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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
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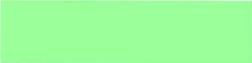


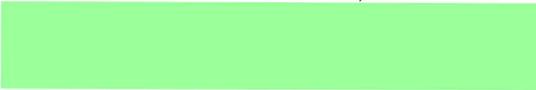
U.S. Citizenship
and Immigration
Services



Date: APR 22 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 (AAO) 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the instant nonimmigrant visa petition. The director granted a subsequently filed motion to reopen and reconsider. In the reopened/reconsidered proceeding, the director affirmed his initial decision denying 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 is a non-denominational Christian organization that seeks to employ the beneficiary in a position it designates as its Director of Education. Accordingly, the petitioner filed this H-1B petition to employ the beneficiary as a temporary 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 initially denied the petition and later affirmed his decision on a single basis, namely, his determinations that the petitioner failed to establish that the proffered position qualifies as a specialty occupation.

As will be discussed below, the AAO finds that the director's decisions to deny the petition and to affirm that denial were correct, in that they were based upon a proper application of the statutory and regulatory requirements for a specialty occupation position to the evidence in this record of proceeding as currently constituted. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. PROCEDURAL HISTORY

The petitioner filed the Form I-129 on December 14, 2010. Finding insufficient evidence of eligibility for the benefit sought, the service center issued a request for additional evidence (RFE) on December 20, 2010. On December 30, 2010, the petitioner submitted a timely response to the RFE issued by the service center. On January 12, 2011, the director denied the petition, concluding that the petitioner failed to establish that this petition was filed for a specialty occupation position.

On January 23, 2011, the petitioner claims to have filed a complaint in the Federal District Court for the Southern District of Texas, which, among other prayers for relief, requests, *inter alia*, that the court order the defendant U.S. Citizenship and Immigration Services (USCIS) to approve the H-1B petition that is the subject of this appeal.¹

On January 24, 2011, the petitioner timely filed a combined motion to reopen and motion to reconsider. By letter to the petitioner dated March 3, 2011, the director granted the motion. Noting that the petitioner's submission to date had not overcome the basis for denial cited in the decision to deny the petition, the director combined an RFE with the notice, affording the petitioner an additional 45 days in which to submit additional evidence to establish the proffered

¹ The procedural history of counsel's brief on appeal states that, "[a]fter negotiations, both parties agreed to set aside one H-1B visa to stay the lawsuit until adjudication of the Plaintiff's Motion to Reopen/Reconsider."

position as a specialty occupation. This letter also expressed why the director continued to find the evidence of record insufficient for the petitioner to prevail on the specialty occupation issue.

On April 15, 2011, the petitioner filed a response to the director's 45-day notice of March 3, 2011. The response is a set of submissions from the petitioner's counsel, which he identifies collectively as "Response to the Request for Evidence." Introduced by a cover letter dated April 14, 2011, this response consists of (1) a two-page brief, with the heading "Response to RFE issued on March 3, 2011"; (2) a copy of the brief submitted on motion; (3) a copy of a 13-page resume of an [REDACTED] Department of Educational Leadership and Cultural Studies, [REDACTED] Texas; and (4) the original of an April 1, 2011 memorandum from [REDACTED] to the petitioner's counsel, subject: Teachers as Directors.

On May 27, 2011, the director issued his decision affirming his previous decision and denying the petition. The petitioner timely filed the instant appeal on June 27, 2011.

The record of proceeding before the AAO contains: (1) the Form I-129 (Petition for a Nonimmigrant Worker) and supporting documentation; (2) the director's RFE and the petitioner's response to the RFE; (3) the director's denial letter; (4) the petitioner's combined motion to reopen and motion to reconsider, consisting of the Form I-290B electing that option and the accompanying brief and supporting documents; (5) the director's letter granting the petitioner's motion, informing the petitioner that the motion as submitted did not overcome the basis of denial, and affording the petitioner 45 days to submit additional evidence; (6) the petitioner's submissions in response to the director's letter regarding the motion; (7) the director's decision on the motion, affirming his previous decision to deny the petition; and (8) the Form I-290B, brief, and supporting documents submitted on appeal. The AAO reviewed the record in its entirety before reaching its decision.

