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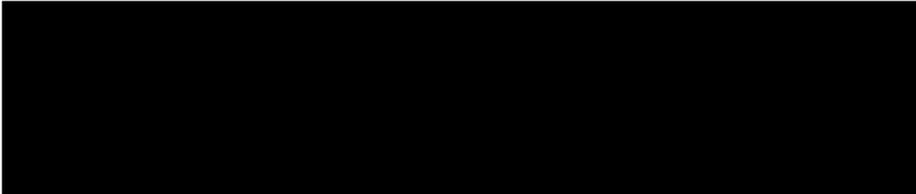
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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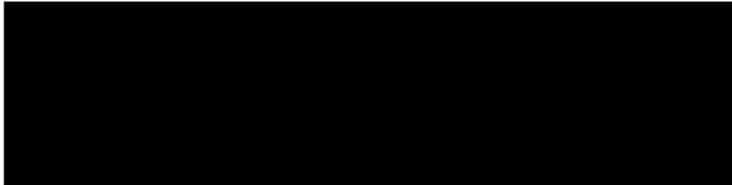
Date: **APR 30 2010**

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)

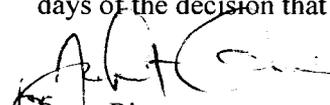
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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.

The petitioner is a private non-profit religious primary and secondary school with over 30 employees. It seeks to employ the beneficiary as a preschool/kindergarten teacher 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: 1) the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation; and 2) the petitioner failed to provide a sufficiently detailed description of the work to be performed by the beneficiary, thereby precluding examination of a material line of inquiry.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

First, the AAO affirms the director's finding that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring a degree in a specific specialty under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for

training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The AAO notes that in the petitioner's support letter, the petitioner states that a bachelor's degree is required for the proffered position, but does not indicate that a bachelor's degree is required in a *specific specialty*. However, the petitioner states as follows:

[A]s we are not a public school, teaching certification is preferred but not required.

* * *

[The beneficiary] is fully qualified for this position as described in her enclosed resume. She holds a Master of Arts in political science and Bachelor of Arts . . . which have been evaluated to be a U.S. bachelor's degree in political science. Additionally, she has attended and completed numerous education courses and, as indicated by her resume, she has worked as a kindergarten and early elementary teacher at our school and others for many years. Her educational degrees combined with her specialized training in early childhood education, and numerous years of teaching experience are equivalent to a Bachelor's degree in early childhood education and qualify her for state certification as confirmed by the enclosed evidence.

This language is confusing as it states, on the one hand, that teaching certification is not required and, on the other hand, that the beneficiary is qualified for state certification. Counsel argues on appeal that because the proffered position is for a private school teacher, there is no requirement that the beneficiary be licensed or that she graduate from an accredited teacher education program. Although this may be true for most private school teachers of grades K-12, the petitioner has characterized the proffered position as a pre-school teacher as well as a kindergarten teacher. According to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, online edition 2010-11:

The training and qualifications required of preschool teachers vary widely. Each State has its own licensing requirements that regulate caregiver training. These requirements range from a high school diploma and a national Child Development Associate (CDA) credential to community college courses or a college degree in child development or early childhood education.

The petitioner did not submit any information regarding the licensing requirements of preschool teachers in Texas and so insufficient evidence has been provided to determine whether the beneficiary would qualify under Texas state rules regarding preschool teachers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, even if the petitioner could demonstrate that there are no licensing or training requirements in Texas governing private preschool teachers in the petitioner's facility, this does not mitigate the petitioner's failure to demonstrate that the beneficiary is qualified to perform in a specialty occupation requiring a degree in education.

The beneficiary does not hold a U.S. degree, and her foreign degree has been found to be the equivalent to a bachelor's degree in political science. Therefore, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), in order for the beneficiary to qualify for a specialty occupation requiring at least a bachelor's degree in education, the record must demonstrate that she has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in education, as well as recognition of her expertise through progressively responsible positions directly related to this specialty.

