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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

PUBLIC COPY

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Date: MAR 07 2012

Office: CALIFORNIA SERVICE CENTER

File: [REDACTED]

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,

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

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on June 25, 2009. The petitioner stated that its type of business is "consumer services" and that it has five employees and a gross annual income of approximately \$550,000 and a net annual income of \$50,000.

Seeking to employ the beneficiary in what it designates as an instructional music coordinator for music education position, the petitioner filed this H-1B petition in an endeavor to classify him 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 on January 19, 2010, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions and that the petitioner failed to demonstrate that there is a credible offer of employment. On appeal, counsel asserts that the director's basis for the denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision on each of the enumerated grounds. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition and that the petitioner failed to establish that the beneficiary is qualified to serve in the position. Thus, for these reason as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.¹

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

First, the AAO will address counsel's contention that the H-1B petition should be approved because an Immigrant Petition for Alien Worker (Form I-140) was granted by USCIS for a

¹ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

position involving the petitioner and beneficiary. Counsel states that "the Form I-140 Immigrant Petition was approved on May 18, 2009 and is enclosed as further evidence that this extension should be approved."

The AAO notes that counsel cites no statutory or regulatory authority, case law, or precedent decision to support his assertion. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty-occupation petitions provide for the approval of an H-1B specialty-occupation petition on the grounds argued by counsel, or indicate that USCIS decisions on Form I-140 adjudications are material to demonstrating that a proffered position is a specialty occupation in the H-1B context. Accordingly, it is not sufficient for counsel to simply claim that the instant H-1B petition should be granted because USCIS previously approved a Form I-140 petition on behalf of the beneficiary. The AAO finds no merit in counsel's contention that the referenced Form I-140 petition is relevant to determining whether the proffered position is a specialty occupation for H-1B classification.

Next, the AAO will address counsel's assertion that the H-1B petition should have been granted because it is an extension of status involving the same parties and the same or similar position. Counsel references an April 23, 2004 memorandum authored by William R. Yates, USCIS Associate Director for Operations, on the subject of extensions to support his assertion.²

The Yates memorandum acknowledges that a petition must be decided according to the evidence of record on a case-by-case basis. Specifically, the Yates memorandum states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d)... Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

The Yates memorandum does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility pursuant to the controlling statute and regulations. In fact, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Moreover, the memorandum clearly states that each matter must be decided according to the evidence of record. In the appeal, counsel suggests that USCIS was required to look at the prior

² Counsel refers to the memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (April 23, 2004).

record of proceedings dealing with separate adjudications of H-1B petitions filed on behalf of the beneficiary. Counsel's assertion is not persuasive. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.³ Accordingly, the director was not required to request and obtain copies of the previous H-1B petitions.

If a petitioner wishes to have previously filed evidence considered by USCIS in its adjudication of a subsequent petition, the petitioner is permitted to submit copies of such evidence that it either maintained itself or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit copies of previous H-1B petitions and supporting documents, and the record of proceeding does not contain complete or even partial copies of the prior petitions. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

As the record of proceeding does not contain any evidence from previous petitions, there are no underlying facts to be analyzed and, therefore, no prior, substantive determinations which may be given deference. Thus, the Yates memorandum does not apply in this instance.

USCIS was not compelled to grant the instant petition because the beneficiary was previously accorded H-1B status. The petitioner is not relieved of its burden to provide sufficient documentation to establish current eligibility for the benefit sought by simply referring to previous approvals. A prior approval does not compel the grant of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). The AAO finds that counsel's claim is without merit.

The AAO will now discuss the evidentiary deficiencies in the record of proceeding that preclude the determination that the proffered position is a specialty occupation.

³ USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdictions over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as an instructional music coordinator for music education on a full-time basis (40 hours per week) at a salary of \$16.31 per hour. The AAO extracted the following job duties for the proffered position from the petitioner's letter of support dated June 11, 2009:

- Develop and run the instructional program for music, utilizing print and musical software for instructional technology;
- Plan and manage curricular and instructional improvements and develop pilots of new and revised musical program;
- Plan and lead meetings of general music resources to develop workshops and in-house training;
- Implement and evaluate musical programs in presentations;
- Select the most appropriate techniques in utilizing [the beneficiary's] background in design to solve problems and create efficiency;
- Supervise the evaluation and selection of textbooks, instructional materials and equipment, along with collaborating in the development of plans for new and renovated facilities.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on September 29, 2009. The director requested the petitioner submit additional documentation, including a detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary will perform, level of responsibility, hours per week of work along with an explanation of why the work performed requires the services of a person who has a college degree or its equivalent in the occupational field.

