

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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**

**PUBLIC COPY**

b2

[Redacted]

Date: **JUL 28 2011** 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:  
[Redacted]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner describes itself as a child development center and seeks to employ the beneficiary as a preschool teacher. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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, finding that the position was not a specialty occupation.

On appeal, counsel for the petitioner submits a brief and additional evidence, and contends that, contrary to the director's findings, the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [1] 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 [2] 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;
- (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 (5<sup>th</sup> 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), 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. 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, 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. *Cf. 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.

In a letter dated March 20, 2009, the petitioner explained that it "was established in 1984 to provide children and their parents a positive educational experience and a reassuring and nurturing environment." It further claimed that it wished to employ the beneficiary as a preschool teacher, and indicated that she would have the following duties:

- 1) Teaches children ages 2 to 5 basic skills such as color, shape, number and letter recognition, personal hygiene and social skills;
- 2) Teaches reading and math skills such as: phonetic reading, reading of blends and sight words as well as number concepts through basic fundamental operations;
- 3) Engages children in activities designed to promote physical, mental and social development, such as games, arts and crafts, music and storytelling;
- 4) Prepares lesson plan by providing a variety of materials and resources for children to explore, manipulate and use, both in learning activities and in imaginative play;
- 5) Teaches 5 year old children basic writing skills which include tracing, printing and cursive writing;
- 6) Attends to children's basic needs, such as assisting them during meal times and use of restroom;
- 7) Establish and enforce rules for behavior, and procedures to maintain order among children;
- 8) Observe and evaluate children's performance, behavior, social development and physical health;
- 9) Identify children showing signs of emotional, developmental, or health related-problems, and discuss them with supervisors, parents or guardians, and child development specialists[;]
- 10) Confers with parents and guardians to discuss their children's progress and needs, determine their priorities for their children, and suggest ways that they can promote learning and development;
- 11) Enforce all administration policies and rules governing children.

The petitioner further contended that performance of the duties of the position required the attainment of at least a bachelor's degree in elementary education or a related field.

In an April 6, 2009 RFE, the director requested additional information. Specifically, the director requested more detailed evidence demonstrating that the proffered position is a specialty occupation, including but not limited to a more detailed description of the proffered position. In a response dated May 5, 2009, counsel addressed the director's queries. Counsel contended that the proffered position qualified as a specialty occupation under the first three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). In support of this contention, counsel submitted a letter from the petitioner dated April 29, 2009 which essentially restated the duties discussed in the March 20, 2009 letter of support, as well as job postings from what counsel contends are parallel positions in similar organizations within the petitioner's industry. It is noted, however, that the petitioner for the first time contends that the duties of the proffered position are actually those of a kindergarten teacher, as opposed to those of a preschool teacher as stated initially in the petition.

On August 10, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. The director found that the proffered position of preschool teacher did not require at least a bachelor's degree in a specific specialty as the minimum requirement for entry into the occupation.

On appeal, counsel contends that the director's findings were erroneous, and contends that the director erroneously relied on generalized statements contained in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Counsel argues that the actual duties of the position are more comparable to those of a kindergarten teacher as claimed in response to the RFE, and asserts that the director's reliance on the *Handbook's* section pertaining to preschool teachers was therefore misplaced. Counsel also asserts that the director discounted the ten job postings submitted in response to the RFE, which counsel contends demonstrate that a degree requirement is common in parallel positions within the petitioner's industry.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree in a specific specialty.

On the Form I-129 and in the Labor Condition Application (LCA) submitted with the petition, the petitioner claims that the proffered position is that of a preschool teacher. Although the AAO acknowledges counsel's assertions on appeal that the proffered position is actually more akin to that of a kindergarten teacher, these assertions will not be considered. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the requested classification. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather altered the title and associated responsibilities of job the description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Nevertheless, in reviewing the record, the AAO observes that the critical element is not the title of the position or 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.

To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO first turns to the 2010-2011 online edition of the *Handbook* for its discussion of preschool teachers, the section most akin to the duties of the proffered position as described in the record. As stated by the *Handbook*, this occupational category is described as follows:

Preschool teachers nurture, teach, and care for children who have not yet entered kindergarten. They provide early childhood care and education through a variety of teaching strategies. They teach children, usually aged 3 to 5, both in groups and one on one. They do so by planning and implementing a curriculum that covers various areas of a child's development, such as motor skills, social and emotional development, and language development.

Preschool teachers play a vital role in the development of children. They introduce children to reading and writing, expanded vocabulary, creative arts, science, and social studies. They use games, music, artwork, films, books, computers, and other tools to teach concepts and skills.

Preschool children learn mainly through investigation, play, and formal teaching. Preschool teachers capitalize on children's play to further language and vocabulary development (using storytelling, rhyming games, and acting games), improve social skills (having the children work together to build a neighborhood in a sandbox), and introduce scientific and mathematical concepts (showing the children how to balance and count blocks when building a bridge or how to mix colors when painting). Thus, an approach that includes small and large group activities, one-on-one instruction, and learning through creative activities such as art, dance, and music, is adopted to teach preschool children. Letter recognition, phonics, numbers, and awareness of nature and science are introduced at the preschool level to prepare students for kindergarten.