II. STATUTORY AND REGULATORY FRAMEWORK

To meet its burden of proof with regard to the specialty occupation issue, 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 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

III. FACTUAL BACKGROUND AND ANALYSIS

A. The Petitioner

At Part 5, item 11, of the Form I-129, the petitioner identified its type of business as "Christian Religious Ministry."

In its December 10, 2010 letter of support filed with the Form I-129 (hereinafter referred to as the letter of support), the petitioner describes itself as "a non-denominational Christian organization" that provides:

- a Sunday morning church service;
- a Sunday school for children, youth, and adults; and
- a Bible Study program on Monday evenings from 7 to 9:30 p.m.

The letter of support also asserts that the petitioner has "begun to provide after[-]school programs in Math, Science, Reading and English for our youth." The letter further asserts that the petitioner "[has] decided to acquire a day care center to provide assistance to our working families in our area."

The documents initially filed with the Form I-129 in December 2010 also include a copy of an eight-page printout of the petitioner's Internet site as it appeared on December 13, 2010, the day before the petition's filing. The AAO notes that this document contains no evidence of plans to acquire a day care center or to provide the academic classes to which the letter of support refers.

As will now be explained, the AAO accords no evidentiary weight to either the petitioner's assertions that it "has begun to provide" after-school programs in Math, Science, Reading and English for our youth," or to the petitioner's statement that it "has decided" to acquire a daycare center. Likewise, the AAO finds no factual basis in the record of proceeding for counsel's statement that the position for which the petition filed this petition is "Director of its elementary school."²

² Page two of counsel's brief on appeal opens its Procedural History section with the statement that the

The record of proceeding contains no documentary evidence of the extent to which the cited "beginning to provide" academic after-school classes had progressed, if at all. Likewise, the record of proceeding contains no evidence that, at the time of the petition's filing, the decision to acquire a daycare center had translated into any non-speculative work for the beneficiary during the period of employment specified in this petition. Further, the AAO observes that the only documentary evidence of specific classes for children appears in the Children's Ministry section of the December 13, 2010 printouts from the petitioner's Internet site, and that this section indicates that those classes are religiously oriented and do not include Math, Science, Reading, or English.³

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129.⁴

petitioner filed this "H-1B petition for [the] beneficiary, to employer [sic] her as Director of its elementary school." Also, page 6 of the brief on appeal indirectly alludes to the position in question as director of a religious school, in the paragraph which begins as follows:

Therefore, assuming that the Service's argument is now that the job of being a Director of Education is different when it is at a religious school versus a secular school, will USCIS be changing its practice and now questioning thousands of businesses to now track down a specific job description and classification based on the religious or secular nature of each and every petitioner?

³ This section of the Internet site includes the following description of the petitioner's classes for children:

Our Children's department is divided into three classes. The first class is called Beginners in the Lord and is composed of infants – 2 years old. In this class children start their spiritual development and growth in Christ. Our second class is called [REDACTED] In this class[,] children learn about God by relating to real life activities. The children begin to discover who they are in Christ. Their ages ranges [sic] from 3-5 years old. Our third class is from 6-10 years old and is called [REDACTED] In this class, children learn by putting into practice the Word of God. Our children develop inquiring minds and a deeper hunger for God's way and principles.

⁴ It is further noted that to ascertain the intent of a petitioner, USCIS must look 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. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

The AAO finds that the general statements regarding the plans for academic classes and a daycare center are uncorroborated by any substantive evidence that, at the time of the petition's filing, any such plans had progressed to the point that they would generate definite or otherwise non-speculative work for the beneficiary. Likewise, the AAO rejects as unsupported by the evidence of record counsel's reference to an elementary school as the site where the beneficiary would be employed.

An additional reason for discounting the letter of support's assertion regarding the daycare center is that the project is not later mentioned in any submission regarding the proffered position.

Next, the AAO finds that counsel mischaracterizes the petitioner by referring to it as a school (as in the following language at page 5 of the brief on appeal: "assuming that the Service's argument is now that the job of being a Director of Education is different when it is at a religious school versus a secular school"). The record of proceeding contains no documentary evidence that the petitioner has been chartered, licensed, accredited, or otherwise recognized as a school, that it has been conducting business as a school, or, for that matter, that the beneficiary has been or would be employed by the petitioner in any capacity associated with direction of education at a school. Accordingly, the AAO will neither consider the petitioner as a school nor evaluate the proffered position as if it were a director of education at a school.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, 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)

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Also, 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). Accordingly, the assertions about plans for academic classes and a daycare center, and also any allusions to the beneficiary's working at an elementary school, have no probative value and will not be further considered.

