letters and understand that words are constructed by putting individual letter sounds together, they are able to construct simple phonetic words (three letter words) using the Montessori Alphabet Boxes. The children are taught [sic] phonics, rhyming words, word construction and sentence construction. They are taught how to correctly write each letter, from top to bottom, and from [sic] left to right. This prepares them for story writing later on. Other key aspects of the literary arts that are taught are as follows: the correct orientation of a book-what [sic] the front, what [sic] the back and what the [sic] is the title? Where is the title/who is an author? Who is an illustrator? Word functions are also taught-nouns, verbs, adjectives, prepositions etc. Listening skills are taught [sic] by having them follow multi-step directions. Verbal skills are taught by encouraging[,] creating and telling short stories.

- Sensorial- the sensorial awareness of seeing, feeling, touching, tasting, smelling and hearing and the ordering of this awareness. This awareness enables children to make connections to their surroundings by realizing that the fabric of their dress is smooth, or that the cement floor is rough. These sensorial experiences prepare children for other key areas of learning.
- Science- The children are taught classification from living and non-living, rocks and minerals, and plants and animals, to classifying animal and plant groups (vertebrates and invertebrates, flowering and non-flowering plants, birds, fish, mammals, reptiles, amphibians, etc.)[.] The children are taught about the solar system, parts of a fish, parts of [a] frog, parts of a bird, parts of a flower, parts of a tree, and plant and animal life cycles.
- Geography- First the children are introduced to the concept of land and water. The continents are taught and each continent is studied in depth. The countries of each continent are thought [sic] and the children put together their own maps, using the Montessori Puzzle Maps as guides. An in-depth study of each continent is done, looking at cultures, weather, dress, lifestyle, animals, food, flags, etc. An in-depth study of the land and water forms is also taught to the children. They will learn to identify islands, lakes, peninsulas, bays, and so on.
- Practical Life Activities- These activities relate to the daily challenges that children face to do things by themselves, for themselves. From pouring a glass of milk for themselves without spilling, and tying their own shoe laces, to speaking kindly and courteously to their peers and adults, the children are taught all of this. These activities focus on the children's gross motor and fine motor development.
- Music and Art-These are an integral part of the Montessori Curriculum and children are free to work on a set art project or free drawing when the inner need arises. They are also taught about various famous artists and are works, and various musical instruments.

Counsel's March 31, 2013 letter reiterates the aforementioned duties.

### C. Analysis

As a preliminary matter, the petitioner's claim that a bachelor's degree is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the

position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).

Accordingly, the petitioner's assertion that its minimum requirement for the proffered position is only a bachelor's degree, without further requiring that that degree be in any specific specialty, is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

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 U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>3</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Kindergarten Teachers, Except Special Education" occupational category.

The *Handbook* states the following with regard to the duties of positions falling within the "Kindergarten and Elementary School Teachers" occupational category:

Kindergarten and elementary school teachers prepare younger students for future schooling by teaching them basic subjects such as math and reading.

#### **Duties**

Kindergarten and elementary school teachers typically do the following:

- Plan lessons that teach students subjects, such as reading and math, and skills, such as studying and communicating with others
- Assess students to evaluate their abilities, strengths, and weaknesses

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our reference to the *Handbook* are from the 2014-15 edition available online.



- Teach lessons they have planned to an entire class of students or to smaller groups
- Grade students' assignments to monitor their progress
- Communicate with parents about their child's progress
- Work with students individually to help them overcome specific learning challenges
- Prepare students for standardized tests required by the state
- Develop and enforce classroom rules to teach children proper behavior
- Supervise children outside of the classroom—for example, during lunchtime or recess

Kindergarten and elementary school teachers help students learn and apply important concepts. Many teachers use a hands-on approach, such as the use of props, to help students understand abstract concepts, solve problems, and develop critical thinking skills.

For example, they may show students how to do a science experiment and then have the students do the experiment. They may have students work together to learn how to collaborate to solve problems.

