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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

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Date: **JUL 05 2012** Office: VERMONT 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

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

The petitioner is an individual. In order to employ the beneficiary in what he designates as a preschool teacher position, to teach his own child, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that he would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in his decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means 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 a particular position 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.

With the visa petition, counsel provided a letter, dated November 13, 2009, from the petitioner, who stated that his child was then nine months old. As to the duties of the proffered position, the petitioner stated:

In this position, [the beneficiary] will work under our supervision to instruct (our) child in activities to promote social, physical and intellectual growth through the use of multi-sensory toys and teaching materials. [The beneficiary] will teach music, art and Spanish. She will rotate to a different teaching stimulus every half an hour. She will be responsible to perform the daily teaching activities. She will use her knowledge and theory of education to plan the long[-]term and short[-]term objectives. She will teach [our] child academic (music, art and Spanish), social and motor skills to promote social, physical and intellectual growth; will assess the child's individual needs to determine an appropriate teaching method; determine method of presenting materials to [our] child to obtain optimum results; encourage[] [our] child in activities to promote self-expressions; observe[] [our] child to detect signs of emotional problems and to evaluate progress, and discuss[] matters with [the petitioner].

The petitioner further stated, "In order to perform the duties of the pre-school teacher position, we require the teacher to have a minimum of a baccalaureate degree or its equivalent in education." He also stated:

Petitioner has never hired any body [sic] for this position. However, the nature of the duties is so specialized and complex that knowledge required to perform the job duties is usually associated with the attainment of a bachelor's degree.

On January 8, 2010, the service center issued an RFE in this matter. The service center requested, *inter alia*, additional evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted an undated letter from the petitioner and counsel's own letter, dated February 19, 2010.

In his undated letter, the petitioner stated, "The [proffered] position is not a 'nanny' position." He also provided the following more detailed description of duties:

- I. Needs. Attend to my daughter's basic needs by feeding her, overseeing her getting dressed, and changing her diapers, presently, but soon teaching how to use the toilet. (11%) Teach proper eating and personal hygiene. (4%)
  
- II. Activities. Provide a variety of materials and resources (blocks, toys, books, games) to my daughter to explore, manipulate and use, both in learning activities and in imaginative play. Demonstrate these activities to her and help her to do the same.

This includes hand/eye coordination. (25%) She would organize and lead activities designed to promote her physical, mental and social development, such as games, arts and crafts, music, storytelling, and outside stimuli. She would teach her basic skills such as color, shape, number and letter and word recognition. (25%) and read books to her (15%). She would teach her to interact properly with our dog. She would adapt teaching methods and instructional materials to meet my daughter's varying needs and interests. She would establish clear objectives for all each [sic] activity and communicate those objectives to my daughter. She would arrange indoor and outdoor space to facilitate creative play, motor-skill activities, and safety. She would teach a progressive program in which after my daughter learns a task or skill she would begin to learn the next.

III. Guidance. Establish and enforce rules for behavior. My daughter's behavior would be [sic] monitored continuously. [The beneficiary] would have to apply behavior modification techniques when she sees the need. (2%). She would observe and evaluate my daughter's performance, behavior, social development, physical health, and social skills. (This is ongoing and is difficult to give an exact percentage of time 6-10%).

IV. Report. [The beneficiary] would monitor and identify any signs of emotional, developmental, or health-related problems, and discuss with parents. Meet with parents to discuss their children's progress and needs, determine their priorities for their [sic] child, and suggest ways that they can promote learning and development. (Done at the end of each day (4%). May meet with my wife, me and other professionals to discuss problems, needs or progress of our daughter.

In his February 19, 2010 letter, counsel stated cited the U.S. Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and *O\*NET* and, more specifically, the Specific Vocational Preparation (SVP) level they accord to preschool teacher positions, for the proposition that the proffered position is a specialty occupation position, stating that SVP 6 and SVP 7 "allow the minimum of a bachelor's degree in education." Counsel also cited the *DOT Code* accorded to preschool teachers and the North American Free Trade Agreement (NAFTA) list of professionals for the proposition that the proffered position is a professional position. Counsel asserted that the duties of the proffered position correspond to those discussed in the DOL's *Occupational Outlook Handbook (Handbook)* chapter pertinent to preschool teachers.