In response to the director's RFE, the petitioner provided additional evidence including a document entitled "Job Description." The following duties were provided for the position:

- Organize all music school programs (includes curriculums, lessons, selection of appropriate instructors, producing music, price charts, all contents on websites or ads, selection of appropriate textbooks, video, CD's and so on);
- Organize all weekly lessons schedules (call instructors & students for their availabilities to set up schedule);

- Organize all concert opportunities for students' performances at regular basis (includes sending invitation to 200 guests, rehearsing with instructors and students, directing all events, providing auditions and so on);
- Survey for the advertisement to recruiting students in the United States and other countries, such as Japan;
- Make contract documents in English and Japanese, and negotiating and making contract with agencies and music schools inside or outside of the United States (includes going to Japan to introduce the companies programs to them);
- Consult with assist students with translation needs;
- Conduct lessons for private lessons and group lessons, such as performance workshops, Music Theory, Rhythm training, Harmony, Musical notation, Composing, Arranging, Bass, Guitar, Piano, Reading Techniques for American students & students from Asian countries (includes taking students to Jam session and clubs in LA);
- Hiring all personnel (includes checking their profiles);
- Meeting with instructors or staff, students to make the program or curriculum better;
- Accounting and keeping all day-to-day records for lesson schedule or students information;
- Reception for visitors or telephone;
- Arrange student housing and English school schedule;
- Support students for their daily life for 24 hours (includes taking them to hospital in emergency, shopping, helping get drivers license test, rental car, rental cell phone, picking-up or dropping-off at airport);
- Make musical products, such as photos, movie, composing, recording, digital programming, arranging for students' promotional kits for their future auditions;
- Make price estimation to all customers and agencies;
- Bring professional musicians through my network of me (sic) as musicians for events;

- Recruit students through my experience of recruiting more than 300 hundred students for the past 10 years in the United States and Japan;
- Go to shop for musical materials and events materials;
- Write all letters and go to postal office;
- Donate fund[s] to friendly organization;
- Clean and coordinate the facility and musical material.

Although the petitioner claimed that the beneficiary will serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on January 19, 2010. The petitioner and counsel submitted a timely appeal of the denial of the H-1B petition.

After reviewing the record, the AAO concurs with the director's decision. For the reasons discussed below, the AAO finds that the petitioner has not provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position.

The title of the proffered position, instructional music coordinator for music education, is amorphous and may include a range of duties, some of which may be performed with experience alone, some of which may require a general bachelor's degree, and some of which may require a bachelor's or higher degree in a specific discipline. To determine whether this instructional music coordinator for music education position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

The petitioner provided two descriptions of the proffered position but did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Although the director specifically requested the petitioner provide the percentage of time the beneficiary would spend on each job duty, the petitioner failed to submit this information. Thus, the petitioner has not established which tasks are major functions of the proffered position nor has it established the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, and as a matter critically important in its determination of the merits of this appeal, the AAO cannot discern the primary and essential functions of the proffered position.

Counsel stated in his response to the RFE that the "petitioner's principle business activity involves sales of consumer products to hundreds of different retailers and private customers and to distributors around the country" and that the petitioner "expanded in this ever changing consumer market by forming a musical instruction department and required an individual to lead them in their musical instruction department." The petitioner and counsel claim that the business has "expanded" that the "[g]rowth in our industry has been rapid, and accordingly we need the continued services of [the beneficiary]" and that the beneficiary "has worked for us in the past year with remarkable achievements in developing this portion of our business." The AAO finds these statements questionable based upon the record of proceeding. Upon review of the documentation submitted by the petitioner, the AAO finds that there are deficiencies and inconsistencies in the evidence submitted regarding the nature, scope and size of the petitioner's business operations as well as a failure to establish the actual duties and functions said to comprise the proffered position. 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)). Unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel for the petitioner states that "the facts of the case establish and more than overcome the erroneous decision of the Service in denying [the beneficiary's] application" and that "the great weight of the evidence produces the only outcome that can possible result: that [the beneficiary] qualifies as a person performing services in a specialty occupation and [is] entitled to receive H-1b classification." The AAO notes that petitioner must demonstrate by a preponderance of the evidence that it is eligible for the benefit sought in this matter. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the

context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. As will be discussed, in the instant case, there are significant inconsistencies and deficiencies in the record of proceeding and the evidence submitted and the petitioner has failed to adequately address or explain these incongruities.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. *See* 8 C.F.R. § 103.2(b)(1).