Kindergarten and elementary school teachers generally teach kindergarten through fourth or fifth grade. However, in some schools, elementary school teachers may teach sixth, seventh, and eighth grade. They most often teach students many subjects, such as reading, science, and social studies, which students learn throughout the day.

Some teachers, particularly those who teach young students, may teach a multilevel class that includes children who would traditionally be in different grades. They may have the same group of students for several years.

Kindergarten and elementary school students spend most of their day in one classroom. Teachers may escort students to assemblies; to classes taught by other teachers, such as art or music; or to recess. While students are away from the classroom, teachers plan lessons, grade assignments, or meet with other teachers and staff.

In some schools with older students, teachers work in teams. Each teacher often specializes in teaching one of two pairs of specialties, either English and social studies or math and science. Generally, students spend half their time with one teacher and half their time with the other.

Some kindergarten and elementary school teachers teach special classes, such as art, music, and physical education.

Some schools employ teachers of English as a second language (ESL) or English for speakers of other languages (ESOL). Both of these types of teachers work exclusively with students who are learning English, often referred to as English language learners (ELLs). The teachers work with students individually or in groups to help them improve their English skills and to help them with assignments they got in other classes.

Students with learning disabilities or emotional or behavioral disorders are often taught in traditional classes. Teachers work with special education teachers to adapt lessons to these students' needs and monitor the students' progress. In some cases, kindergarten and elementary school teachers may co-teach lessons with special education teachers.

Some teachers maintain websites to communicate with parents about students' assignments, upcoming events, and grades. For students in higher grades, teachers may create websites or discussion boards to present information or to expand on a lesson taught in class.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Kindergarten and Elementary School Teachers," <http://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm#tab-2> (last visited August 27, 2014).

While the *Handbook* notes that all 50 States require public kindergarten and elementary school teachers to have at least a bachelor's degree in elementary education, it also notes that private school teachers do not need to meet state requirements. The *Handbook* also states that private schools "typically seek kindergarten and elementary school teachers who have a bachelor's degree in elementary education." *Id.* at <http://www.bls.gov/ooh/Education-Training-and-Library/Kindergarten-and-elementary-school-teachers.htm#tab-4>.

That the *Handbook* does not indicate that private kindergarten teacher positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "How to Become a Kindergarten Teacher or Elementary School Teacher" section of its chapter "Kindergarten Teachers and Elementary School Teachers," which does not specify a requirement of a bachelor's degree in a particular major or academic concentration for private school kindergarten teachers:

Kindergarten and elementary school teachers must have a bachelor's degree. In addition, public school teachers must have a state-issued certification or license.

## **Education**

All states require public kindergarten and elementary school teachers to have at least a bachelor's degree in elementary education. Some states also require kindergarten and elementary school teachers to major in a content area, such as math or science. They typically enroll in their university's teacher preparation program and also take classes in education and child psychology in addition to those required by their major.

In teacher education programs, future teachers learn how to present information to young students and how to work with young students of varying abilities and backgrounds. Programs typically include fieldwork, such as student teaching. For information about teacher preparation programs in your state, visit [Teach.org](https://www.teach.org).

Some states require all teachers to earn a master's degree after receiving their teaching certification.

Teachers in private schools do not need to meet state requirements, such as certifications or licenses. However, private schools typically seek kindergarten and elementary school teachers who have a bachelor's degree in elementary education.

### **Licenses, Certifications, and Registrations**

All states require teachers in public schools to be licensed or certified. Those who teach in private schools are generally not required to be licensed.

Kindergarten and elementary school teachers are typically certified to teach early childhood grades, which are usually preschool through third grade, or elementary school grades, which are usually first through sixth grades or first through eighth grades.

Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, typically gained through student teaching. Some states require a minimum grade point average. States often require candidates to pass a general teaching certification test, as well as a test that demonstrates their knowledge of the subject they will teach. Although kindergarten and elementary school teachers typically do not teach only a single subject, they may still be required to pass a content area test to earn their certification. For information on certification requirements in your state, visit [Teach.org](https://www.teach.org).

Teachers are frequently required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.

All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification.



