

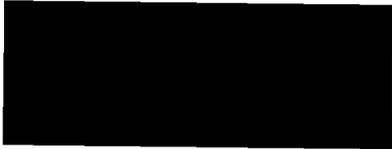
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



D2

Date: **APR 04 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

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 describes itself as an early childhood school with 13 employees. It seeks to employ the beneficiary as a Co-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 the petitioner has not established that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Notice of Appeal or Motion (Form I-290B). The AAO reviewed the record in its entirety before issuing its decision.

The primary 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 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 [(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 (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), 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.

In this matter, the petitioner seeks the beneficiary’s services as a co-teacher for another three years. The petitioner’s support letter indicates that the proffered position would be responsible for the following:

- As a team with another teacher, plan the activities in the room that appropriately address and support the cognitive, social, emotional and physical development of children;
- Instruct children in activities designed to promote social and intellectual growth needed for school in preschool, or other child development facility;
- Plans individual and group stimulate growth in language, social, and motor skills as learning to listen to instructions, playing with others, and using play equipment;
- Prepares lesson outline and plan in assigned area; plans, prepares, and develops various teaching aids;
- Presents subject matter to children, utilizing variety of methods and techniques, such as lecture, discussion, and role-playing.

The petitioner's support letter goes on to state that the proffered position requires a bachelor's degree in child education and psychology. The petitioner submitted documentation evidencing that the beneficiary has the foreign equivalent of a U.S. bachelor's degree in pre-school and a U.S. master's degree in early childhood education from National Louis University in Chicago, Illinois.

The submitted Labor Condition Application (LCA) was certified for a "Co-Teacher" to work full-time at the preschool at an annual salary of \$28,500.00.

On September 21, 2009, the director requested additional information from the petitioner to establish that the proffered position is a specialty occupation.

In response to the director's RFE, counsel for the petitioner submitted a letter dated March 17, 2009 from the petitioner stating that (1) the school provides three classrooms: preschool (3-years-old), junior kindergarten (4-years-olds), and primary(kindergarten and first grade) and (2) the beneficiary is a co-teacher with another teacher for the preschool classroom. The petitioner's letter also lists all teachers' names and their positions. Counsel also submitted copies of these teachers' degrees.

Counsel states that the petitioner is accredited by the National Association for the Education of Young Children (NAEYC) and, in order to meet their requirements, 75% of the teachers are required to have bachelor's degrees in early childhood education, child development, elementary education, or early childhood special education. To support counsel's assertion, a copy of the NAEYC requirements and a letter dated October 20, 2005 from NAEYC informing the petitioner of its achievement of accreditation are also submitted in the record.

Counsel's response provides an excerpt from the petitioner's manual showing the requirements and duties for the position of Head Teacher. The excerpt provides the following Head Teacher requirements: "a bachelor's degree in early childhood education or related field or a CDA, must include 18 semester hours in child development, birth-age 6." The excerpt also states detailed duties for Head Teacher as follows:

1. Maintain a safe and orderly environment conducive to optimal growth and

- development of children.
2. Support the purpose and goals of The [REDACTED] and gain an understanding of its philosophy and practice it in daily activities.
 3. Plan and conduct daily activities for assigned group.
 4. Maintain and share plan book with Director.
 5. Prepare educational materials required to implement the daily activity plan.
 6. Maintain a file for each child which includes drawings, artwork and writings throughout the year, written evaluations, and copies of pertinent notes to parents.
 7. Maintain confidentiality in regards to children/parent records. This information may only be discussed with the child's parents and appropriate staff.
 8. Observe, record, and report to Director significant individual and group behavior.
 9. Understand and communicate health and safety rules (indoors and outdoors) to the children and assistants. This includes an understanding of the Emergency Procedures of fire, tornados, illness and injuries.
 10. Write a report for all significant injuries/illness report to parents, and submit to Director.
 11. Keep attendance of children and turn into Director weekly.
 12. Post daily schedule.
 13. Create class newsletter biweekly.
 14. Supervise personnel who assist with daily activities.
 15. Attend staff and parent meetings/events and contribute to these activities.
 16. Cooperate and support the Director in meeting the goals and the philosophy of The Barbereux School.
 17. Discuss any personnel, scheduling or other problems to the Director in a timely fashion.
 18. Relate to parents in a positive and confidential manner.

The director denied the petition, finding that the petitioner has failed to establish that any of the four factors enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) are presented in this processing and therefore, the petitioner has not demonstrated that the proffered position is a specialty occupation as defined in the regulations. Specifically, the director states in her decision that, although the petitioner has titled the proffered position as a Co-Teacher, an analysis of the proposed duties reveals that the position described by the petitioner reflects the duties of child care workers as listed under the title Child Care Workers in the *Occupational Outlook Handbook (Handbook)*, 2008-09 edition, and that as shown in the *Handbook*, "the position of a Child Care Worker is an occupation that *does not require* a baccalaureate level of education in a *specific specialist* as a normal, *minimum* for entry into the occupation."

