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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



D2

Date: **JUN 12 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner: (Y)
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 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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 claims to be a business entity engaged in providing quality bilingual (Chinese/English) care and educational programs for children 1.5 to 6 years old with three employees and a stated gross annual income of \$200,000. It seeks to employ the beneficiary in a part-time capacity as a "kindergarten teacher" to teach in both Chinese and English 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 failed to establish that the proffered position is a specialty occupation.

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

The primary issue before the AAO is whether the 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position;
or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 kindergarten teacher. In its support letter dated March 16, 2010, the petitioner states that the beneficiary will be employed in the specialty occupation of Kindergarten Teacher. In this capacity, she will be responsible for

teaching kindergarteners at [REDACTED]. Her specific responsibilities will include:

- teaching Chinese language and Chinese literature to children from 4 to 6;
- introducing Chinese culture to children;
- teaching elemental natural and social science, personal hygiene, music and art;
- teaching mathematics to children;
- promoting children's physical, mental and social development; [and]
- [e]stablishing strong interpersonal communication with parents.

The support letter goes on to state that the position of kindergarten teacher requires theoretical and practical application of highly specialized knowledge and attainment of a master's degree in an education and human development field related to the occupation. The petitioner submitted copies of the beneficiary's Master of Education diploma from [REDACTED] and Bachelor of Science diplomas in chemistry and psychology from [REDACTED].

The submitted Labor Condition Application (LCA) was certified for a "Kindergarten Teacher" under SOC code 25-2012.00 Kindergarten Teachers, Except Special Education, to work at [REDACTED] at a rate of \$18.00 per hour. The LCA also indicates that the Level I prevailing wage of kindergarten teacher is \$17.83 per hour.

On April 16, 2010, 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 the petitioner's certificate of formation, licenses, occupancy permit for its business, organizational chart, tax returns, W-2 forms and payroll records, and printouts from the Massachusetts Department of Early Education and Care website.

The response also includes a copy of an additional job description of bilingual kindergarten teacher. The job description states that the kindergarten teacher will be in charge of teaching kindergarten classes in Chinese. The job consists of three major duties: a) offering language courses in both oral and written Chinese language, b) teaching Chinese culture, and 3) conducting the math and science section in Chinese. According to the job description, the teacher will spend approximately sixty percent (60%) of her time teaching Chinese, twenty percent (20%) of her time teaching Chinese culture, and twenty percent (20%) of her time teaching math and science in Chinese.

The director denied the petition, finding that the evidence of record does not establish that the job offered qualifies as a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. Specifically, the director determined that the petitioner failed to establish that it has qualifying work in which it could sustain a person within a specialty occupation, and that the job duties as described by the petitioner do not establish that the beneficiary will be employed within a specialty occupation which warrants the expertise of a specialty bachelor's degree recipient.

On appeal, counsel for the petitioner contends that the director erred in finding that the duties of the proffered position reflect the duties performed by preschool teachers, as described in the *Handbook*, instead of kindergarten teacher. Counsel also asserts that (1) a baccalaureate degree is normally a minimum requirement for entry into the kindergarten teacher position, (2) a baccalaureate is common to the education industry for all kindergarten teachers, (3) the petitioner consistently and exclusively requires a bachelor's degree for this kindergarten teacher position, and (4) the nature of the kindergarten teacher's duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To make its determination 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 U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*),¹ on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

It is important to note that the director concluded in his decision that it has not been established that the petitioner has qualifying work in which it could sustain a person within a specialty occupation. The AAO concurs with the director's statement that when determining whether a particular job qualifies as a specialty occupation, USCIS does not use a title by itself and also notes that the director correctly found that the record is insufficient to establish a credible offer of employment as a kindergarten teacher.

The AAO finds that the record does not contain any documentary evidence establishing that the petitioner, [REDACTED], is doing business as [REDACTED]. The petitioner claims that it is doing business as [REDACTED] at [REDACTED]. In response to the director's RFE, counsel submitted documentation about the petitioner's business. The record shows that the petitioning entity, [REDACTED] Technologies LLC, was formed as a Delaware domestic limited liability company on August 4, 2004 with two managing members ([REDACTED]).

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

█). On May 26, 2009, █ Technologies LLC was registered as a foreign limited liability company to do business in the Commonwealth of Massachusetts.²

Copies of Schedule Cs of █ 2006 and 2007 tax returns in the record show that █ reported the income from █ Technologies LLC as an "Internet Service." Copies of Schedule Cs of █ 2008 tax return show that █ reported her income from █ Family Day Care at █, for "Family Child Day Care" and income from The █ at █, for "Childcare."