The AAO notes that the salient inquiry is not whether the proffered position qualifies as a "professional" position, but whether it qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel's argument pertinent to the *DOT Code* and the NAFTA list will not, therefore, be further addressed. Counsel's assertions pertinent to the SVP level accorded to the proffered position will be addressed below.

The director denied the petition on July 1, 2010, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty.

On appeal, counsel provided an evaluation of the proffered position and a brief.

The evaluation, dated July 29, 2010, was prepared by a credential evaluator, who reviewed the duties attributed to the proffered position and concluded that they require:

[the] strong analytical and problem-solving abilities acquired in four years of academic study towards the U.S. Bachelor's degree in Education, Early Childhood Education, Elementary Education or related area awarded by a regionally accredited university in the United States or equivalent.

The evaluator did not indicate which of the listed duties could not be performed without such a degree or equivalent, but concluded that such a degree or equivalent is a minimum qualification for the proffered position.

In his brief, counsel asserted, mistakenly, that 8 C.F.R. § 214.2(h)(4)(ii) makes clear that jobs in education categorically qualify as specialty occupation positions, and that the proffered position is therefore, "By definition" a specialty occupation position. Subsequently, perhaps in the alternative, counsel asserted, "The petitioners have submitted sufficient documentation to distinguish the proffered position from non-degreed employment as a preschool teacher." Counsel also cited the evaluation provided as evidence that the proffered position is a specialty occupation position.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> In the chapter entitled "Preschool Teachers," the *Handbook* provides the following descriptions of the duties of those positions:

- Prepare children for kindergarten by introducing concepts they will explore further in kindergarten and elementary school

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

- Work with children in groups or one on one, depending on the needs of children and the subject matter
- Plan and carry out a curriculum that targets different areas of child development, such as language, motor, and social skills
- Organize activities so children can learn about the world, explore interests, and develop talents
- Develop schedules and routines to ensure children have enough physical activity, rest, and playtime
- Watch for signs of emotional or developmental problems in children and bring problems to the attention of parents
- Keep records of the students' progress, routines, and interests, and keep parents informed about their child's development

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Preschool Teachers <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm> (last visited April 23, 2012).

In the same chapter, the *Handbook* describes the educational requirements of a preschool teacher position as follows:

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

Preschool teachers in Head Start programs must have at least an associate's degree. However, by 2013, at least 50 percent of preschool teachers in Head Start programs nationwide must have a bachelor's degree in early childhood education or a related field. As a result, Head Start programs may prefer to hire workers with a bachelor's degree. Those with a degree in a related field must have experience teaching preschool-age children.

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

The AAO notes that the *Handbook* does not specifically address the educational requirements of preschool teachers who work in private homes, caring for a single child. In any event, the *Handbook* only indicates that public school preschool teachers are generally required to have a bachelor's degree. Further, the *Handbook* does not indicate that even public school preschool teachers require a minimum of a bachelor's degree or the equivalent *in a specific specialty*.

Further, the AAO observes that, in the chapter entitled "Childcare Workers," the *Handbook* provides this description of the duties of those positions:

- Supervise and monitor the safety of children in their care
- Prepare meals and organize mealtimes and snacks for children
- Help children keep good hygiene
- Change the diapers of infants and toddlers
- Organize activities so that children can learn about the world and explore interests
- Develop schedules and routines to ensure that children have enough physical activity, rest, and playtime
- Watch for signs of emotional or developmental problems in children and bring the problems to the attention of parents
- Keep records of children's progress, routines, and interest

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Childcare Workers <http://www.bls.gov/ooh/Personal-Care-and-Service/Childcare-workers.htm> (last visited April 23, 2012).

More specifically, the Childcare Workers chapter of the *Handbook* states the following about nannies:

*Nannies* work in the homes of the children they care for and the parents that employ them. Most often, they work full time for one family. They may be responsible for driving children to school, appointments, or afterschool activities. Some live in the homes of the families of that employ them.