To determine whether the proffered position, as described in the initial petition and in the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns first 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 that 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)).

It is noted that the director concluded that the proffered position most closely resembles the occupation of Child Care Worker as described in the *Handbook* and therefore, analyzed it as such. On appeal, counsel asserts in the brief submitted in support of the Form I-290B that the director erred in classifying the proffered position as a child care worker. Counsel argues that the proffered position is a preschool teacher position, and that the submitted description of duties for the proffered position and the school brochure show that more than 80% of the beneficiary's duties involve teaching. Counsel also contends that the position requires a bachelor's degree, and that the employer hires people with bachelor's degrees for the preschool teacher positions. Counsel submits a printout of the job description for Teacher, Preschool from the *Dictionary of Occupation Title (DOT)* to show the similarity between the duties of the proffered position and a preschool teacher.

According to the *Handbook*, child care workers perform the following duties:

Child care workers nurture, teach, and care for children who have not yet entered kindergarten. They also supervise older children before and after school. These workers play an important role in children's development by caring for them when their parents are at work or are away for other reasons or when the parents place their children in care to help them socialize with children their age. In addition to attending to children's health, safety, and nutrition, child care workers organize activities and implement curricula that stimulate children's physical, emotional, intellectual, and social growth. They help children explore individual interests, develop talents and independence, build self-esteem, learn how to get along with others, and prepare for more formal schooling.

Child care workers generally are classified into three different groups based on where they work: private household workers, who care for children at the children's homes; family child care providers, who care for children in the providers' homes; and child care workers who work at child care centers, which include Head Start, Early Head Start, full-day and part-day preschool, and other early childhood programs.

Most child care workers perform a combination of basic care and teaching duties, but the majority of their time is spent on caregiving activities. However, there is an

increasing focus on preparing children aged 3 to 5 years for school. Workers whose primary responsibility is teaching are classified as preschool teachers. However, many basic care activities also are opportunities for children to learn.

Dept. of Labor, Bureau of Labor Statistics, the *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos170.htm> (last accessed March 16, 2012).

The *Handbook* describes the nature of the work of Preschool Teachers 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.

Id., available at <http://www.bls.gov/oco/ocos317.htm> (last accessed March 16, 2012).

While both preschool teachers and child care workers, especially those who work at child care centers including preschools or other early childhood programs, perform almost the same duties for children at ages 3 to 5, according to the *Handbook*, child care workers focus on providing care to children and spend the majority of their time on caregiving activities, but workers whose primary responsibility is teaching are classified as preschool teachers. Child care workers also teach children while they provide care to them, however, preschool teachers provide education through a variety of teaching strategies by planning and implementing a curriculum. At preschools or child care centers, preschool teachers play the main teaching role while child care workers assist the preschool teachers.

In the instant matter, the petitioner is an early childhood education facility that provides education to preschoolers, kindergarteners and first graders. The proffered position is being filled to teach preschoolers. While the petitioner titled the position as a co-teacher on the Form I-129, the petitioner indicates that the proffered position is a preschool teacher in its supporting letter. Although the duties described by the petitioner overlap those of child care workers, the duties show that the beneficiary in the proffered position would focus on teaching the children in the preschool class and would spend the majority of her time teaching and a minority of here time dedicated to caregiving activities.

Upon further review and analysis of the duties described for the proffered position and comparing those duties to the descriptions of both child care workers and preschool teachers in the *Handbook*, the AAO finds that the proffered position more closely resembles the position of Preschool Teacher than Child Care Worker. The AAO agrees with counsel's assessment that the proffered position most closely resembles that of Preschool Teachers as described in the *Handbook*. Therefore, the part of the director's assessment concluding that the duties of the proffered position most closely resembles that of Child Care Worker will be withdrawn.

Although the AAO agrees with counsel's assertion that the proffered position most closely resembles that of Preschool Teacher as described in the *Handbook*, for the reasons discussed in greater detail *infra*, the AAO finds that the petitioner has failed to demonstrate that the proffered position constitutes a specialty occupation, and therefore affirms the director's decision to deny the petition.

The overarching reason for the AAO's dismissal of this appeal is that the proposed duties as described in the record do not establish that performance of the proffered position requires the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as required by the H-1B specialty occupation provisions of the Act and their implementing regulations. In this regard, the AAO has considered all of the assertions of counsel in support of the requirements of the position, but finds that they are not supported by sufficient evidence in the record. 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)). As stated previously, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Here and in accordance with the *Handbook's* descriptions of preschool teachers, the record's descriptions of the proposed duties are limited to generic and generalized functions which, even when read in the context of the evidence submitted in support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically in performing those duties. Specifically, the *Handbook's* description of training and other qualifications for Preschool Teachers provides in pertinent part:

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.