The AAO also finds, however, that, even if it were to consider planning for daycare and academic classes as additional duties that the beneficiary would perform, the record of proceeding contains no substantive evidence with regard to what such duties would entail in their actual performance, and, likewise, no evidence of the nature and level of educational attainment that would be required for their performance.

B. The Proffered Position and Its Duties

According to the Form I-129, the beneficiary would be employed as its "Director of Education" at the petitioner's address in Houston, Texas.

The Labor Condition Application (LCA) submitted with this petition, however, was certified for a position under the Standard Occupational Classification (SOC) code 21-2021.00 and the associated occupation of Directors, Religious Activities and Education.⁵ As indicated in the LCA, the associated prevailing wage for such a position, at the wage level specified on the LCA (Wage Level I), for the period in question was \$38,376.00.

At item 1 of Section 1 of the Form I-129 Supplement H, the petitioner described the proposed duties as follows:

In the position of Director of Education, [the beneficiary] will be responsible for hiring and training staff, developing curriculum, and reviewing religious materials. She will use her experience, education and training to oversee all aspects of [the petitioner's] educational programs.

The petitioner's letter of support, filed with the Form I-129, describes the beneficiary's duties in exactly the same language as above. That letter also states that the petitioner filed this petition for a "Director of Education" due to the petitioner's "emphasis on education."

Counsel's December 29, 2010 letter replying to the December 20, 2010 RFE described the requirements of the proffered position as follows:

⁵ Item 2 of the LCA (ETA Form 9035/9035E) designates 21.2021.00 as the "SOC (ONET/OES) Code" for the proffered position; and item 3 of the form identifies the "SOC(ONET/OES) occupation title" as "DIRECTORS, RELIGIOUS ACTIVITIES AND EDUCATION."

The position of Director of Education, with respect to the instant petition, requires [the beneficiary] to successfully identify and recruit potential volunteer workers and train and supervise religious educational instructional staff. In addition, the petition requires [the beneficiary] to develop and direct study courses and religious education programs within congregations, select appropriate curricula and class structures for educational programs, implement program plans by ordering needed materials, scheduling speakers, reserving space, and handling administrative details. The position requires [the beneficiary] to counsel individuals regarding interpersonal, health, financial and religious problems. Furthermore, the position requires [her] to analyze member participation and changes in congregation emphasis to determine needs for religious education, collaborate with other ministry members to establish goals and objectives for religious education programs, and develop ways to encourage program participation.

The AAO observes that the above description is basically a compression of the "Tasks" section of the *Occupational Information Network (O*NET) Summary Report* for the occupational classification "Directors, Religious Activities and Education."⁶

⁶ The Internet version of the *O*NET* (which is commonly, and hereinafter, referred to as *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* section that counsel transposed into his RFE-reply letter as the beneficiary's duties is accessible at <http://www.onetonline.org/link/summary/21-2021.00>. It reads:

TASKS:

- Identify and recruit potential volunteer workers.
- Train and supervise religious education instructional staff.
- Develop and direct study courses and religious education programs within congregations.
- Select appropriate curricula and class structures for educational programs.
- Implement program plans by ordering needed materials, scheduling speakers, reserving space, and handling other administrative details.
- Counsel individuals regarding interpersonal, health, financial, and religious problems.
- Analyze member participation and changes in congregation emphasis to determine needs for religious education.
- Collaborate with other ministry members to establish goals and objectives for religious education programs, and to develop ways to encourage program participation.
- Schedule special events such as camps, conferences, meetings, seminars, and retreats.

The fact that counsel's descriptive comments regarding the proffered position mirror the tasks that the *O*NET* ascribes to the Director, Religious Activities and Education occupation does not advance the petitioner's attempt to establish the proffered position as a specialty occupation. As will be further discussed below, the *O*NET* itself does not identify those tasks with any particular educational level, let alone with a requirement for at least a bachelor's degree in a specific specialty or its equivalent.