As mentioned above, the AAO notes that there are deficiencies and discrepancies in the record of proceeding regarding the size, scope and nature of its business operations. For example, the director requested the petitioner submit an organizational chart showing the petitioner's hierarchy, staffing levels and all divisions of the company along with the names and job titles of persons whose work will come under the control of the proposed position, as well as the name and job title of the person who will direct the beneficiary. The petitioner failed to submit this information and did not provide a reason for neglecting to provide the requested evidence. Given the size of the company (3 to 5 employees, as discussed below), the director's request for evidence on this issue does not appear to have been overly burdensome.

Additionally, the record is unclear as to the number of people employed by the petitioner. On the Form I-129, the petitioner stated that the business consists of five employees. The Form I-129 was signed by the president of the company and submitted to USCIS on June 25, 2009. In response to the RFE, the petitioner submitted its Quarterly Federal Tax Return for April, May and June 2009, which indicated that for this quarter the petitioner's business only consisted of the beneficiary and two additional employees. Thus, although the petitioner stated on the Form I-129 that its business operations consisted of five employees, the supporting documentation

indicated that the business operations consisted of just three employees. No explanation was provided for the variance.

Further, the petitioner failed to properly comply with the director's RFE by providing full English translations of documents submitted in support of the petition. That is, counsel stated in his cover letter that the RFE response included "documents which constitute the work product for the Music Instructional Coordinator." However, a review of the documents reveals that most of the documentary evidence is in a foreign language and is not accompanied by an English translation. The RFE specifically notified the petitioner that any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

In the appeal, counsel claims that the petitioner has "businesses in graphic design, sales and music development." However, the record of proceeding and the petitioner's website only indicate that it is involved in credit card processing and related services. The petitioner's website states "We provide credit/debit card processing, check guarantee service, giftcard service, wirelss,[sic] and DSL Terminals." The petitioner indicated on its tax return forms that its "business activity" is "credit card services." This is further supported by the petitioner's advertisements, which also indicate that the petitioner provides credit card machines and services. The lease states agreement states that the nature and agreed use of the premises is "general office space." The photographs of the petitioner's business also indicate that the space is used for general office space. The photos depict cubicles with computers, telephones, etc. (In the photos, there are no musical instruments, associated equipment or other evidence that suggests the petitioner provides music instruction.) The business tax registration certificate for the petitioner (dated March 10, 2009) states the petitioner's name, address and the phrase "Business Management Service & Training." Although the petitioner asserts that it expanded its operations a few years ago by forming a "musical instruction department," as will be discussed below, the petitioner did not submit any documentary evidence that establishes that it has been, or currently is involved, in music education.

In response to the RFE, the petitioner provided several documents for the "Music Performance Academy" located on [REDACTED]. However, the record of proceeding does not contain any information to establish the relationship between the

⁴ The AAO notes that the petitioner indicated that the company's address is [REDACTED] on the Form I-129, Labor Condition Application and letter of support. The address on [REDACTED] is also provided on the petitioner's tax returns, business tax registration certificate, utility bills and other invoices, lease agreement, photos of the business premises, etc. A review of the Form I-129, Part 5 reveals that the petitioner indicated that the beneficiary will be employed at this same address. No other work locations were provided for the beneficiary.

petitioner and the "Music Performance Academy." There is no explanation or indication that the petitioner is same entity as "Music Performance Academy." The record is devoid of any information to suggest that there was a change in name/identity or that the entities were involved in a merger, acquisition or division. The petitioner and counsel have failed to establish the relevancy of the "Music Performance Academy" documents to this matter. Moreover, the director addressed this in the denial, stating the following:

The petitioner has submitted several documents from the Music Performance Academy. The submitted documents do not show how the petitioner's credit card services business relates to this music academy. Furthermore, the documents from the Music Performance Academy do not show the beneficiary as a teacher or Instructional Music Coordinator for this business. A search of the Music Performance Academy's website appears to indicate the beneficiary is a member of a local band called [REDACTED] and not a teacher or Instructional Music Coordinator. These discrepancies cast doubt as to the validity of the petitioner's statements and submitted documentation. Based on the evidence of record, the petitioner has not established their Credit Card Services business requires the services of an Instructional Music Coordinator. There is no clear nexus between the nature of the employer's business and the proffered position.