Preschool teachers often work with students from varied ethnic, racial, and religious backgrounds. With growing minority populations in most parts of the country, it is important for teachers to be able to work effectively with a diverse student population. Accordingly, some schools offer training to help teachers enhance their awareness and understanding of different cultures. Teachers may also include multicultural programming in their lesson plans, to address the needs of all students, regardless of their cultural background.

The *Handbook's* section pertaining to the educational requirements for preschool teachers states:

Education requirements vary greatly from State to State and range from a high school diploma to a college degree. The requirements also vary based on employer requirements and the source of the funding of the preschool program.

***Education and training.*** 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.

Different public funding streams may set other education and professional development requirements. For example, many States have separate funding for prekindergarten programs for 4-year-old children and typically set higher education degree requirements for those teachers, including those providing prekindergarten in a child care center. Head Start programs must meet Federal standards for teacher requirements. For example, by 2011 all Head Start teachers must have at least an associate degree.

Some 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

The *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. The *Handbook* further indicates that the educational requirements for preschool teachers vary from State to State, and can range from a high school diploma to a college degree. Neither the petitioner nor counsel submitted any evidence of the State of California's educational requirements for preschool teachers. Notwithstanding, the AAO conducted an independent search, and determined that the State of California's requirements for preschool teachers are as follows:

Teachers who work in public or private schools and other State-funded programs are required to have a Child Development Teacher Permit and one of the following options:

- Twenty-four semester units in ECE or CD, 16 units in general education, and a minimum of 525 hours within four years of working in a child care center.
- Associate of Arts degree or higher in ECE or CD or related field with three units supervised field experience in an ECE or CD setting.

Child care centers are regulated by the California Department of Social Services. Teachers who work in these centers must be at least 18 years of age and meet one of the following requirements:

- Completion of 12 postsecondary semester units in ECE or CD from an accredited college and six months of work experience in a licensed child care center or similar program.
- Possess a current and valid Child Development Assistant Permit.
- Completion of at least six postsecondary semester units of specified ECE or CD classes; however, a Teacher hired with six units must complete at least two additional units each semester until the full requirement of 12 postsecondary semester units is met.<sup>1</sup>

Neither the *Handbook* nor the State of California requires at least a bachelor's degree in a specific specialty for entry into the occupation of preschool teacher. The petitioner has therefore failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position. Accordingly, the petitioner has not satisfied 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. Factors often considered by USCIS when determining the industry standard 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)).

---

<sup>1</sup> <http://www.labormarketinfo.edd.ca.gov/occguides/Detail.aspx?Soccode=252011&Geography=0601000000>.

The petitioner, through counsel, submitted ten job postings in support of the contention that a degree requirement is common in the petitioner's industry. The AAO has considered these postings but finds them unpersuasive for the reasons set forth below.

Several postings do not require a bachelor's degree or higher in a specific specialty for entry into the proffered position. The posting for the position of preschool teacher [REDACTED] simply states that a "four year degree" is required. Additionally, the posting for the position with E Center's Migrant Seasonal Head Start Program indicates that a level II position, which appears most akin to the proffered position based on the wage offered, is an associate's degree.

The remaining postings, most of which require a bachelor's degree in education or early childhood education, cannot be deemed sufficient to satisfy this criterion because they contain insufficient information regarding the hiring entities. Therefore, the AAO is unable to determine if these entities are in fact similar organizations to that of the petitioner. Additionally, several of these postings distinguish between a "lead" preschool teacher and standard (associate) preschool teacher, thereby making it difficult to determine which positions are actually parallel to the proffered position in this matter. In the absence of additional evidence demonstrating that these remaining organizations are child development centers similar in size and scope to that of the petitioner, the petitioner has not established that the related advertisements are relevant to the educational requirements for the proffered position.

Further, the AAO notes that, aside from the evidentiary deficiencies already noted with regard to the job vacancy announcements, they are not supported by reliable documentary evidence establishing that they are representative of a common industry-wide recruiting and hiring practice.

For all of the reasons discussed above, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether actual performance of the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. In response to the RFE, the petitioner claimed in its April 29, 2009 letter that it has always required its teachers to have a bachelor's degree and appropriate state credentials. However, simply concluding that "all three of our teachers who hold H-1B status have Bachelor's degree[s]," absent evidence to support this contention, is insufficient to meet the burden of proof under this criterion. 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)). It is further noted that the petitioner's statement is limited to H-1B employees, thereby raising a question with regard to its hiring practices and educational requirements pertaining to its non-H1B teachers. Again, absent additional evidence regarding its hiring practices, the AAO cannot explore this issue further. Further, it is again worth noting that the degree requirement for each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is for not merely a bachelor's or higher degree, but also for such a degree in a specific specialty directly and closely related to the performance requirements of the proffered position.

The record, therefore, does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. The AAO notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's 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 required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Here the AAO finds that the duties of the position described encompass routine teaching duties associated with preschool teachers. While the petitioner suggests that the duties of the proffered position are sufficiently specialized and complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the

████████████████████  
criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.