Further, to the extent that they are described in the record of proceeding, the AAO finds nothing in the proffered position and its duties that inherently convey the need for at least a bachelor's degree in a specific specialty. The AAO finds that, even in the aggregate, the petitioner's descriptions of the proposed duties and the aforementioned comments by counsel do not establish that performance of the proffered position would require the application of any particular minimum level of educational attainment of a body of highly specialized knowledge in a specific specialty.

Rather, the AAO finds, the position and its constituent duties are described exclusively in terms of generalized functions that relate neither the substantive level of knowledge that would be required in any of the areas in which it is generally asserted the beneficiary would work, nor any necessary nexus between such knowledge and a particular level of educational attainment in a specific specialty. Representative examples include general statements, unaccompanied by elucidating particulars, that the beneficiary would, as abstractly described in the record, "oversee all aspects of [the petitioner's] educational programs," "[t]rain and supervise religious education instructional staff," "[d]evelop and direct study courses and religious education programs within congregations," and "[i]mplement program plans by ordering needed materials, scheduling speakers, reserving space, and handling other administrative details."

The AAO also finds that, as a consequence of the generalized and generic level at which the proffered position and its duties are addressed, the record of proceeding does not convey whatever levels of complexity, specialization, or uniqueness may reside in them.

The following statement in counsel's letter of response to the RFE misconstrues the relevant information in *O*NET OnLine* and the *Handbook* as indicating that Director of Religious Activities and Education positions categorically require at least a bachelor's degree in a specific specialty:

[I]n the industry of Religious Organizations, a baccalaureate degree in a specific field of study is a standard minimum requirement for the position offered. According to O-Net the Occupational Outlook Handbook [sic] under "Directors Religious Activities and Education," most of the occupations [sic] require a four-year bachelor's degree. According to respondents on O-Net OnLine, a vast majority of individuals employed under the occupational classification possess a

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- Confer with clergy members, congregation officials, and congregation organizations to encourage support of and participation in religious education activities.

Bachelor's degree or higher (46% Some college, no degree; 49% Master's degree). . . .

The AAO observes that the *O*NET OnLine* table at its Education section indicates that, of the voluntary respondents to the *O*NET* survey of Directors, Religious Activities and Education with regard to the educational attainment required for their particular position, 49% reported "Master's degree," 46% reported "Some college, no degree," and 3% reported "High school diploma or equivalent." However, contrary to counsel's assertion, these figures are not indicative of "a baccalaureate degree in a specific field of study [as] a standard minimum requirement for the position offered." While not the product of a scientific survey, it must be noted that the table's figures support a conclusion opposite to the one drawn by counsel, i.e., that a bachelor's or higher degree in a specific specialty or its equivalent is not a minimum requirement for entry into the proffered position's occupation as required by the Act.⁷

Likewise, the Job Zone component at the *O*NET OnLine* Summary Report for Directors, Religious Activities and Education, at <http://www.onetonline.org/link/summary/21-2021.00>, does not indicate that a baccalaureate or higher degree in a specific specialty is normally a minimum requirement for directors of religious education. In particular, the "Education" segment of the Job Zone component states, with regard to the Zone Four rating assigned to this occupation, "Most of these occupations require a four-year bachelor's degree, but some do not." This places directors of religious education among a group of occupations for which most, but not all, require a bachelor's degree. Further, the wording does not even indicate that, for Job Zone Four occupations requiring a bachelor's degree, the degree must be in a specific specialty, as is required by the controlling definitions of specialty occupation at Section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).⁸

Further, the *O*NET* does not indicate whether a baccalaureate or higher degree in a specific specialty is a minimum for entry into the type of position proffered here.

⁷ The table is reproduced below, from *O*NET OnLine* section which counsel transposed into his RFE-reply letter as the beneficiary's duties was accessed by the AAO at <http://www.onetonline.org/link/summary/21-2021.00> on April 10, 2013.

Percentage of Respondents	Education Level Required
49 ██████████	Master's degree
46 ██████████	Some college, no degree
3 ■	High school diploma or equivalent

⁸ An explanation of all of the components of the *O*Net* Summary Reports can be found at *O*NET OnLine's* Help site, at <http://online.onetcenter.org/help/>.

