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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 1 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

M Bailey
for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on September 8, 2010. In the Form I-129 visa petition, the petitioner describes itself as a school/daycare established in 2008. In order to employ the beneficiary in what it designates as a pre-school educator position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 20, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Subsequently, the petitioner filed a motion to reopen, which met the requirements of a motion under 8 C.F.R. 103.5. However, the director found that the grounds for denial had not been overcome and reaffirmed the denial of the petition. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

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 for the Form I-129; (5) the Form I-290B (Motion) and supporting documentation; (6) the director's denial for the Form I-290B (Motion); (7) the Form I-290B (Appeal) and supporting documentation; (8) the AAO's RFE; and (9) the response to the AAO's RFE. 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 that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

As will be discussed in more detail below, even if the petitioner were to overcome the ground for the director's denial of the petition, it could not be found eligible for the benefit sought because of several additional, independent grounds not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to submit evidence that the petitioner was a corporation in good standing at the time of filing the visa petition; (2) failed to establish that it was authorized to conduct business in the location where the beneficiary would be employed; (3) failed to establish that a credible offer of employment existed between the petitioner and the beneficiary; and (4) failed to provide a Labor Condition Application (LCA) that corresponds to the petition. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.[1]

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

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a pre-school educator to work on a full-time basis at an annual salary of $21,320 per year. With the Form I-129 petition, the petitioner provided a letter of support dated August 23, 2010, which included the following description of the proffered position:

> As a pre-school educator, the beneficiary will teach kinder pupils academic, social and motor skills; prepare course objectives and outline for course of study following curriculum guidelines or requirements of state and school; lecture, demonstrate, and use audio-visual teaching aids to present subject matter to class; prepare, administer, and correct tests, and record results; assign lessons, correct papers, and hear oral presentations; teach rules of conduct; maintain order in classroom and on playground; counsel pupils when adjustment and academic problems arise; discuss pupils' academic and behavioral attitudes and achievements with parents; keep attendance and grade records as required by school; and may coordinate class field trips.

The petitioner further stated that the "minimum requirements for this position include a Bachelor of Science degree in Education or a related field." The petitioner continued by stating that "a couple of years of teaching experience is preferable." The petitioner submitted copies of the beneficiary's foreign credentials and an educational evaluation form International Education Consultants. The evaluation states that the beneficiary "has the equivalent of the U.S. Degrees of Bachelor of Science in Teaching History and Master of Arts in Educational Administration earned at a regionally accredited institution of higher education in the United States."

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Preschool Teachers, Except Special Education" – SOC (ONET/OES Code) 25-2011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 25, 2011. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation.

The petitioner and counsel responded to the RFE by submitting a brief and additional evidence. In response, the petitioner claimed that it had "not hired teachers in [sic] pre-kindergarten level who have not earned of [sic] at least a bachelor's degree in education or a related field." The petitioner stated that "all teachers in Pre-Kindergarten class must have a bachelor's degree in education as that is how we promote [the] school." The petitioner claimed that "[it has] made that a specific requirement on [its] website advertisement."

In support of this assertion, the petitioner submitted copies of diplomas for two employees and a transcript for one of the two employees, along with a printout from its website. Further, counsel stated that the petitioner "is in the process of seeking its curriculum to be accredited by the

Education Department" and "it is requirement in order to be certified, that all the teachers are holders of a bachelor's degree in at least a related field."

Although the petitioner claimed that the beneficiary would 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 May 20, 2011. Counsel for the petitioner submitted a motion to reopen the denial of the H-1B petition. The director reviewed the submission and found that the grounds for denial of the petition had not been overcome. The director affirmed the denial of the petition.

Thereafter, counsel for the petitioner submitted an appeal of the decision. The AAO received the submission and, notably, after a preliminary review of the record of proceeding, the AAO found that the Texas Comptroller of Public Accounts for the State of Texas indicated that the petitioner's corporate status was "Not in Good Standing." The AAO issued an RFE on January 25, 2013. The petitioner was notified that information regarding its corporate status was material to the petitioner's eligibility for the requested benefit. Specifically, the petitioner's "Not in Good Standing" status raises serious questions about whether it exists as an importing employer, whether the petitioner qualifies as a United States employer, and whether it is authorized to conduct business. *See* section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1); *see also* 8 C.F.R. §§ 214.2(h)(2)(i)(A), (4)(ii), (11)(ii).

Furthermore, the AAO reminded the petitioner that the regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be doing and continue to do business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the absurd result of the approved petition immediately and automatically being revoked the instant it was approved. *See* 8 C.F.R. § 214.2(h)(11)(ii).