Notwithstanding the petitioner's conclusory assertion that the proffered position is not a nanny position, the AAO observes that the beneficiary would perform all of the duties the *Handbook* attributes to Childcare Workers, the occupational group in which nannies are included. Although the *Handbook* does not specifically mention teaching children to interact properly with dogs, the ancillary duty of overseeing a child's interaction with animals is likely common to nanny positions in households with pets. The description of the duties of the proffered position indicates that it very closely fits the description of nanny positions. The AAO finds that the proffered position is a position for a nanny as described in the *Handbook* chapter on childcare workers.<sup>2</sup>

The *Handbook* states the following about the educational requirements of childcare worker positions, including nanny positions:

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<sup>2</sup> The AAO notes that, had the proffered position been analyzed as a preschool teacher position as urged by the petitioner and counsel, this would not have affected the outcome of the instant visa petition. The *Handbook* indicates that preschool positions in public schools generally require a minimum of a bachelor's degree or the equivalent in a specific specialty, but not that such a degree requirement exists in other venues, and does not even address the possibility of a preschool teacher working in a private home. It offers no support for the proposition that the proffered position in the instant case, even if analyzed as a preschool teacher position, would require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Childcare workers must meet education and training requirements, which vary with state regulations. Some states require these workers to have a high school diploma, but many states do not have any education requirements.

However, employers often prefer to hire workers with at least a high school diploma and, in some cases, some postsecondary education in early childhood education.

Beginning in 2013, workers in Head Start programs must at least be enrolled in a program in which they will earn an associate's degree in early childhood education or a child development credential.

Many states require providers to complete some training before beginning work. Often, these requirements can be satisfied by having some college credits or by earning a degree in early childhood education.

States do not regulate educational requirements for nannies and babysitters. However, some employers may prefer to hire workers with at least some formal instruction in education or a related field, particularly when they will be hired as full-time nannies.

The *Handbook* indicates that the requirements for childcare worker positions are controlled by state law. It does not indicate that any states require childcare workers in any venue to possess a minimum of a bachelor's degree or the equivalent in a specific specialty, and further indicates that no states have educational requirements for nannies. The *Handbook* does not support the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has provided no evidence pertinent to the requirements of Florida, the state where the beneficiary would work.

Counsel observed that the *DOT* and *O\*NET* assign preschool teacher positions SVP levels that "allow" a minimum of a bachelor's degree. The AAO observes, first, that the issue is not whether the proffered position *allows* a bachelor's degree, but whether the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. Second, the petitioner has not demonstrated, as was noted above, that the proffered position is a preschool teacher position. Third, SVP level of a position indicates only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, counsel's citation of the *DOT* and *O\*NET* are not persuasive.

Counsel also stated that, because the proffered position is a teaching position, it is a specialty occupation position "by definition." The language upon which counsel relies, mistakenly, in making that assertion is taken from 8 C.F.R. § 214.2(h)(4)(ii), to wit:

*Specialty occupation* means 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.

Counsel appears to assert that, because "education" appears in that list, any position in education is categorically a specialty occupation position. A more careful reading reveals that this is not the intent of that paragraph at all. It contains a list of fields in which a specialty occupation position might be found. A position is not required to be in one of those fields in order to qualify, but, on the other hand, that a position is in one of those fields is not sufficient to show that it is a specialty occupation position, either. As that paragraph makes clear, in order to qualify as a specialty occupation position, a position must require a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel's reliance on the language of that regulation is misplaced.

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge in childcare, but do not establish any particular level of formal education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 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 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.

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 was observed above, the *Handbook* provides no support for the proposition that childcare-worker employers like the petitioner normally require childcare workers to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of childcare workers that requires a minimum of a bachelor's degree or

the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the childcare or nanny industry.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the pertinent industry in parallel positions among similar organizations, and has not, therefore, satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner establishes that, notwithstanding that other positions in the childcare industry may not require a minimum of a bachelor's degree, or the equivalent, in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such credentials.

The description of the proffered position in the petitioner's November 13, 2009 letter, however, contains no indication of complexity or uniqueness that would require a minimum of a bachelor's degree or the equivalent in a specific specialty.