C. The *Occupational Outlook Handbook*

The AAO will next address the relevant information presented in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹

The *Handbook's* complete comments about directors of religious activities and education are reproduced directly below:

**Directors, Religious Activities and Education
(O*NET 21-2021.00)**

Plan, direct, or coordinate programs designed to promote the religious education or activities of a denominational group. May provide counseling and guidance for marital, health, financial, and religious problems.

- 2010 employment: 126,000
- May 2010 median annual wage: \$36,170
- Projected employment change, 2010-20:
 - Number of new jobs: 21,200
 - Growth rate: 17 percent (about as fast as average)
- Education and training:
 - Typical entry-level education: Bachelor's degree
 - Work experience in a related occupation: 1 to 5 years
 - Typical on-the-job-training: None

U.S. Dep't. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Directors, Religious Activities and Education," <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited April 10, 2013).

Counsel misapprehends the import of the *Handbook's* single statement with regard to the educational attainment of persons serving as directors of religious activities and education. Contrary to counsel's view, the *Handbook's* reference to "Bachelor's degree" - without specification of any particular academic concentration or major - as the "[m]ost significant

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012 - 2013 edition available online (last accessed April 10, 2013).

source of postsecondary education or training” is not evidence that a bachelor’s degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation to which the proffered position belongs.

D. The “Teachers as Directors” Memorandum

As noted earlier in this decision, the record of proceeding includes an April 1, 2011 memorandum to the petitioner’s counsel from [REDACTED]

[REDACTED] Houston, Texas. This two-page memorandum, which identifies its subject as “Teachers as Directors,” is accompanied by a copy of an “Employee Profile” of [REDACTED] from a [REDACTED] Internet site, and also by a copy of the professor’s resume.

The AAO finds that this memorandum has no probative value with regard to the nature and level of educational attainment required to perform the proffered position. The AAO reaches this conclusion on the basis of a number of factors, each of which undermines the memorandum’s evidentiary value.

The body of the memorandum does not address the particular position in question, or, for that matter, even its general type – that is, director of religious activities and education. Rather, the memorandum is a summary review of director-of-education positions in a public-education environment.

In the order referenced in the memorandum, these positions include school-district-appointed directors who are serving (a) as a “teacher-plus” director “who will work 11 months or one more than teachers”; (b) in a “director’s position that may be categorized as an administrative position that requires a bachelor’s degree and a master’s degree with teacher certification and four to seven years of experience as a teacher in the related field”; (c) as an athletic director, who “must have a bachelor’s degree in a directly related field and six years of experience of related experience [sic]”; (d) as a director of instruction, who “must have [a] master’s degree with appropriate administrator certification and a minimum of four years of successful experience as a classroom teacher which requires a bachelor’s degree”; (e) a director of individual evaluation, who “must have a bachelor’s degree in a directly related field . . .”; (f) a director of adult basic education, who must possess “a bachelor’s degree in a directly related field with a certification in educational leadership or administration and a valid teacher certificate which requires a bachelor’s degree . . . and eight years of directly related experience”; or (g) a director of extended-day-year operations, who is “expected to have a bachelor’s degree in a directly related field with a valid teacher certificate and eight years of experience, including three years of teaching experiences.”¹⁰

¹⁰ As other examples of the type of directors that she is addressing, the professor also identifies “the director of magnet programs, academic services director, athletics director, government relations director, producer director and over 100 federal program project directors.” None of the examples addressed in the memorandum address the type of position that is the subject of this petition, namely, director of religious activities and education, a different occupational classification.

Further, neither the memorandum nor any other document in the record of proceeding establishes that the professor-author familiarized herself with the particular position that is the subject of this petition, or that she had reviewed the specific duties of that position as they would be performed in the particular context of the petitioner's operations.

The AAO also observes that neither the memorandum nor the professor's resume (or any other documentation in the record for that matter) establishes that the petitioner had studied, or had substantial experience with, the type of position that is the subject of this petition. In fact, the memorandum cites observational bases that do not encompass directors of religious activities or education. In this regard, the AAO notes that the professor relates her bases of observation as follows, in the final paragraph of her memorandum:

In my experiences as a former classroom teacher, a central office administrator, school board member, and in my practice as a professor of educational administration, I have never seen a director of any academically-related programs hired with less than a bachelor's degree and related classroom experience. While my personal and professional experiences were with [REDACTED] a 200,000 student organization, the principles I have set out here would apply to rural, suburban, and urban school districts, as there is substantial convergence among school districts.