The petitioner responded to the RFE on February 15, 2013. The petitioner claimed that "[t]here was a time when [the petitioner] was not able to maintain its 'good standing'" and that the "issue was purely in regard to the payment of the franchise tax for 2012." The petitioner further noted that the "said tax has been duly paid, and the appropriate change in status has been duly made by the Comptroller's Office." The petitioner submitted a Certificate of Account Status dated February 6, 2013, which states that the petitioner is in good standing. In addition, the petitioner submitted the following documents:

- Letter from the new owner, stating that she "assume(s) full responsibility over the employment of [the beneficiary]";
- Sale and Purchase Agreement dated October 19, 2011 showing that purchased the petitioning business;

- Certificate of Filing of the new business dated February 3, 2012 with the petitioner's assumed name;

- Employment Identification Number for the new business dated December 9, 2011;

- Bank statements from Bank for the new business dated December 2012; and

- Information regarding the petitioner's business operations including a description of staff (including beneficiary), Pre-K curriculum, policies Handbook, newsletter, and brochures.

The AAO notes that in its RFE dated January 25, 2013, it specifically requested to submit evidence that the petitioner was a corporation in good standing when the petition was filed as well as evidence that it has remained in good standing in the interim and is also now a corporation in good standing. While the petitioner submitted evidence that the petitioner is in good standing as of February 6, 2013, the record does not contain evidence that the petitioner was active and in good standing at the time of filing the petition on September 8, 2010 (and thereafter). The State of Texas has an application process for registering as a corporation and obtaining authorization to conduct business within the state. There are exceptions under which a corporation may conduct business in Texas without authorization from the State of Texas. However, the petitioner does not claim, nor did it provide any probative evidence to establish, that it was registered to do business in Texas and in good standing (or that it fell under an exception) when the petition was submitted on September 8, 2010 – up until February 6, 2013 (the date of the Certificate of Account Status showing the petitioner is in good standing).

Upon review of the record of proceeding, the AAO finds that the petitioner failed to establish that when the H-1B petition was submitted (1) the petitioner was "in business"; and (2) it was permitted to conduct business in Texas. Accordingly, the record contains insufficient evidence to establish that a credible offer of employment existed between the petitioner and the beneficiary. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved 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). A petitioner may of course change a material term and condition of employment. However, such a change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition, with the appropriate fee(s), for USCIS to consider. *See* 8 C.F.R. § 214.2(h)(2)(i)(E). As the petitioner failed to establish eligibility for the benefit sought, the AAO finds that the petitioner cannot be approved and the appeal must be dismissed.

Accordingly, the AAO need not address any additional grounds for denial of the petition as the issues are moot. Nevertheless, in any event, it reviewed the record of proceeding and observes that there are inconsistencies in the petition and supporting documents, which undermines the petitioner's

credibility with regard to the services the beneficiary will perform and the wages to be paid, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

When determining whether a 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. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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 attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

While the petitioner has identified its position as that of a pre-school educator, the descriptions of the beneficiary's duties in the record of proceeding lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. The job descriptions fail to communicate (1) the complexity, uniqueness and/or specialization of the tasks; and/or (2) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. In the instant case, the petitioner 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. Thus, the petitioner failed to specify which tasks were major functions of the proffered position. It did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, the petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence. The job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of actual work that the beneficiary would perform. Rather, the job description conveys only generalized functions of the occupational category at a generic level. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. That is, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a

beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Furthermore, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Preschool Teacher, Except Special Education" at a Level I (entry level) wage.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) 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.[2] It is important to note that prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (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.[3] The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

> **Level I** (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

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[2] For additional information on wage levels, *see* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

[3] 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 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.

> 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 I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://ww[illegible]nlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

[illegible] uties of the pr[illegible]d position are complex, unique [illegible] ergarten students require a [illegible] tea er bec[illegible]se [illegible] ities of a Pre-Kindergarten teac[illegible] Counsel further lai[illegible] u[illegible] sition of Pre-kindergarten teacher is a highly complex position." In addition, the petitioner submitted a letter from Professor [redacted] at the University of Albany, referencing the petitioner's "unique appr[illegible] hands-on learning activities" [illegible] the petitioner "requir[illegible] of a Pr[illegible] or for its day care center to [illegible] he position is a "professional position [illegible] ecific knowl[illegible] he complex responsibilities of this position." [redacted] describing the "cha[illegible]ng tasks of the position" and asserts that the nature of [illegible] sponsibilities and knowledge is specialized and complex. According to Ms. [illegible] e specialized" and require "highly specialized knowledge." She states that the petitioner [illegible] endent upon the ability and expertise of its Pre-School Educators . . . as the specialized duties of these individuals directly and indirectly affect the organizations' operational stand[illegible]ls, enrollment and performance statistics, and ultimately the overall success of the insti[illegible]