The record also contains copies of Business Certificate No. 49 and a Certificate of Use and Occupancy issued by the Town of █ on June 25, 2009, both of which indicate that the certificates are issued to █. d/b/a █ at █ to operate a child care center. The record also contains License Number █, a First Provisional License to Operate a Large Group & School Age Childcare Program issued by the Commonwealth of Massachusetts Department of Early Education and Care for Program Number █ indicates the umbrella organization for the program Willows Child Care at █, is █

Consequently, as the record does not contain any documentary evidence establishing that the petitioner, █ Technologies LLC, is doing business as Willows Child Care Academy at █, and that █ is a trade name of █ Technologies LLC, the petitioner in this matter, █ Technologies LLC, has failed to establish its eligibility as a U.S. employer to extend a bona fide job offer to the beneficiary at █. It is noted that one of the two managing members of █ Technologies LLC appears to be the owner of █ and reported her income from █ on tax returns. However, without independent evidence in support, the AAO cannot consider that █ Technologies LLC has established its eligibility to file this petition since █ reported her income from █ as a sole proprietor. While an LLC may be classified for federal income tax purposes as if it were a sole proprietorship, like a corporation, it is a legal entity separate and distinct from its owners. The business owned and run by its owner cannot be automatically treated as the business owned and run by the LLC itself even though the owner is a managing member of the LLC. Therefore, the petitioner in this matter has failed to establish its eligibility to file the instant petition.

The AAO notes that even if the petitioner had established that the LLC were the owner of the child care center, the petitioner would still fail to establish that the job offer to the beneficiary in the position of kindergarten teacher was *bona fide*. The AAO also finds that the evidence of record is insufficient to establish that the nature of the petitioning business is an early education organization providing kindergarten-level education. Instead, it appears more likely than not that it is a provider of toddler daycare and preschool education. Although the petitioner claims that █ provides kindergarten-level education, the evidence of record does

² See <http://corp.sec.state.ma.us/corp/corpssearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=432079019> (last visited May 15, 2012).

not support the petitioner's assertion. As previously noted, the owner, [REDACTED] reported her income from [REDACTED] on Schedule C of her Federal individual income tax return for 2008 and defined the service provided as "Childcare." The business certificate and certificate of use and occupancy issued by the Town of Belmont define the type of business as "CHILD CARE CENTER" and "Day Care Center," respectively, for [REDACTED]. The license issued by Massachusetts Department of Early Education and Care names the program [REDACTED] and sets a total capacity of 22 children with no allowance for kindergarteners. While the license sets a capacity for toddlers and preschoolers, the department does not set any capacity for kindergarteners or kindergarteners and school agers mix.

In response to the director's RFE, counsel also provided a list of children who attended [REDACTED] in 2010. The list shows that there were four children enrolled in the toddler classroom and 13 children enrolled in the PS (preschool & school age) classroom when the instant petition was initially filed on April 7, 2010. As of the initial filing, all of the 13 children enrolled in the preschool classroom were at ages of two to six. The evidence of record does not show that there is any kindergarten classroom at [REDACTED]. Therefore, the petitioner failed to submit sufficient evidence that the scope of the petitioning business requires a kindergarten teacher in a specialty occupation for [REDACTED]. The evidence of record is insufficient to establish that the nature of the petitioning business is an early education organization providing kindergarten-level education. Instead, it appears more likely than not that it is a provider of toddler daycare and preschool education. Accordingly, the AAO finds that the petitioner failed to submit sufficient evidence that the nature of the petitioning business requires the services of a kindergarten teacher for [REDACTED].

On appeal, counsel asserts that the petitioner expects more than 10 kindergarteners and first grade students in a program currently negotiating with a Chinese church in [REDACTED] Massachusetts, from the first week of September 2010. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For the reasons discussed above, the AAO concurs with the director's finding that the record is insufficient to establish a credible offer as a kindergarten teacher. Accordingly, the petition must be denied for this reason alone.

Furthermore, to prove its job offer is *bona fide*, the petitioner must also demonstrate that it is capable of paying the proffered wage to the beneficiary of the petition at the time of the petition is filed. The petitioner did not submit any complete tax returns or any financial statements for either [REDACTED] or [REDACTED]. However, with negative net income of \$19,354 from [REDACTED] as reported on Schedule C of [REDACTED]

2008 individual income tax return, the AAO cannot find, absent evidence to the contrary, that the petitioner had demonstrated its realistic ability to comply with the law and pay at least the prevailing wage to the instant beneficiary for whom the petitioner filed this nonimmigrant petition in 2010.³

Nevertheless, the AAO will continue its analysis to determine whether the proffered position, as described, qualifies as a specialty occupation. As previously discussed, the petitioner failed to establish that the petitioning business has sufficient work for a kindergarten teacher, and the job offered to the beneficiary in the position of kindergarten teacher at the petitioning business is not a *bona fide* one. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

The *Handbook*'s description of preschool teachers provides in pertinent part:

Preschool teachers educate and care for children, usually ages 3 to 5, who have not yet entered kindergarten. They explain reading, writing, science, and other subjects in a way that young children can understand.

Duties

Preschool teachers typically do the following:

- Prepare children for kindergarten by introducing concepts they will explore further in kindergarten and elementary school
- 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, *Handbook*, 2012-13 ed., Preschool Teachers, <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-2> (last visited May 30, 2012).