In support of the petition, the petitioner provided a credential evaluation written by [REDACTED] Professor of Education and Psychology at Stanford University School of Education, stating that the beneficiary's education and experience amount to the equivalent of a U.S. bachelor's degree in education with a concentration in early childhood education.

On August 26, 2009, the director denied the petition on the basis that the beneficiary is not qualified to perform services in a specialty occupation.

The AAO finds that the evaluation from [REDACTED] together with the supporting documentation submitted, does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). [REDACTED] states that, "I have the authority to evaluate foreign educational credits, experience, training, and/or courses taken at other U.S. or international universities, and to determine whether credit would be awarded to a student by the University." However, no documentation from an official at the university or other independent evidence was submitted to corroborate this statement. Additionally, [REDACTED] does not state that he has the "authority to grant" such credit for training and/or experience, and no evidence was submitted to demonstrate that Stanford University has a program for granting such credit based on an individual's training and/or work experience. Therefore, the evaluation does not meet the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Aside from the decisive fact that the evidence of record does not establish [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, the AAO finds that the content of his evaluation of the beneficiary's experience would merit no weight even if [REDACTED] were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). [REDACTED] basically summarizes the beneficiary's resume along with her certificates and one skeletal and undated letter from a previous employer, which describes the beneficiary's experience only in generalized and generic terms and does not indicate how long she was employed there, and he then concludes, without analysis, that the "responsibilities handled by [the beneficiary] throughout her career are indicative of Bachelor's-level coursework in Early Childhood Education and related subjects." As this evaluation does not establish a substantive basis for its conclusion, it would have no probative value even if it were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the beneficiary has the equivalent of a degree in education if she has a combination of education, specialized training, and/or work experience in areas related to this specialty. The evaluation on record is not supported by specific evidence. The letter

from the beneficiary's previous employer and her certificates do not contain enough detail to determine how many years of experience the beneficiary has in education and whether this experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in education. Finally, the record lacks the required showing of the beneficiary's expertise in education. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation requiring a bachelor's degree in education.

For the reasons related in the preceding discussion, the AAO affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation requiring at least a bachelor's degree in education.

Second, the AAO affirms the director's finding that the petitioner failed to provide a sufficiently detailed description of the work to be performed by the beneficiary, thereby precluding examination of a material line of inquiry. In support of the petition, the petitioner submitted a copy of the director's decision, dated July 14, 2009, denying the petitioner's previously filed H-1B petition (WAC 09 058 51169) on behalf of the beneficiary. The AAO therefore notes this decision as part of the record. This prior decision, which also found that the petitioner failed to establish that the beneficiary is qualified to perform in a specialty occupation, notes that "[t]he petitioner did not provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. The petitioner has not provided specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. . . ."

The director explained in the July 14, 2009 decision that, "[A]ccording to the statute and regulations, H-1B classification is not established merely by the beneficiary's possession of a baccalaureate degree (or equivalent). It must also be demonstrated that there exists a nexus between the nature of the beneficiary's degree (or equivalent) and the position duties proposed by the petitioner. . . ." Such a nexus cannot be determined without a sufficiently detailed position description.

In the petitioner's support letter filed with the present petition, the petitioner describes the proffered position as follows:

Our school requires the services of a preschool/kindergarten teacher. We wish to have [the beneficiary] continue to serve in such capacity. She will serve under the directions of the school Principal . . . in instructing her students in all state endorsed subjects integrating Islamic culture, teachings, values, and Arabic language as required or needed by the [petitioner]. [The beneficiary] will perform the duties normally performed by a teacher, which include developing lesson plans, monitor child development, assessment, classroom management, communicating with parents, and supervision and participation in Islamic prayers and religious rituals. . . .