In the appeal, counsel stated that the petitioner is "a multi-faceted company, having businesses in graphic design, sales and music development" and that the petitioner "supplied key financial information, including tax returns, DE-6 payroll records and business licenses to ensure that the company is bona fide and credible." Counsel claims that the "Music Development department completely relies on the services of [the beneficiary]. He has been an integral part of the company since 2008." As previously mentioned, 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. (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The petitioner and counsel did not provide any information or explanation regarding the submission of documents for the Music Performance Academy. Accordingly, without further clarification, the evidence regarding "Music Performance Academy" is extraneous to this proceeding.

Moreover, even if the petitioner had established that its business operations include musical instruction, which it has not, the AAO notes that the substantive requirements of the beneficiary's duties, listed above, are questionable when viewed in terms of the size and scope of the petitioning entity's business operations.⁵ For example, counsel claims that the beneficiary

⁵ It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would

will "lead" the petitioner's musical instruction department. However, the petitioner failed to provide information regarding its staff, including the names and job titles whose work will come under the control of the beneficiary. The petitioner has not established how the beneficiary will be relieved from performing non-qualifying duties. Thus, it can only be assumed, and has not been established otherwise, that the beneficiary will perform all functions for the music instruction department, including those that would be normally associated with subordinate workers. This is supported by the description of the duties of the proffered position provided by the petitioner in response to the RFE. That is, the petitioner claims that the beneficiary will "[w]rite all letters and go to postal office;" "donate fund[s] to friendly organization;" "clean and coordinate the facility and musical material;" "tak[e] students to Jam session and clubs in LA;" serve as "[r]eception[ist] for visitors or telephone" and "[c]onduct lessons for private lessons and group lessons." The petitioner also asserts that the beneficiary will "[s]upport students for their daily life for 24 hours (includes taking them to hospital in emergency, shopping, helping get drivers license test, rental car, rental cell phone, picking-up or dropping-off at airport);" "[o]rganize all weekly lessons schedules (call instructors & students for their availabilities to set up schedule);" and "[b]ring professional musicians through my network of me (sic) as musicians for events." The job duties, as described, mostly involve basic, routine tasks and the AAO observes that the petitioner has failed to demonstrate that the performance of these duties, as described in the record, would require the attainment of a bachelor's or higher degree.

Furthermore, the petitioner describes the proposed duties in terms of generalized and generic functions that do not convey either the substantive nature of the work that the beneficiary would actually perform. As described, the duties fail to communicate either the actual work entailed or an adequate correlation between that work and the petitioner's stated business operations. For instance, the abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrases "[d]evelop and run the instructional program for music, utilizing print and musical software for instructional technology;" "[p]lan and manage curricular and instructional improvements and develop pilots of new and revised musical program;" and "[p]lan and lead meetings of general music resources to develop workshops and in-house training." The petitioner also asserts that the beneficiary will "[i]mplement and evaluate musical programs in presentations;" and "[s]elect the most appropriate techniques in utilizing his background in design to solve problems and create efficiency." These responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which this spectrum of duties would manifest themselves in their day-to-day performance within the petitioner's business operations. As with the other duties described in this record of proceeding, these tasks fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

employ the beneficiary in position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent.

Next, the AAO will highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the Labor Condition Application (LCA) submitted in support of the petition.

More specifically, on the Form I-129 petition, the petitioner identified the proffered position as falling under the occupational code 099, which, the AAO notes, is assigned by the Department of Labor (DOL) to the category "Other Occupations in Education."⁶ The petitioner's president signed the Form I-129 under penalty of perjury that the information supplied to USCIS on the petition and the evidence submitted with it is true and correct.

On the LCA, the petitioner also specified that the occupational code for the proffered position as 099. The petitioner listed the prevailing wage as \$16.31 per hour, which corresponds to the occupational category "Instructional Coordinators" SOC (ONET/OES) Code 25-9031. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

In response to the RFE, counsel asserted that "[a]s evidenced by the Occupational Outlook Handbook issued by the U.S. Department of Labor, a college degree is normally required for a position as a Music Instructional Coordinator, many of which require an English degree. (See Exhibit 13)[.]" At "Exhibit 13," the petitioner submitted an excerpt from the 2008-09 Edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* for the occupational category "Musicians, Singers and Related Workers." The assertion of the petitioner and counsel that the occupational category for the proffered position is "Musicians, Singers and Related Workers" is contradicted by the occupational classification selected by the petitioner for the LCA and the Form I-129 petition.⁷

With respect to the LCA, DOL provides clear guidance for selecting the most relevant *O*NET* occupational code classification.⁸ The "Prevailing Wage Determination Policy Guidance" states the following:

⁶ See U.S. Department of Labor, Employment and Training Administration, *Form ETA 9035CP, Appendix 1*, which provides a list of the "Three-Digit Occupational Groups." The form is accessible on the Internet at http://www.lca.doleta.gov/h1bcl_oc.pdf (visited February 15, 2012).