The AA [illegible] nes[illegible] the level of complexity, independent judgment and understanding required for the p[illegible]ion as the LCA is certified for a Level I entry-level position. The characteriz[illegible] osition and the claimed duties and responsibilities as described conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. 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. 591-92.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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 (emphasis added):

> 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.

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, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the director's basis for denial, the petition could still not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position 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 applicable statutory and regulatory requirements.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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 normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a pre-school educator position. 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 recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[4] The petitioner asserts in the LCA that the proffered position falls under the occupational category "Preschool Teachers, Except Special Education."

The AAO reviewed the chapter of the *Handbook* entitled "Preschool Teachers," including the sections regarding the typical duties and requirements for this occupational category.[5] However, the *Handbook* does not indicate that "Preschool Teachers" comprise an occupational group that for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Preschool Teacher" states the following about this occupational category:

> 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 a 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

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[4] All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

[5] U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Preschool Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4 (last visited March 13, 2013).

programs teach students about children's development, strategies to teach young children, and how to observe and document children's progress.

Certification
Some states and employers require preschool teachers to have a nationally recognized certification such as the Child Development Associate (CDA) offered by the Council for Professional Recognition. Requirements to earn the CDA include a high school diploma, experience in the field, and coursework.

Some states recognize the Child Care Professional (CCP) designation offered by the National Early Childhood Program Accreditation. Requirements to earn the CCP include a high school diploma, experience in the field, and continuing education courses.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Preschool Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4 (last visited March 13, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that although there is a range of acceptable credentials, most preschool teachers are required to have a high school diploma. The *Handbook* further indicates that some employers *prefer* to hire workers with some postsecondary education in early childhood education. Obviously, a *preference* for a particular level of education does not indicate a requirement. Moreover, the phrase "some postsecondary education" clearly does not indicate that such education must be a baccalaureate or higher degree.

The *Handbook* discusses the requirements for preschool teachers in Head Start programs and in public schools. The petitioner does not claim, and has not provided any documentation to support a finding, that it has a Head Start program or is a public school. Thus, these paragraphs of the *Handbook* are not relevant to the instant matter.

In response to the RFE, counsel claims that requiring a bachelor's degree for preschool teachers is "really nothing new, especially in Texas where [the] petitioner['s] school is located." Counsel submitted an article from DOL's CareerOneStop entitled "Preschool Teachers, Except Special Education: Texas," which states that 31.8% of all preschool teachers hold a bachelor's degree, 11.9% have a master's degree, and 0.8% have a doctoral or professional degree. However, contrary to the purpose for which it was submitted, the indication that 44.5% of respondents (less than half) possess an advanced degree does not establish that a bachelor's degree is normally the minimum

requirement for entry as a preschool educator.[6] Further, it does not state that a degree in a specific specialty is required. Moreover, under the subsection "Education and Training," the article states that the most common educational/training level is "postsecondary vocational award." In addition, the article does not indicate when the data was collected. Counsel's reliance on the document is misplaced, as it does not establish that the proffered position qualifies as specialty occupation.

Moreover, the AAO notes that the petitioner submitted several articles regarding the importance of pre-kindergarten programs for children. The AAO does not disagree that such programs may be beneficial for children. However, the issue here is not the value of such programs, but rather whether the petitioner has established eligibility for the benefit sought in accordance with the applicable statutory and regulatory provisions.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 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 requirement of a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. *2d 1151, 1165 (D. Minn. 1999)* (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

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[6] Furthermore, the AAO again observes that the petitioner designated the proffered position as a Level I position, which is designated for low, entry level positions within the occupation.

In response to the RFE, counsel emphasizes that the beneficiary is "already a pre-kindergarten teacher" for another employer, who is "doing similar business as that of [the petitioner]."[7] On appeal, counsel states that "USCIS previously approved a Form I-129 petition filed on behalf of the same beneficiary (different petitioner) for the same position" and that "a previous decision concerning the same beneficiary and the same position deserves great weight."