Some alternative certification programs allow candidates to begin teaching immediately after graduation, under the supervision of an experienced teacher. These programs cover teaching methods and child development. After they complete the program, candidates are awarded full certification.

Other programs require students to take classes in education before they can teach.

Students may be awarded a master's degree after completing one of these programs. For information about alternative certification programs, contact Teach-Now.

### **Training**

In order to receive certification, teachers need to undergo a period of fieldwork, commonly referred to as student teaching. During student teaching, they work with a mentor teacher and get experience teaching students in a classroom setting. The amount of time required varies by state.

### **Important Qualities**

**Communication skills.** Teachers must collaborate with teacher assistants and special education teachers. In addition, they need to discuss students' needs with parents and administrators.

**Creativity.** Kindergarten and elementary school teachers must plan lessons that engage young students, adapting the lessons to different learning styles.

**Patience.** Working with students of different abilities and backgrounds can be difficult. Kindergarten and elementary school teachers must respond with patience when students struggle with material.

**Resourcefulness.** Kindergarten and elementary school teachers need to be able to explain difficult concepts in terms that young students can understand. In addition, they must be able to get students engaged in learning and adapt their lessons meet students' needs.

### **Advancement**

Experienced teachers can advance to serve as mentors to newer teachers or to become lead teachers. In these roles, they help less experienced teachers to improve their teaching skills.

With additional education or certification, teachers may become school counselors, school librarians, or instructional coordinators. Some become assistant principals or principals, both of which generally require additional schooling in education administration or leadership.

*Id.* at <http://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm#tab-4> (last visited August 27, 2014).

As indicated above, while private schools may typically seek kindergarten teachers with a bachelor's degree in elementary education, such a specialty degree is not required for entry into this particular occupation. Because the *Handbook* indicates that entry into the private school kindergarten teaching occupation does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

Accordingly, as the *Handbook* indicates that entry into the kindergarten and elementary school teachers occupational category does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent, it does not support the proffered position as being a specialty occupation.

Furthermore, the materials from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine excerpt is of little evidentiary value to the issue presented on appeal.

It is also noted that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>4</sup>

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<sup>4</sup> The *Prevailing Wage Determination Policy Guidance* (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 27, 2014)) issued by 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 [emphasis in original].



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)(1).

Next, we find 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. Nor does the record contain any submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner refers to two advertisements: the first is from [REDACTED], for a kindergarten teacher; and the second is from [REDACTED] for an infant teacher. Although the first advertisement states that a bachelor's degree from an accredited college or university is required, it does not specify a particular field from which the degree should come. The second advertisement, which is not even for a kindergarten teacher, states that the employer "prefers" (but does not require) an associate's degree or a bachelor's degree. The petitioner has not submitted any documentary evidence to establish that these employers are "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or to any other relevant extent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

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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 is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests 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.



these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As noted above, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations." Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised.<sup>5</sup>

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) 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."

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain sufficient evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, we find, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Kindergarten and Elementary School Teachers" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

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<sup>5</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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.

Furthermore, the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 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 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 a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>6</sup>

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

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<sup>6</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.



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").

The record does not include evidence that it has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

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 "Kindergarten and Elementary School Teachers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite). With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Finally, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (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 [emphasis in original].

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 27, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level 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.

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

*Id.*

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

Here we again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. The petition, therefore, may not be approved.

### III. BENEFICIARY QUALIFICATIONS

The director found that the beneficiary is not qualified to perform the duties of the proffered position. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent, and the director's determination with regard to that issue was premature. The AAO therefore need not and will not address the beneficiary's qualifications further.

### IV. CONCLUSION AND ORDER

As discussed above, the evidence of record does not establish that the proffered position is a specialty occupation. As this factor precludes approval of the petition, we will not address the



beneficiary's qualifications to perform the duties of the position. Accordingly, the appeal will be dismissed.<sup>7</sup>

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we conduct appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reason. 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.

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<sup>7</sup> The failure of the evidence of record to establish that the proffered position is a specialty occupation precludes the approval of this petition. As such, we will not discuss any of the additional deficiencies we have observed in this record of proceeding.