⁷ The AAO's discussion, at this point in the decision, is based on the petitioner and counsel's assertions that the appropriate occupational classification for the proffered position "Instructional Coordinators" and/or "Musicians, Singers and Related Workers." Later in the decision, the AAO will discuss the proffered position in the context of the various occupational categories depicted in the *Handbook*.

⁸ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The AAO notes that the petitioner stated on the LCA that the wage level for the proffered position is Level 1 (entry). The petitioner stated that the prevailing wage was \$16.31 per hour, which corresponds to the occupation "Instructional Coordinators."

The AAO observes that the prevailing wage for the position "Musicians and Singers" at a Level 1 wage is significantly higher at \$18.28 per hour/\$64,896 per year than the prevailing wage for "Instructional Coordinators." Thus, according to DOL guidance, if the petitioner believed its position was described as a combination of O*NET occupations, it should have chosen the relevant occupational code for the highest paying occupation, in this case "Musicians and Singers." However, the petitioner chose the occupational category "Instructional Coordinators" for the proffered position.

Moreover, based upon a review of the record of proceeding, the AAO finds the wage level for the proffered position questionable. Wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁹

Prevailing wage determinations start with a Level 1 (entry) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹⁰ DOL emphasizes that these guidelines should not be implemented in a

⁹ *Id.*

¹⁰ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more

mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."¹¹ A Level 1 wage rate is describes as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level 1 wage should be considered.

The petitioner and counsel stated that the beneficiary will "lead" and "develop and run the instructional program for music" and that "the hired Music Instructional Coordinator is required to be highly intelligent with updated knowledge in music and instruction." It is also asserted that the position requires the beneficiary "to possess a wide range of knowledge and skills" and that it is a "highly specialized job" and that the duties are "specialized" and "complex." Furthermore, the beneficiary will "hir[e] all personnel," "make contract documents" and "supervise the evaluation and selection of textbooks, instructional materials and equipment." Moreover, the beneficiary will "[p]lan and manage curricular and instructional improvements and develop pilots of new and revised musical program;" and "[p]lan and lead meetings of general music resources to develop workshops and in-house training." The petitioner also asserts that the beneficiary will "[i]mplement and evaluate musical programs in presentations;" and "[s]elect the most appropriate techniques in utilizing his background in design to solve problems and create efficiency."

The AAO notes that these claimed duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that he would be closely supervised, that his work would be closely

than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

¹¹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

monitored and reviewed for accuracy, and that he would receive specific instructions on required tasks and expected results.

While the description of the duties provided by the petitioner includes low-level duties, as previously discussed (i.e., "[w]rite all letters and go to postal office;" "donate fund[s] to friendly organization;" "clean and coordinate the facility and musical material;" "tak[e] students to Jam session and clubs in LA;" etc.), the LCA wage rate is not consistent with these additional duties with regard to the claimed level of complexity, independent judgment and understanding. These "complex" and "specialized" tasks and responsibilities are materially inconsistent with the LCA certification for a Level 1 entry-level position.

Given that the LCA submitted in support of the petition is for a Level 1 wage, it must therefore be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the position and that is certified for the proper wage classification.¹²

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, it appears that

¹² In this regard, the petitioner should note that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

the petitioner has failed to submit a certified LCA that corresponds to the claimed duties of the proffered position

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA's certification for a Level 1 entry-level position. This conflict, along with the discrepancies in the occupational classification and duties, undermines the overall credibility of the petition. It is further noted that the petitioner provided no explanation for the inconsistencies.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties of the proffered position and sufficiency of the petitioner's evidence into each basis discussed below for dismissing the appeal.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 requiring the following:

- (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 the following:

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.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner asserted that the beneficiary would be employed as an instructional music coordinator for music education. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO here incorporates by reference its earlier discussion regarding the abstract, generalized, and generic terms by which the petitioner describes the proposed duties. Moreover, some of the duties appear to involve basic, simple tasks. The petitioner's descriptions of the duties of the proffered position are broad and generic and do not convey either the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. Because of the lack of specificity as to the duties the beneficiary would perform on a day-to-day basis, the particular level of knowledge to be applied in this case is not self-evident.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹³ The petitioner and counsel indicated that the two sections of the *Handbook* most relevant to this proceeding are the chapters "Instructional Coordinators" and "Musicians, Singers and Related Workers."¹⁴ The AAO reviewed both of these occupational categories, as well as other occupational categories depicted

¹³ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

¹⁴ For these chapters, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Instructional Coordinators at <http://www.bls.gov/oco/ocos269.htm> (visited February 15, 2012) and Musicians, Singers and Related Workers, on the Internet at <http://www.bls.gov/oco/ocos095.htm> (also visited February 15, 2012).

in the *Handbook*, in its determination of whether the *Handbook* supports the claim that the proffered position qualifies as a specialty occupation.