Id. (emphasis added).

While preschool teachers may require a college degree, the *Handbook* does not indicate that a bachelor's degree is normally required for preschool teachers or even state that degree in a specific specialty is usually required for entry into the occupation. Instead, the *Handbook* states that education requirements vary greatly from State to State and range from a high school diploma to a college degree. Therefore, the *Handbook* states that a preschool teacher does not require at least a bachelor's degree in a specific specialty or its equivalent as a minimum educational requirement and, thus, it does not categorically qualify as a specialty occupation.

Counsel also submitted a printout of the job description for Teacher, Preschool from *DOT* to show the similarity between the duties of the proffered position and preschool teacher. The DOL assigns *DOT* Code 092.227-018 for the title of preschool teacher and a specific vocational preparation (SVP) of 7. SVP is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. According to the *DOT* (4th Ed., Rev. 1991) – Appendix C, available at <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM> (last accessed March 16, 2012), SVP 7 requires over 2 years up to and including 4 years of vocational education, training or experience.

In addition, the *DOT* code 092.227-018 is converted into the Standard Occupational Classification (SOC) code 25-2011.00 in *O*NET*. See <http://www.onetonline.org/crosswalk/DOT?s=092.227-018&g=Go> (last accessed March 16, 2012). *O*NET* is the current occupational classification system used by the DOL. The *O*NET* online database states that the occupation of preschool teacher falls within Job Zone Three: Medium Preparation Needed and that most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. See <http://www.onetonline.org/link/summary/25-2011.00> (last accessed March 16, 2012). Therefore, neither *DOT* nor *O*NET* states that a preschool teacher requires a bachelor's degree in a specific specialty or its equivalent as a minimum educational requirement for the occupation.

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 beneficiary, 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 in the United States, as required by the Act.

The *Handbook's* description of preschool teacher indicates that the education and training requirements for this occupation vary greatly. However, as stated above, the *Handbook* does not state that a bachelor's degree is required or, more importantly, that the degree must be in a specific specialty. Therefore, the AAO concludes that the *Handbook* does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as is required under section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Accordingly, the AAO finds that the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Again, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. In response to the RFE, counsel stated that the petitioner is accredited by NAEYC which requires 75% of the teachers to have bachelor's degrees in early childhood education to maintain its accreditation. The submitted copy of the NAWEC requirements and a letter dated October 20, 2005 from NAEYC support counsel's assertion. However, the NAEYC Accreditation Criterion 6.A.05 states in pertinent part that:

All teachers [have] a minimum of an associate's degree or equivalent. At least 75% of teachers have a minimum of a baccalaureate degree or equivalent in early childhood education, child development, elementary education, or early childhood special education[.]

Thus, even among the preschool teachers who work at fully accredited preschools and child care centers, only 75% of them are required to possess a baccalaureate degree or equivalent in one of the specific specialties listed. In other words, the true minimum entry requirement even at an NAEYC accredited preschool is only an associate's degree. Therefore, and given also that only seven percent of the nation's preschools are accredited by NAEYC, the NAEYC's accreditation and its accreditation criterion do not demonstrate that the industry's professional association has made a degree in a specific specialty a minimum entry requirement and thus, are not evidence of a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not required for entry into the occupation. Neither the petitioner nor its counsel has provided evidence to distinguish the proffered position as unique from or more complex than preschool teacher positions, such as those as described in the *Handbook* or *O*NET*, that can be performed by persons without a specialty degree or its equivalent.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The petitioner submitted a letter dated March 17, 2009 that provides the educational background of all of its teachers and copies of their degrees and transcripts. In the letter, the petitioner claims that it has a total of 13 employees, consisting of Director, Curriculum Director, Assistant to the Director and Director Admission, nine teachers, assistant teachers, and a substitute teacher, and one kitchen staff. It is not clear whether the substitute teacher holds a bachelor's degree and, if so, in what specialty. The eight teachers and assistant teachers' educational backgrounds are as follows: one master's degree in early education, two master's degrees in education, and one bachelor's degree in each of the following fields: early childhood education, music education, art, anthropology, and English respectively. While all eight teachers and assistant teachers have at least a bachelor's degree, only two have their degrees in early education, the specific specialty allegedly required. Therefore, the petitioner failed to demonstrate that it normally hires candidates who hold at least a bachelor's degree in the specific specialty

allegedly required for the position of preschool teacher. As a result, the petitioner has not established that it routinely requires at least a bachelor's degree in a specific specialty or its equivalent for preschool teacher positions. The AAO finds that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).¹

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 or its equivalent. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the proffered position does not meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the 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 petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

The appeal will be dismissed and the petition denied. 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.

¹ 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 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 degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").