As the extent of her knowledge is expressed above, the AAO finds that the professor has not established herself as an authority on the issue for which her memorandum was submitted, namely, the minimal education required to serve in the proffered position, for she cites no basis of knowledge regarding the particular occupational classification involved in this petition.

Further, aside from the lack of established knowledge about the proffered position and the general occupation to which it belongs, and as clearly evident in the last sentence of the excerpt above, the professor does not extend the "principles" enunciated in the memorandum beyond the precincts of "rural, suburban, and urban school districts," entities to which the petitioner and its director of religious activities and education do not belong. As such, the professor has not established the relevance of her memorandum to this petition.

Also, the memorandum is not supplemented by treatises, studies, surveys, or authoritative sources of any kind that extend to directors of religious activities and education the views that the professor expressed regarding the thirteen types of director positions that she addressed.

For the reasons, discussed above, the AAO finds that the memorandum from [REDACTED] has no material bearing on the issue of the minimum educational requirements of the proffered position.

E. The Job Vacancy Advertisements

As will now be discussed, the AAO also concludes that the job vacancy advertisements submitted into the record of proceeding are not probative evidence with regard to the specialty occupation issue.

The less than a dozen job-vacancy announcements submitted into this record are too few to constitute a reliable statistical sample of the job recruiting practices of religious congregations throughout the United States. For this reason alone, the advertisements fail to establish themselves as evidence of a minimum educational standard normally applied by religious congregations for the type of position advertised.¹¹

Additionally, the advertisements are not supplemented by documentary evidence as to how they may or may not relate to those employers' course of recruiting, through time, for the type of positions advertised. Further, by nature, the advertisements do not capture the advertising employers' hiring history for the type of position advertised, and, of course, the advertisements do not indicate the educational credentials of whomever the employer may have actually hired for the position advertised. Consequently, the petitioner has not even established that the advertisements represent normal recruiting and hiring standards of the advertising employers.

Additional deficiencies that undermine the evidentiary value of the job vacancy advertisements is the fact that the record of proceeding lacks evidence establishing that the scope and actual performance requirements of the advertised positions are substantially the same as those of the proffered position. Accordingly, the petitioner has not established the relevance of the advertisements to the position proffered in this petition.

The AAO also observes that the educational requirements specified in the advertisements range from a baccalaureate or higher degree in a specific specialty, to a bachelor's degree without any specified academic concentration or major, to no particular educational attainment specified at all. As such, the advertisements corroborate the indication in the aforementioned *O*NET OnLine* Education table that a bachelor's degree in a specific specialty is not a normal minimum requirement for directors of religious activities and education.

For the reasons discussed above, the AAO finds, first, that the job vacancy advertisements are not probative evidence that the proffered position qualifies as a specialty occupation under any criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), and, second, that the range of

¹¹ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from less than a dozen job postings with regard to determining the common educational requirements for entry into parallel positions in similar religious organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of director of religious activities and education for a two-person religious organization required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

acceptable educational backgrounds stated in the advertisements is not evidence that a bachelor's degree, or the equivalent, in a specific specialty is not a normal minimum requirement for serving as a director of religious activities and education.

F. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

As a preliminary matter, the AAO hereby incorporates its earlier analyses of the evidence of record, its deficiencies, and lack of probative value into the following discussions of the 8 C.F.R. § 214.2(h)(4)(iii)(A) criteria.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has established none of the additional, supplemental criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), as it has not established the proffered position as one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As reflected in this decision's earlier comments regarding the evidence in the record of proceeding, neither the *Handbook* nor *O*NET* indicate the directors of religious activities and education comprise an occupation with a normal minimum entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty. Accordingly, as inclusion in the pertinent occupational category is not in itself sufficient to establish the education or education-equivalent requirement of this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide other additional evidence sufficient to reach this criterion's threshold. This the petitioner failed to do.