The AAO finds that, when compared with the full spectrum of the duties that comprise the instructional coordinator occupation as described in the *Handbook*, the duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute an instructional coordinator position, and not that they would require the range of specialized knowledge that characterizes instructional coordinators.

The petitioner provided a list of over 20 duties, which range from "arranging student housing and English school schedule;" "conduct[ing] lessons for private lessons and group lessons;" "[c]onsult[ing] with assist students with translation needs;" to "[r]eception (sic) for visitors or telephone;" "[m]ak[ing] price estimation to all customers and agencies;" as well as "[a]ccounting and keeping all day-to-day records;" "organiz[ing] all music school programs (includes curriculums, lessons, selection of appropriate instructors, producing music, price charts, all contents on websites or ads, selection of appropriate textbooks, video, CD's and so on);" and "[m]eeting with instructors or staff, students to make the program or curriculum better." As previously discussed, the petitioner has not established which of the duties are essential functions of the proffered position nor has it provided information regarding the regularity with which each of the duties will be performed (e.g., frequently, occasionally or at irregular intervals).

Moreover, although the petitioner asserts that the beneficiary will perform some general duties that are associated with "Instructional Coordinators," the record is devoid of evidence establishing that these duties are major functions of the proffered position. Additionally, there is a lack of documentation demonstrating the actual work required of the beneficiary to perform these duties. For example, other than the petitioner's general assertions, the AAO finds no documentary evidence that the beneficiary's services would include the following responsibilities and duties presented by the *Handbook*: "develop curricula, select textbooks and other materials, train teachers, and assess educational programs for quality and adherence to regulations and standards"; "research teaching methods and techniques"; "meet with members of educational committees and advisory groups to explore how curriculum materials relate to occupations and meet students' needs"; "develop questionnaires and interview school staff about the curriculum"; "supervise workers who catalogue, distribute, and maintain a school's educational materials and equipment." To the extent that they are described in this petition, the petitioner has failed to establish that the proposed duties that the beneficiary would perform are at the capacity and level of functions that the *Handbook* uses to generally characterize the occupational category of an instructional coordinator. Again, 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, (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The petitioner has not provided sufficient documentation to establish the actual duties and responsibilities of the proffered position.

Moreover, "Instructional Coordinators" are normally found in school systems and other formal educational settings. The *Handbook* states that "[a]bout 70 percent [of instructional

coordinators] worked in public or private educational institutions. Other employing industries included State and local government, individual and family services, and child day care services." In the instant case, although the beneficiary has reportedly served in the position instructional music coordinator since 2008, the petitioner failed to establish that its business operations encompass a musical instruction department, nor does the record establish that the petitioner is, or has any formal connection, with any educational institutions, State/local government, individual and family services, or child day care services.

The totality of the evidence in this proceeding, including information and documentation regarding the proposed duties, the petitioner's business operations, and the petitioner's organizational structure, does not establish that the duties of the proposed position are substantially comparable to those of an instructional coordinator as described in the *Handbook*.

The petitioner and counsel also assert that the appropriate classification for the proffered position is "Musicians, Singers and Related Workers." The AAO also reviewed the occupational category "Teachers-Self-Enrichment Education." As will now be discussed, neither occupational category comprises an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The relevant section for this proceeding of the chapter on "Musicians, Singers and Related Workers" is the section dealing with teaching music courses. The *Handbook* states, in pertinent part, the following under the "Training, Other Qualifications, and Advancement" section of this chapter:

A master's or doctoral degree usually is required to teach advanced music courses in colleges and universities; a bachelor's degree may be sufficient to teach basic courses. A degree in music education qualifies graduates for a State certificate to teach music in public elementary or secondary schools. (Information related to teachers—postsecondary and teachers—kindergarten, elementary, middle, and secondary can be found elsewhere in the *Handbook*.) Musicians who do not meet public school music education requirements may teach in private schools and recreation associations or instruct individual students in private sessions.

As evident in the excerpt above, the *Handbook* does not support the view that the occupational category qualifies as a specialty occupation. The *Handbook* does not indicate that a minimum of a bachelor's degree or the equivalent in a specific specialty is a requirement for positions teaching music except in public school and in college.