Although the petitioner claims that it seeks to hire the beneficiary in the position of kindergarten teacher, upon careful analyses of the bona fides of the job offer and the duties proposed by the

³ The petitioner indicates that the beneficiary will work 15-40 hours per week and the underlying LCA indicates that the rate of pay the petitioner offered is \$18.00 per hour. Based on working 15-40 hours per week, 52 weeks a year, the beneficiary's approximate annual compensation should be approximately in range from \$14,040.00 to \$37,440.00.

petitioner, the AAO concurs with the director that the proffered position most closely resembles the position of preschool teacher as generally described in the *Handbook*.

The “How to Become a Preschool Teacher” section of the *Handbook* states the following:

Education and training requirements vary based on settings and state regulations. They range from a high school diploma and certification to a college degree.

Education

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.

Licenses

Many states require childcare centers to be licensed. To meet licensure requirements, their staff must pass a background check, have a record of immunizations, and meet a minimum training requirement.

In public schools, preschool teachers must be licensed to teach early childhood education, which covers preschool through third grade. Requirements vary by state, but they generally require a bachelor’s degree and passing an exam to demonstrate competency. Most states require teachers to complete continuing education credits to maintain their license.

Handbook, 2012-13 ed., Preschool Teachers, <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4> (last visited May 30, 2012). Although the *Handbook* indicates that public school preschool teachers are generally required to have at least a bachelor’s degree in early childhood education or a related field and must be licensed to teach early childhood education, which generally requires a bachelor’s degree and passing an exam to demonstrate competency, it clearly states that in childcare centers, preschool teachers in general are only required to have at least a high school diploma and a certification in early childhood education. The *Handbook* further states that preschool teachers in Head Start programs only

require an associate's degree. Because the *Handbook* indicates that entry into the preschool teaching occupation does not normally require a bachelor's or higher degree in a specific specialty or its equivalent, the *Handbook* does not support the proffered position as being a specialty occupation.

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

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As stated earlier, 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 reflected in this decision's discussions regarding the *Handbook's* information, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner 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. Although counsel for the petitioner contends on appeal that the bilingual kindergarten teacher position is so complex and unique that it can be performed only by an individual with a degree, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than preschool teacher positions that require the application of teaching principles, but that are not at a level that require the degree of highly specialized knowledge in teaching that is only attained by the attainment of at least a bachelor's degree, or the equivalent, in education or a closely related specialty 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. Counsel states on appeal that the petitioner currently has two employees: [REDACTED] who has degrees in science and arts and [REDACTED] who

has a bachelor's degree in elementary education. As the evidence of record shows, [REDACTED] is the owner and director of the school. Record evidence does not establish that [REDACTED] is a teacher at the school. The fact that [REDACTED] holds a bachelor's or higher degree does not establish that the employer normally requires a bachelor's or higher degree or its equivalent for the position because she is not and will not be a kindergarten or preschool teacher. In addition, the record does not show that [REDACTED] has a bachelor's or higher degree *in a specific specialty* closely related to the proffered position.

The petitioner claims that the other employee, [REDACTED], is employed as the "English Lead Teacher." However, again the fact that she possesses a bachelor's degree in elementary education is not sufficient to establish that a bachelor's degree in elementary education or its equivalent is the minimum entry requirement for the proffered position since the proffered position is not the same position. As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁴

On appeal, counsel asserts that the proffered position qualifies as a specialty occupation because the Massachusetts Department requires possession of a bachelor's degree for every licensed kindergarten teacher. However, as previously discussed, the proffered position as described is not a kindergarten teacher position. Nevertheless, even if it were, 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, the AAO still cannot find that a position belongs to an occupational classification for which there is a categorical, minimum entry requirement of at least a bachelor's degree in a specific specialty even if entry into that occupation requires a license and a bachelor's degree, but not a degree in a specific specialty, is required to obtain that license. Therefore, the petitioner still failed to establish that the proffered position qualifies as a specialty occupation because the license does not require a bachelor's degree in a *specific specialty*.

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

⁴ 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").

or higher degree in a specific specialty or its equivalent. Counsel for the petitioner asserts that the duties of the proffered position are very specialized because the beneficiary must teach students Chinese language and culture and conduct lessons in Chinese, and also because she will play an important role for the "future mental, educational and physical development of those Chinese American children in [REDACTED]" However, the record does not contain any evidence to distinguish the proffered position as unique from or more complex than preschool teacher positions, such as those described in the *Handbook*, that can be performed by persons without a specialty degree or its equivalent. To the extent that they are depicted in the record, the duties of the proposed position mainly teaching children at the ages of two to six do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. In fact, the only distinguishing factor appears to be the requirement that the teacher speak and read/write Chinese, for which a bachelor's degree in a specific specialty is not required. The AAO, therefore, concludes that the petitioner has not established that it meets the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).⁵

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

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

⁵ It must be noted that the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA) indicating that it is an entry-level position for an employee who has only a basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

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