The AAO notes that the petition referred to by counsel was revoked prior to the submission of the instant H-1B petition. Furthermore, the director's decision does not indicate whether the prior approval of the other nonimmigrant petition was reviewed. However, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Notably, a copy of the prior petition and the supporting documents was not included in the record and, therefore, counsel's claim is without merit. If a petitioner wishes to have a prior decision considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit a copy of such evidence that it either obtained itself and/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).

As previously mentioned, 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. 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.[8]

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[7] Notably, on the instant Form I-129 petition (Part 4, Question 8) page 3, the petitioner indicated that the beneficiary had never been given H-1B classification. No explanation was provided. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

[8] USCIS is not required to engage in the practice of reviewing previous nonimmigrant petitions when adjudicating petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and

Accordingly, the director was not required to request and obtain a copy of the prior H-1B petition (which notably was filed by a different employer).

Again, the petitioner in this case failed to submit a copy of the prior H-1B petition and its respective supporting documents. As the record of proceeding does not contain sufficient evidence of the allegedly approved petition, there were no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petition was not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a letter from Professor (hereinafter "the writer") of the University of Albany. The letter is dated November 21, 2011. The AAO reviewed the opinion letter and the writer's curriculum vitae. However, the AAO observes that the petitioner's reliance on the opinion letter is misplaced.

More specifically, upon review of the opinion letter, there is no indication that the writer possesses any particular knowledge of the petitioner's proffered position and its business operations, beyond the job title and a brief description of the job duties. The writer does not demonstrate or assert in-depth knowledge of the petitioner's specific academy/day care or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. There is no evidence that the writer has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

Also, while the writer claims that the duties of the proffered position are complex, unique and/or specialized, it must be noted that there is no indication that the petitioner advised the writer that the petitioner characterized the proffered position as a low, entry-level position, for a beginning level employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. It appears that the writer would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that the writer possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar or parallel positions based upon the job duties and responsibilities.

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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.

Moreover, the writer does not provide a substantive explanation of the specific analytic process by which her conclusions were reached. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by the writer in the specific area upon which she is opining. The writer provides no documentary support for her ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies). She asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, she does not provide a substantive, analytical basis for her opinion and ultimate conclusion. The writer's opinion is not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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 its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and counsel claim that the proffered position involves complex and/or unique duties. In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted a printout from its website; corporate documents; brochures regarding its programs; the petitioner's policy handbook; information regarding its curriculum; and various articles and related materials.[9] The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty or its equivalent. The petitioner has failed to credibly demonstrate the duties the beneficiary will be

[9] In addition, the AAO acknowledges that the petitioner submitted an opinion letter from Professor of the University of Albany. The AAO hereby incorporates by reference the above discussion and analysis regarding the opinion letter into its analyses of this criterion of the regulations.

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 in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The petitioner reported the offered wage for the proffered position as $21,320 per year. Notably, the prevailing wage for "Preschool Teacher, Except Special Education" for a Level IV position is designated as $29,286.[10]

Counsel claims that the proffered position is so complex that the duties can be performed only by an individual with at least a baccalaureate degree. However, the petitioner and counsel failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of preschool educator. More specifically, the petitioner failed to demonstrate how the duties of the preschool educator as described in the record 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. For instance, 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 that counsel claims are so complex or unique. While related courses may be beneficiary, or even required, in performing certain duties of the proffered 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 particular position here. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

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[10] For more information about prevailing wage for Preschool Teachers in , Texas, *see* the All Industries Database for 7/2010 - 6/2011 for Preschool Teachers, Except Special Education at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-2011&area=26420&year=11&source=1 (last visited March 13, 2013).

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. Thus, the record lacks sufficient probative evidence 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.

Further, counsel and the petitioner claim that the petitioner is "in the process of preparing [the petitioner's] curriculum to become an accredited school." The petitioner asserts that "to develop a curriculum requires an individual to possess the scholarly acumen that is obtained with a degree in higher education, such as a bachelor's degree in the related field" and "field experience." The petitioner states that the beneficiary "is a unique individual who possesses both traits and is an integral part of the development of [the petitioner's] curriculum and classroom policy." However, the record of proceeding does not contain any information to establish that the petitioner is in the process to become an accredited school and the criteria for such designation. 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)).

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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 in a specific specialty, or its equivalent, 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 satisfy this criterion, 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. In the instant case, 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 in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

In response to the RFE, counsel claimed that the petitioner employs three pre-kindergarten teachers who have bachelor's degrees and asserted that "a bachelor's degree has always been a minimum STANDARD MINIMUM REQUIREMENT of petitioner." However, the petitioner only submitted the academic credentials for two individuals. No explanation was provided for failing to submit the third teacher's academic credentials.