The occupational category of "Teachers-Self-Enrichment Education" also is not a specialty occupation according to the information provided in the *Handbook*. The AAO observes that the *Handbook* states the following about this occupation:

Self-enrichment teachers provide instruction on a wide variety of subjects that students take for fun or self-improvement. Some teach classes that provide students with useful life skills, such as cooking, personal finance, and time

management. Others provide group instruction intended solely for recreation, such as photography, pottery, and painting. Many others provide one-on-one instruction in a variety of subjects, including singing, or playing a musical instrument. Some teachers conduct courses on academic subjects, such as literature, foreign languages, and history, in a nonacademic setting. The classes taught by self-enrichment teachers seldom lead to a degree and attendance is voluntary. At the same time, these courses can provide students with useful skills, such as knowledge of computers or foreign languages, which make them more attractive to employers.

Among self-enrichment teachers, their styles and methods of instruction can differ greatly. Most self-enrichment classes are relatively informal. Some classes, such as pottery or sewing, may be largely hands-on, with the instructor demonstrating methods or techniques for the class, observing students as they attempt to do it themselves, and pointing out mistakes to students and offering suggestions for improving their techniques. Other classes, such as those involving financial planning or religion and spirituality, might center on lectures or rely more heavily on group discussions. Self-enrichment teachers may also teach classes offered through religious institutions, such as marriage preparation or classes in religion for children.

Many of the classes that self-enrichment educators teach are shorter in duration than classes taken for academic credit; some finish in 1 or 2 days or several weeks. These brief classes tend to be introductory in nature and generally focus on only one topic—for example, a cooking class that teaches students how to make bread. Some self-enrichment classes introduce children and youth to activities such as piano or drama, and they may be designed to last from 1 week to several months.

Many self-enrichment teachers provide one-on-one lessons to students. The instructor might only work with the student for 1 or 2 hours per week and then provide the student with instructions on what to practice in the interim until the next lesson. Many instructors work with the same students on a weekly basis for years and derive satisfaction from observing them mature and gain expertise.

All self-enrichment teachers must prepare lessons beforehand and stay current in their fields. The amount of time required for preparation can vary greatly, depending on the subject being taught and the length of the course. Many self-enrichment teachers are self employed and provide instruction as part of a personal business. As such, they must collect any fees or tuition and keep records of their students' accounts. Although not a requirement for most self-enrichment classes, teachers often use computers and other modern technologies in their instruction or to maintain their business records.

The "Training, Other Qualifications, and Advancement" section of this chapter in the *Handbook* states the following:

The main qualification for self-enrichment teachers is expertise in their subject area, but requirements vary greatly with the type of class taught and the place of employment.

Education and training. In general, there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught. To demonstrate expertise, however, self enrichment teachers may be required to have formal training in disciplines such as art or music, where specific teacher training programs are available. Prospective dance teachers, for example, may complete programs that prepare them to teach many types of dance—from ballroom to ballet. Other employers may require a portfolio of a teacher's work. For example, to secure a job teaching a photography course, an applicant often needs to show examples of previous work. Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time. In many self-enrichment fields, however, instructors are simply experienced in the field, and want to share that experience with others.

The *Handbook* does not report that "Teachers-Self-Enrichment Education," as an occupational group, require at least a bachelor's degree in a specific specialty. According to the *Handbook*, the main qualification for self-enrichment teachers is expertise in the subject area. The *Handbook* indicates there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught, which may come from formal training. The *Handbook* does not report that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the occupational classification in the United States.

The AAO finds that the duties of the proffered position do not fall directly within any one occupation within the *Handbook*. There are some aspects of the duties of the proffered position that relate to the occupations cited above; however, none of the occupations encompass all of the claimed duties of the proffered position. The AAO has compared with the responsibilities that comprise the occupational categories as described in the *Handbook* to the duties of the proffered position, to the extent that they are depicted in the record of proceeding. While the beneficiary may perform some tasks in common with these occupations, the beneficiary's duties would not be fully encompassed by any one of these positions.