For instance, the petitioner does not provide credible documentary evidence that the activities it ascribes to the proffered position (such as, for instance, instructing a child in activities to promote social, physical and intellectual growth through the use of multi-sensory toys and teaching materials) would be so performed as to constitute a position so complex or unique as to require a person with a minimum of a bachelor's degree or the equivalent in a specific specialty. Likewise, the evidence in this record of proceeding does not establish that the actual teaching of music, art, and Spanish would be done on such a level as to require a minimum of a bachelor's degree or the equivalent in a specific specialty. In the instant case, in which the child to be instructed was nine months old when the visa petition was filed, a lower level of instruction is implied.<sup>3</sup> Similarly, daily teaching activities, planning long-term and short-term objectives, teaching social and motor skills, assessing a child's needs, selecting an appropriate teaching method, encouraging a child in activities, observing a child to detect signs of emotional problems and to evaluate progress, and discussing these matters, absent detail to indicate complexity or uniqueness, do not demonstrably require a person with a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In his November 13, 2009 letter, the petitioner stated, "[I have] never hired any body [sic] for this position." Further, the petitioner submitted no evidence pertinent to previous recruitment efforts.

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<sup>3</sup> The AAO notes that the petitioner's child's instructional needs may become more complex as she ages. However, even if, hypothetically and for the sake of argument, these anticipated future needs were demonstrated to rise to the level of requiring a worker in a specialty occupation position, that would not justify present approval of the visa petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on anticipation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The record contains no evidence, therefore for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>4</sup>

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree, or the equivalent, in a specific specialty.

The evaluation of the proffered position, submitted on appeal, states the evaluator's opinion that the duties of the proffered position "would require an applicant to possess a minimum of a U.S. Bachelor's degree in Education, Early Childhood Education, Elementary Education or [a] related area awarded by a regionally accredited university in the United States or equivalent." However, as was noted above, the evaluator did not indicate which of the duties described could not be performed absent such a degree or equivalent. More fundamentally, the AAO finds that the evaluation merits no evidentiary value. Neither the evaluation nor any other evidence in the record of proceeding established that the evaluator is expert in or a recognized authority in the areas in which she opines, namely, the educational requirements for positions such as the one proffered and whether positions such as the one proffered here qualify as specialty occupation positions. Further, even if the evaluator had the proper qualifications for opining in the aforesaid areas – and she does not – her evaluation also merits no evidentiary weight because this evaluator does not provide specific studies, treatises, surveys, or any other authoritative basis for her opinion, and also because she fails to relate how specific elements of the actual performance of the proffered position in its day-to-day unfolding in this particular household would manifest the educational needs that the evaluator asserts.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where, as here, 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).

The duties of the proffered position do not convey any such inherent level of specialization or complexity to the AAO. Such functions as feeding a child; overseeing her dressing; changing her diapers; toilet training her; teaching her to eat properly; teaching her personal hygiene; providing materials and resources; demonstrating activities to her and helping her to repeat them; organizing

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<sup>4</sup> 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").

and leading activities designed to promote her physical, mental and social development, such as games, arts and crafts, music, and storytelling; teaching color, shape, number, letter, and word recognition; reading to her; teaching her to interact with a dog; adapting teaching methods and instructional materials to meet the child's needs and interests; establishing and communicating clear objectives for these various activities; arranging indoor and outdoor space to facilitate creative play, motor-skill activities, and safety; establishing and enforcing rules for behavior; monitoring and correcting behavior, observing and evaluating a child's performance, behavior, social development, physical health, and social skills; monitoring and identifying emotional, developmental, or health-related problems and discussing them with a child's parents.; discussing a child's progress and needs; determining parents' priorities for their child; suggesting ways the parents can promote learning and development; are generalized statements of generic functions that, even in their totality, do not indicate the level of specialization and complexity required to satisfy this criterion. Without evidence directly addressing and developing the requisite degree of specialization or complexity that may reside in the proposed duties, the AAO cannot determine that any of those activities, or all of them together, are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree, or the equivalent, in a specific specialty. The petitioner has not satisfied the criterion 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.

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. The appeal will be dismissed and the petition denied.

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