The petitioner therefore, again, failed to include a sufficient level of detail regarding the proffered position as is required to determine a nexus between the nature of the beneficiary's degree and the position duties or, as will be discussed *infra*, to determine whether the proffered position is a specialty occupation. The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of

ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). The AAO therefore finds that the petitioner failed to submit previously requested evidence that precluded a material line of inquiry.¹ The petitioner and counsel did not provide additional details about the proffered position that the director had previously indicated were required for adjudication of the petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

¹ Although this evidence was not specifically requested by the director with regard to this petition, the petitioner's introduction of the prior petition's denial into this record of proceeding indicated the need for this additional evidence to establish eligibility. When the petitioner then failed to provide this information together with said denial identifying the material deficiency, sufficient grounds were created to deny the instant petition on this basis. Moreover, when further given the opportunity to remedy this error of the petitioner on appeal, the petitioner or its counsel once again failed to provide this material evidence.

- (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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To make its determination whether the employment as described by the petitioner qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

As discussed previously, the petitioner states that it is seeking the beneficiary's services as both a preschool and kindergarten teacher. Also mentioned previously, the petitioner did not provide a detailed position description, including a breakdown of the percentage of time to be spent in each duty. Consequently, it is not clear how much of the time the beneficiary will teach kindergarten students and how much she will teach preschool students. According to the *Handbook* section on Teachers – Preschool, except Special Education, “[s]ome employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education.” Therefore, the *Handbook* indicates that working as a preschool teacher does not normally require a bachelor's degree *in a specific specialty* and therefore is not a specialty occupation.

Even if the petitioner could demonstrate, which it did not do, that the beneficiary would only work as a kindergarten teacher and not as a preschool teacher or that any preschool related duties would only be incidental to her kindergarten teaching duties, the *Handbook* states: “[p]rivate school teachers do not have to be licensed but *may* still need a bachelor's degree.” [Emphasis added.] Because the *Handbook* does not indicate that a bachelor's degree *in a specific specialty* is normally required for kindergarten teachers in a private school setting, the *Handbook* does not establish that a private school kindergarten teacher is a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. The petitioner did not submit any expert opinions or other documentation evidencing that private non-profit religious schools similar to the petitioner require a bachelor's degree in a specific specialty for their preschool/kindergarten teachers.

The petitioner does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has not satisfied 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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for private school teacher positions. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As mentioned earlier, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than preschool/kindergarten teaching positions that are not usually associated with a bachelor's degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason also, the petition will be denied.

Also beyond the decision of the director, the AAO finds that the petitioner does not qualify for an exemption from the H-1B cap as a non-profit entity affiliated with or related to an institution of higher education under section 214(g)(5)(A) of the Act and therefore was ineligible to file this H-1B petition for Fiscal Year 2009.² The petitioner filed this petition on August 13, 2009, with a request for the beneficiary to change status from R-1 to H-1B. The requested start date for the present petition is August 12, 2009, which falls in Fiscal Year 2009. The petition was accepted by USCIS as cap-exempt because the petitioner claimed that it is a nonprofit

² On April 8, 2008, USCIS announced that it had received enough H-1B petitions to meet the congressionally mandated cap for Fiscal Year 2009. As such, only H-1B cap-exempt petitioners were permitted to file a petition after this date requesting an employment start date in Fiscal Year 2009.

entity affiliated with an institution of higher education, the Dallas County Community College District (DCCD). The AAO notes that the submitted copy of the 2008 Affiliation Agreement between the petitioner and DCCD does not support the petitioner's claim that it is affiliated with an institution of higher education. Upon review, the record does not establish that the petitioner and DCCD are owned or controlled by the same boards or federations. Instead, the Agreement establishes only that the petitioner and DCCD have a cooperative arrangement through which DCCD will educate the petitioner's students in college-level courses for those identified as requiring such instruction. Thus, evidence was not provided to demonstrate that the two educational entities are associated through control by the same board or federation. Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B). Next, the petitioner has not established that it is a related or affiliated non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B), operation by an institution of higher education, as the evidence in the record does not show that an institution of higher education operates the petitioner, a private religious school, within the common meaning of this term. Finally, the petitioner has not established that it is a related or affiliated nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B) as there is no indication whatsoever from the evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of DCCD. Therefore, the petitioner does not qualify for an exemption from the H-1B cap for Fiscal Year 2009 as a nonprofit entity affiliated with an institution of higher education under section 214(g)(5)(A) of the Act and, consequently, this petition is denied on this additional ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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