In the appeal, counsel states that "the Occupational Information Network (O-NET) states that a bachelor's degree is the minimum formal education for occupations such as Instructional Music Coordinators." The petitioner and counsel did not submit a copy of the *O*NET OnLine* Summary Report printout for the referenced occupation from the Foreign Labor Certification (FLC) Data Online Wage Library.¹⁵ The AAO notes that *O*NET OnLine* does not contain an

¹⁵ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report

occupational category entitled "Instructional Music Coordinators" and counsel provided no further information. Without additional information, the AAO is unable to address counsel's specific assertion.¹⁶ However, the AAO finds that generally *O*NET OnLine* Summary Reports are insufficient to establish that a position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. The *O*NET* Summary Reports do not state specific educational requirements for occupations. Rather, occupations are classified according to a five-level "Job Zone" rating system. The Job Zone classification provides users with a guide to the vocational preparation levels of occupations, based on data from job incumbents and occupational experts regarding the levels of education, experience, and training needed for work in the occupations.¹⁷ It must be noted that *O*NET OnLine* Job Zones do not state that a degree for any occupation must be in a *specific specialty* closely related to the requirements of that occupation. Therefore, the *O*NET OnLine* Summary Reports are not probative of a position being a specialty occupation.

Upon complete review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

for the occupational classification "Training and Development Specialists" is accessible on the Internet at <http://www.onetonline.org/link/summary/13-1151.00> (visited on January 22, 2012). The wage results for the occupation "Training and Development Specialists" on the Internet at the Foreign Labor Certification Data Online Wage Library is available at <http://www.flcdatacenter.com/OesQuickResults.aspx?area=35644&code=13-1073&year=9&source=1> (also visited on February 15, 2012).

¹⁶ The AAO reviewed the *O*NET OnLine* Summary Reports for "Instructional Coordinators" and "Musicians, Singers and Related Workers" – the two occupational categories that the petitioner and counsel previously referenced. However, the summary reports for these occupations do not state, as counsel asserts, that "a bachelor's degree is the minimum formal education for occupations such as Instructional Music Coordinators."

¹⁷ DOL's report "Procedures for *O*NET* Job Zone Assignments" describes the procedure within the *O*NET* Data Collection Program for assigning Job Zone information to occupations. See http://www.onetcenter.org/dl_files/JobZoneProcedure.pdf (visited on February 15, 2012). Additional information is available at the *O*NET OnLine* Internet site at <http://www.onetonline.org/help/online/zones> (also visited on February 15, 2012).

As previously mentioned, the petitioner stated on the Form I-129 petition and initial supporting documents that its type of business is "consumer services" and that it has five employees and a gross annual income of approximately \$550,000 and a net annual income of \$50,000.

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. at 1102).

In the appeal, the petitioner and counsel do not assert that a degree requirement is common to the industry in parallel positions among similar organizations and did not provide any evidence in support of this prong of the regulations. 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 or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. The petitioner did not submit any letters or affidavits from firms or individuals in the industry to meet this criterion of the regulations.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. 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 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 shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

A review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment. The beneficiary's work will be closely supervised and monitored and he will receive specific instructions on required tasks and expected results. His work will be reviewed for accuracy. The petitioner failed to establish how

the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that 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 in a specific specialty.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the instructional music coordinator for music education duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge and skills for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial in performing certain duties of an instructional music coordinator for music education position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Furthermore, as previously discussed many of the duties, as described, involve low-level, routine tasks, i.e., "[w]rite all letters and go to postal office;" "donate fund[s] to friendly organization;" "clean and coordinate the facility and musical material;" "tak[e] students to Jam session and clubs in LA;" and serve as "[r]eception[ist] for visitors or telephone;" etc. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of instructional music coordinator for music education is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.¹⁸

In the instant matter, it appears that the proffered position of instructional music coordinator for music education is a new position. The petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. Furthermore, no evidence regarding any current or past recruitment efforts for this position was submitted (for example, evidence that recruitment steps were taken but were unsuccessful/canceled or in which the petitioner's plans may have changed). Thus, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed by a degreed individual. 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 384. 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

¹⁸ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices. The record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

The AAO incorporates by reference and reiterates its earlier discussion that the petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

Furthermore, in the appeal, the petitioner and counsel do not claim that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. And they did not provide any documentation in support of this criterion.

Upon review of the record, the petitioner has not met its burden of proof to establish that the duties of the position 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. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the proffered 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, except to note that the petitioner did not submit an evaluation of the beneficiary's foreign degree or sufficient evidence to establish that the beneficiary's Bachelor of Arts in English Language (along with any relevant education, training and/or experience) is the equivalent of a U.S. bachelor's degree in a specific specialty. The AAO acknowledges that the petitioner submitted a letter from Seattle Pacific University stating that the university "faculty have the authority to grant college level

credit." However, there is no evidence in the record that the beneficiary's credentials were actually evaluated. Since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal will be dismissed. The petition will be denied.