In support of the above statement, the petitioner submitted a copy of the foreign diploma and an academic evaluation for The documentation states that she has a U.S. equivalent of a Bachelor of Science in Physical Education, Music and Health Education at the Secondary Level. The petitioner also submitted a copy of a foreign diploma for but did not submit an academic evaluation to establish that she has the equivalent to U.S. bachelor's degree. No documentation was submitted to substantiate that the individuals are employed by the petitioner.

On motion, the petitioner submitted the following documents regarding Ms. a foreign diploma, transcript and academic evaluation; a pay statement issued in 2011; and a Form W-2 issued in 2009. The petitioner also submitted a copy of a foreign diploma issued to In addition, the petitioner provided a pay statement issued in 2011 and a Form W-2 issued in 2010 for Counsel claimed that such records were previously not available because the employees refused to provide them.[11] The AAO did not submit any evidence to establish that and are the same person. Moreover, the petitioner failed to submit an evaluation to establish that Ms. possesses a degree equivalent to a U.S. bachelor's degree in a specific specialty.

The AAO reviewed the documents and observes that the hourly rate for Ms. is $10 and the hourly rate for Ms. is significantly higher at $14. Notably, the petitioner claims that the beneficiary will be paid $10.25 per hour. No explanation for the variance was provided. The

[11] On appeal, the petitioner submitted an academic transcript (dated December 18, 2010) for along with a pay statement issued to her in November 2011. The information does not pre-date the filing of the instant petition. The AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The petitioner did not state when it hired Ms. However, evidence that the petitioner may have hired an employee with certain credentials after the submission of the instant petition is not considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of filing.

petitioner did not state whether Ms. serves in a more senior position than the proffered position. The petitioner failed to provide the job duties and day-to-day responsibilities for the positions held by Ms. and Ms. that it claims are the same as the proffered position. The petitioner did not indicate the knowledge and skills required for the positions, or provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. As a result, the petitioner has not established that Ms. or Ms. serve in positions that are the same or related to the proffered position.

The petitioner stated that "all teachers in Pre-Kindergarten class must have a **bachelor's degree in education** as that is how [the petitioner] promote[s] [the] school (emphasis added)." The petitioner claimed that "[it has] made that a specific requirement on [its] website advertisement." In support of the assertion, the petitioner submitted a printout (dated February 28, 2011) from its website.[12] However, the AAO notes that the printout states a general-degree requirement for a bachelor's degree but does not indicate that an individual must possess a degree *in education*, as claimed by the petitioner. Likewise, the new owner states in her letter dated February 12, 2013 that she "support[s] and will continue the existing policy of the school to hire only those with bachelor's degree to be assigned teaching position" and that "the job requires at least a bachelor's degree." She states a general-degree requirement but does not state that the petitioner requires a degree *in education*.

The AAO hereby references and reiterates its earlier discussion that for a position to be a specialty occupation, there must be a close correlation between the required specialized studies and the position, thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). A claim by the petitioner that the duties of the position can be performed by an individual with only a general-purpose bachelor's degree (in any discipline or in no specific specialty) is tantamount to an admission that the proffered position is not in fact a specialty occupation. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.[13] Thus, such

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[12] The printout from the petitioner's website does not predate the filing of the Form I-129 petition.

[13] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

statements do not establish that the petitioner normally requires a baccalaureate or higher degree *in a specific specialty*, or its equivalent.

The petitioner stated in the Form I-129 petition that it has 20 employees and that it was established in 2008. However, the petitioner submitted incomplete records for the individuals it claims serve in pre-school educator positions, and it failed to sufficiently substantiate its assertion. Without further evidence, the submission of the academic diplomas of these two individuals is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

Upon review of the record of proceeding, the petitioner has not provided sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, 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 in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner may believe 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 in a specific specialty, or its equivalent. In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations such as printout from its website; corporate documents; brochures regarding its programs; the petitioner's policy handbook; information regarding its curriculum; and various articles and related materials.[14] The AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

The AAO here reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels) as a low, entry-level position relative to others within the occupational category of "Preschool Teacher, Except Special Education." The petitioner designated the position as a Level I position, which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." As previously discussed, without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex

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Id.

[14] Moreover, the AAO acknowledges that the petitioner submitted an opinion letter from Professor of the University of Albany. The AAO incorporates by reference the previous discussion on the matter.

duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 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).

In the instant case, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established 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 in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner 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 it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

As previously mentioned, 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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

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

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