As reflected in this decision's earlier evidentiary analysis, it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position that would normally require at least a bachelor's degree, or the equivalent, in a specific specialty. Further, for the reasons already discussed, this deficiency is not remedied by the "Teachers as Directors" memorandum, by the also previously discussed job-vacancy advertisements, or by any evidence that has been submitted into this record of proceeding.

To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also

establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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.

For the reasons related above, the AAO concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As 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. Also, there are no submissions from professional associations, individuals, or 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. Finally, for the reasons previously discussed, the petitioner's reliance upon the job vacancy advertisements and upon the "Teachers as Directors" memorandum was misplaced. They have no probative weight in the application of this or any of the other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For the reasons discussed above, the petitioner has failed to satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO concludes that the petitioner has failed to satisfy the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), by establishing that the proffered position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner does not explain or clarify how, if at all, the proffered position is so complex or unique as to be distinguishable from director-of-religious-activities-and-education positions that

are held and performed by persons without at least a bachelor's degree or the equivalent in a specific specialty. Further, as earlier noted in the discussion of the generalized and generic description of the proffered position and its constituent duties as described in the record of proceeding, the petitioner failed to develop relative complexity or uniqueness as attributes of the proffered position. Additionally, for the reasons already stated in this decision's discussion of the "Teachers as Administrators" memorandum, that document merits no evidentiary weight on the issue of the education required to perform the proffered position.

Thus, by failing to establish the proffered position as so complex or unique that it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has failed to satisfy the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO concludes that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), by establishing that, for the proffered position, the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.¹²

As the petitioner has not presented evidence that the proffered position is one for which it has an established recruiting and hiring history that supports the specialty occupation claim, this criterion does not present an issue for the AAO's consideration.

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

As already reflected in the AAO's discussion of the extent to which the proposed duties are described in the record of proceeding, the petitioner has failed to develop the duties with sufficient specificity to establish that they possess a level of complexity and specialization that would require the application of a particular level of educational attainment in a specific specialty.

¹² It should be noted that, to satisfy this criterion, the record must establish 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.

To the extent that they are depicted in the record of proceeding, the duties do not appear so specialized and complex as to require highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Rather, the proposed duties as described in the record appear indistinguishable from the general range of director of religious activities and education positions, for which neither the *Handbook* nor *O*NET* indicates a usual association with at least a bachelor's degree, or the equivalent, in a specific specialty. Also, and again, for all of the reasons already discussed, the "Teachers as Directors" memorandum has no evidentiary impact on the application of any criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the AAO finds that, to the extent that the petitioner claims that the proffered position is for a Director of Education at a school, it is asserting a position that is not supported by a corresponding LCA, and, therefore, provides an additional basis upon which the petition must be denied.

In the brief on appeal, the petitioner's counsel argues, in part, that the proffered position is that of a Director of Education at a school run by the petitioner.¹³ Aside from the fact that there is no evidence in the record of proceeding of the existence of any such school, counsel's contentions on appeal that the proffered position be treated as if it were a director of education at a school portrays the position as one that is outside the scope of the position specified in the LCA.

As previously observed in this decision, the LCA was certified for the position of Director, Religious Activities and Education, SOC (O*NET/OES) Code 21-2021.00. However, as the relevant narratives in the *Handbook* and *O*NET OnLine* reveal, the Directors, Religious Activities and Education occupational classification does not encompass education directors and other administrators of educational programs at schools. These positions the *Handbook* and the *O*NET* align under the general occupational classification of Educational Administrators and assign SOC Codes in the range of 11-9031 to 11-9033, as opposed to the SOC Code 21-2021.00 type of position specified in the LCA.

While the U.S. Department of Labor 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 (emphasis added):

¹³ See in particular, counsel's assertion, at page three of the brief, that "the position is for Director of Education at a church related school," and counsel's expressly stated assumption that "the Service's argument is now that the job of being a Director of Education is different when it is at a religious school versus a secular school."

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 not submitted a valid LCA that corresponds to the assertions that the proffered position is for an education director at a school. Therefore, to the extent that the petitioner asserts that the proffered position is for the director of education at a school, the petition must be denied for this additional reason.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the course of such review that the AAO identified this LCA issue. 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).

IV. CONCLUSION

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.